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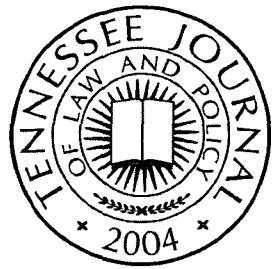

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ARTICLE

THE DYNAMIC CYCLE OF LEGAL CHANGE

Professor John Martinez[1]

....
The life of the law has not been logic: it has been experience. . . .
The law embodies the story of a nation's development through many centuries,
and it cannot be dealt with as if it contained only the axioms and corollaries
of a book of mathematics.[2]

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[1] Professor of Law, S.J. Quinney College of Law at the University of Utah. This article was funded in part by the University of Utah College of Law Excellence in Teaching and Research Fund. I would like to thank my wife, Karen Martinez, for her encouragement and support in the writing of this article.
[2] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1-2 (1881).

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Introduction

Justice Holmes's observation that the law is a product of empirical experience, not a problem of mathematics, leaves us with the task of figuring out how the legal system actually works. Although Holmes made his statement over 130 years ago, there is still no universally accepted analytical approach for describing how the American legal system creates and changes the law. This article proposes a "Dynamic Cycle of Legal Change" as a model for understanding the structure and operation of the American legal system.

Part I first posits that we should consider the legal system from an "information systems" perspective. Part II then describes the proposed "Dynamic Cycle of Legal Change" (DCLC) as an information system model of the legal system. Part III illustrates the operation of the DCLC in three settings: common law, legislation, and direct democracy. Illustrations include settings of gender equality, fame as a property asset, palimony claims, crime victims' bills of rights, same-sex marriage statutes, solar acts, and the California coastal protection initiative and subsequent statute.

I. An Information Systems Approach to the American Legal System

Systems theory conceives of modern societies as comprised of systems of communication for processing information.[3] Examples of such systems include private

[3] Benjamin J. Richardson, *Financing Environmental Change: A New Role for Canadian Environmental Law*, 49 MCGILL L.J. 145, 170 (2004). *See generally* NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (Klaus A. Ziegert trans., Fatima Kastner, Richard Nobles, David Schiff & Rosamund Ziegert eds., 2009).

entities — such as corporations or partnerships — and public entities — such as cities or state highway departments.

Information systems engage in dynamic, continuous processes of inputs, reactions, and feedback.[4] A corporation, for example, obtains inputs of information regarding how its products or services are received by the market, reacts to that information by adjusting its production or marketing, and then repeats the cycle. Similarly, a city obtains inputs of information regarding its operations from the citizenry, reacts to that information by adjusting the manner in which it provides public services, and then repeats the cycle.

Herbert Simon, in his path breaking work, *The Sciences of the Artificial*, emphasized that the structure and operation of society's information systems is the result of human design.[5] Thus, he suggested that we can design information systems, or "artifacts," on a societal scale.[6]

Only until comparatively recently, however, has the American legal system been viewed as an information system.[7] Henry Smith has studied specific fields of law — such as contract, tort, or intellectual property — using an information systems approach.[8] Other scholars have

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[4] Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution is a "Suicide Pact,"* 20 WM. & MARY BILL RTS. J. 287, 332 n.244 (2011); *see also* FREDERICK L. BATES, SOCIOPOLITICAL ECOLOGY: HUMAN SYSTEMS AND ECOLOGICAL FIELDS 80 (1997).

[5] HERBERT A. SIMON, THE SCIENCES OF THE ARTIFICIAL 111 (3rd ed. 1996) ("Everyone designs who devises courses of action aimed at changing existing situations into preferred ones.").

[6] *Id.* at 141.

[7] *See, e.g.*, Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC'Y REV. 727, 739 (1989) ("The law autonomously processes information, creates worlds of meaning, sets goals and purposes, produces reality constructions, and defines normative expectations . . . .").

[8] Particularly significant in this regard is Henry Smith's work: Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691

applied variants of complex adaptive systems theory — such as game theory and chaos theory — to the study of the legal system, but such efforts have foundered on the shoals of indeterminacy that such variants produce.[9]

There is no universally accepted analytical approach for describing how the American legal system creates and changes law.[10] Systems theory can inform understanding of the American legal system, but we need a model for understanding its structure and operation.[11] This article proposes a "Dynamic Cycle of Legal Change" as such a model.

(2012); Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L. 1 (2011); Henry E. Smith, *Institutions and Indirectness in Intellectual Property*, 157 U. PA. L. REV. 2083 (2009); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175 (2006).

[9] *See, e.g.*, J.B. Ruhl, *Law's Complexity: A Primer*, 24 GA. ST. U. L. REV. 885 (2008). On the problems of indeterminacy, which such variants produce, see Jeffrey D. Rudd, *J.B. Ruhl's A Law and Society System: Burying Norms and Democracy under Complexity Theory's Foundation*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 551 (2005) (critically analyzing J.B. Ruhl, *Complexity Theory as a Paradigm for Dynamical Law-and-Society System: Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 861 (1996), which concludes that "[Y]ou can't ever reach absolute system predictability for a nonlinear dynamical system. . . . [Just] blame it on chaos, emergence, and catastrophe.").

[10] *See generally* David T. Richie, *Using John Dewey's Pragmatism Epistemology to Teach Legal Analysis and Communication*, 5 CRIT: CRITICAL LEGAL STUD. J. 1 (2012) (discussing various approaches for describing the American legal system).

[11] Niklas Luhmann suggested that the legal system could be understood by examining its underlying structure, but he did not formulate an explanation of how the legal system actually works. NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 140 (Klaus A. Ziegert trans., Fatima Kastner et al. eds. (1993) (2004)) ("This does not mean, as one might suspect at first glance, that the legal system and the political system form one system together. But they do resort to special forms of structural coupling and are linked to each other through that coupling.").

II. The American Legal System as a "Dynamic Cycle of Legal Change"

A. Creation of Law

The following diagram depicts the "Dynamic Cycle of Legal Change."[12]

Courts/Legislatures/Populace
/ \
Legal Doctrine/Rules of Law (Means) Social Values/Norms (Ends)
\ /
Social Reality

The DCLC is a graphic representation[13] of how the legal system makes and remakes the law over time. It is composed of four major interrelated structures: (1) the *Institutions of Law Creation and Change*, in the form of courts,[14] legislatures,[15] and the populace[16] acting through

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[12] I have set out a slightly modified version of this diagram, which is included in DAVID L. CALLIES ET AL., CONCISE INTRODUCTION TO PROPERTY LAW 9 (Lexis-Nexis 2011).

[13] Graphic representations illustrate the operation of dynamic systems. These representations serve to explain the acquisition, processing, and use of information to achieve meaning. *See generally* Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661 (1989); Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); John Martinez, *A Cognitive Science Approach to Teaching Property Rights in Body Parts*, 42 J. LEGAL EDUC. 290 (1992); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (1989). *See also* Timothy P. Terrell, *Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles*, 72 CALIF. L. REV. 288 (1984) (application of cognitive principles to explain legal reasoning by means of graphic representations, such as lines, planes, and cubes).

[14] Courts "make" law. The now outdated "declaratory" or "Blackstonian" theory of judicial decision making posits that courts merely "find" the law rather than "make" it. For discussions of the declaratory theory, see Linkletter v. Walker, 381 U.S. 618, 622-29

(1964); Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364-65 (1932); J. GRAY, NATURE AND SOURCES OF LAW 218-27 (1921). In contrast, the modern Legal Realist position is that courts indeed "make" law. *See* Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2, 6 (1960) (judges as much as legislators exercise an ineluctable law-creating function). *See generally* Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961); BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

In an earlier article, I suggested that both approaches can be mapped onto an analytical framework that considers judicial decision making as involving three decisions: (1) the substantive decision to change the law; (2) the temporal decision to identify the transactions to which the change applies; and (3) the remedial decision to determine whether a remedy should be provided to those who have reasonably relied on the prior law to their detriment. *See* John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free from "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297, 299-300 (1988).

Both theories therefore entail the threshold decision whether to change the substantive law. The difference comes in the second, temporal, decision identifying the transactions to which the change will apply and in the third, remedial, decision whether to provide a remedy to those who reasonably relied on the prior law. Under the "declaratory" theory, all substantive changes are by definition retroactive, since the change in the law already "existed." And since it therefore was not a "change" at all, because everyone is presumed to know the law, no remedy is required.

In contrast, as set out in my earlier article, the Legal Realist conception that courts indeed "make" law requires serious consideration of the second two decisions. *See* John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free from "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297, 346 (1988) (suggesting that either compensation, or a reasonable period of time to amortize their investments, should be provided to those who reasonably rely on common law property rules that are subsequently overruled by state courts).

[15] "Legislatures" includes Congress at the federal level, state legislatures, and local government legislative bodies, such as city councils.

[16] There is no national "power of initiative." The only way for the general public to impose a rational legislating requirement on Congress would be through the cumbersome constitutional amendment process. David B. Magleby, *Let the Voters Decide: An Assessment of the*

initiatives or referenda;[17] (2) *Social Reality*, as perceived by the institutions of legal change; (3) *Social Values (or "Norms")*, inferred as "should" statements, from social reality as perceived by the institutions of legal creation and change; and (4) *Legal Doctrine* (or "rules of law"), whereby the institutions of legal creation and change seek to implement the derived social values or norms.

The components and operation of the DCLC confirm that "every legal decision is a moral decision."[18]

Initiative and Referendum Process, 66 U. COLO. L. REV. 13, 42 (1995) ("The United States is one of only five democracies which has never held a national referendum . . . ."). However, about half the states do have the initiative mechanism in place whereby citizens may enact statutory or constitutional amendments through popular vote. *See, e.g.*, CAL. CONST. art. IV, § 1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."); OR. CONST. art. IV, § 1 ("The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives."). David B. Magleby, *Let the Voters Decide: An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 15 (1995) ("Only six states west of the Mississippi River do not have some form of initiative . . . while only eight states east of the Mississippi have the process."). *See generally* K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185 (1995) (discussing history of initiatives).

[17] Executives, such as the President, governors, and mayors also "make" law but usually through authority delegated by legislative bodies. When they do have independent authority to make law, the mechanism and constraints applicable to legislatures, the other elected institutions of legal change, apply to executives as well. Accordingly, executives are not treated as separate institutions of legal change in the DCLC.

[18] My good friend and mentor, John J. Flynn, late Hugh B. Brown Professor at the S.J. Quinney College of Law at the University of Utah, used to tell me this all the time. This article is the fruition of my understanding of that phrase and is dedicated to his memory.

The entire DCLC is a design of the legal system. The institutions of law creation and change (courts, legislatures, or the people acting through direct democracy in the form of initiatives and referenda) comprise the "modules" or "subsystems," which are the engines of the DCLC.[19] Social Reality is the object "data" used by the institutions of law creation and change. The Norms derived from social reality and the Legal Doctrine to implement those norms are the "output" of the institutions of legal change.[20]

The operation of the DCLC consists of a dynamic process: From a perceived social reality, social values or norms ("should" statements) are inferred by the institutions of law creation and change.[21] Those institutions then transform the inferred "should" into enforceable legal doctrine, which is then applied to society.[22] Legal doctrine is thus the *means* whereby social values or norms, as *ends*,

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Cf. Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 MICH. L. REV. 1647, 1652 (1989) ("The norm is the application of the norm. It is not *prior* to application.").

[19] HERBERT A. SIMON, THE SCIENCES OF THE ARTIFICIAL 184 (3rd ed. 1996) (noting that systems may be composed of interrelated subsystems — which in turn may be composed of sub-subsystems and so on — "until we reach some lowest level of elementary subsystem").

[20] *Id.* at 146-47 (society is the "data" used by institutions in the legal system).

[21] *See generally* Lawrence A. Cunningham, *The Common Law as an Iterative Process*, 81 NOTRE DAME L. REV. 747 (2006). *See also* Guido Westkamp, *Code, Copying, Competition: The Subversive Force of Para-copyright and the Need for an Unfair Competition Based Reassessment of DRM Laws after INFOPAQ*, 58 J. COPYRIGHT SOC'Y U.S.A. 665, 724-25 (2011) ("Normativity depends on recognizing structural changes between the legal and social sub-systems to which the law is to apply . . . .").

[22] *See* Thomas O. Beebee, *Can Law-and-Humanities Survive Systems Theory?*, 22 L. & LITERATURE 244, 263 (2010) (describing this process as "formalization," which can also be termed "channeling" or "translation," whereby legal institutions elicit norms from social reality and "formalize," "channel," or "translate" such norms into legal doctrine).

are implemented.[23] The cycle then begins again: The institutions of legal creation and change use the feedback from social reality to infer new norms ("should") and/or to modify legal doctrine.[24]

B. Change of Law

The operation of the DCLC shows how a change of law may occur at the level of legal doctrine or, more fundamentally, at the level of social values or norms.

1. Change in Legal Doctrine

Legal doctrine is adjusted from time to time to ensure that the "fit" between the inferred social values or norms and their implementation is appropriately "close." In this form of legal change, the social values or norms are

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[23] Gunther Teubner similarly describes the operation of the legal system as a "hypercycle": "Law . . . distinguishes itself from society . . . by constituting components in a self-referential way and linking them together in a hypercycle." GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 25 (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., 1993).

[24] This has been described as a "positive institutional feedback loop." Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C. L. REV. 373, 376-77 (2008). *See also* Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution is a "Suicide Pact,"* 20 WM. & MARY BILL RTS. J. 287, 332 n.244 (2011):

> A "system" that promotes interplay or interaction is always ongoing and active, never static or inert. A system is a dynamic, continuous process of actions and reflection based on inputs, reactions and feedback to assess the inputs and reactions which, in turn, inspire successive sets of inputs, reactions and feedback. Under systems theory, unlike pure structural-functional analysis, things and events, because they move in time, cannot be understood simply by scrutinizing them at any given moment.

not questioned, but the efficacy with which the legal doctrine implements those social values or norms is examined and, if necessary, modified.

For example, in examining social reality, a legislature may find that vehicle manufacturers have installed additional or more effective safety devices. Accordingly, the legislature may increase speed limits because vehicles have become safer. The underlying norm that people should be protected from driving faster than is safe remains the same.[25]

2. Change in Social Values or Norms

More fundamentally, legal doctrine may be adjusted because the underlying social norms or values derived from social reality have changed. In this form of legal change, when social reality changes — or at least when the institutions of legal creation and change perceive that reality has changed significantly — the social norms or values inferred by the institutions may be modified as well.[26]

For example, in examining social reality, Congress and the state legislatures perceived that society had changed such that human beings should not be owned as

[25] Of course, competing norms, such as environmental protection from vehicle pollution or fuel conservation, may make increasing the speed limit inadvisable.

[26] Niklas Luhmann describes this as the "*temporalization of the validity of norms.*" NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 469 (Klaus A. Ziegert trans., Fatima Kastner et al. eds., 2009) ("Norms, and the validity that supports them, are no longer based on the constants of religion or nature or an unchallenged social structure, but are now experienced and dealt with as time projections. They are valid 'until further notice'. This not only makes them felt as contingent but also as cognitively sensitized. . . . What is meant is only that norms are equipped with assumptions of reality . . . .").

objects of property rights and implemented that norm through the adoption of the Thirteenth Amendment.[27]

III. Illustrations of the Operation of the Dynamic Cycle of Legal Change

A. Common Law — Courts as Institutions of Legal Change

1. Gender Equality

In Kirchberg v. Feenstra,[28] the United States Supreme Court held that a mortgage on the home of a married couple, signed only by the husband without the notice or consent of the wife, violated the federal Equal Protection Clause. The mortgagee had obtained the mortgage pursuant to the Louisiana "Head and Master" statute, which authorized the husband to alienate the property of the marriage without his wife's prior notice or consent.[29]

In terms of the DCLC, Social Reality prior to the Court's decision viewed women as incapable of managing their own property once married.[30] The Norm (or "should"

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[27] U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). That change, of course, occurred only after the trauma of the Civil War.

[28] Kirchberg v. Feenstra, 450 U.S. 455 (1981).

[29] LA. CIV. CODE ANN. art. 2404 (West 1971). The statute was repealed effective on January 1, 1980. *See* LA. CIV. CODE ANN. art. 2325-76 (West 1979). The Feenstra mortgage had been signed in 1974. Kirchberg v. Feenstra, 450 U.S. 455, 457 (1981).

[30] For a discussion of the Napoleonic Code and Spanish law as the sources of the Head and Master statute, see Louis F. Del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMP. L. 1, 25-29 (2010). Married women "owned" equally with their husbands, but only

statement) from that perceived reality was that a man should be the "head and master" insofar as property of the marriage was concerned. The Louisiana Legislature, as the instrument of implementation of that Norm, enacted the Head and Master statute, which embodied the following Legal Doctrine: If a husband signs a mortgage on marital property without the notice or consent of the wife, such mortgage is enforceable.

Mrs. Feenstra got the Court to acknowledge the existence of a different Social Reality: Married women can manage their own property affairs. The Court derived a new social norm: Women should have an equal voice in how marital property is alienated. Accordingly, as the instrument of legal change, the Court modified the Legal Doctrine: If a husband signs a mortgage on marital property without the notice or consent of the wife, such mortgage is *not* enforceable.

2. Fame

In Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.,[31] the court held that fame was protectable as a property asset called the "right of publicity."[32] Thus, the court held, a first transferee of the right of publicity of

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the husband was empowered to act in regard to assets of the marriage. Nina Nichols Pugh, *The Spanish Community of Gains in 1803: Sociedad De Gananciales*, 30 LA. L. REV. 1, 12 (1969) ("Whereas the wife owned equally with her husband, he, as "business manager," of the partnership, actually administered the community of gains. . . . He was described as '*in actu*' (in control) as well as '*in habitu*' (in present interest). The wife was only '*in habitu*' or '*in habitu et in creditu*' (in present interest as creditor) in regard to the *bienes gananciales*, but no less a co-owner.").

[31] Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

[32] *Id.* at 868. *See generally* STUART BANNER, AMERICAN PROPERTY-THE HISTORY OF HOW, WHY, AND WHAT WE OWN 130-61 (2011) (discussing the evolution of "owning fame").

certain baseball players could enforce such right against a subsequent transferee.[33]

In terms of the DCLC, Social Reality prior to the court's decision did not acknowledge "fame" as a proper object of property rights. The Norm (or "should" statement) from that perceived reality was that people should not be able to exercise any of the sticks in the bundle of rights — transfer, use, or exclusion — against others in regard to fame. Previous courts had not conceived of such a property right. Thus, the operative legal doctrine was as follows: If a person contracts to allow another to use his or her photographs, and also subsequently contracts with a third party to also use his or her photographs, then the first contracting party has no claim against the third party.[34]

The first contracting party in the *Haelan* case got the court to acknowledge the existence of a different Social Reality: Fame has pecuniary value.[35] The court derived a new social norm: People should be able to treat their "fame" as an object of property rights.[36] Thus, the

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[33] Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 869 (2d Cir. 1953).

[34] Indeed, that is what the defendants in the *Haelan* case asserted. *Id.* at 868.

[35] For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements and popularizing their countenances, as displayed in newspapers, magazines, buses, trains, and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant that barred any other advertiser from using their pictures. *Id.* at 868.

[36] But plaintiff, in its capacity as exclusive grantee of player's right of publicity, has a valid claim against defendant if defendant used that player's photograph during the term of plaintiff's grant and with knowledge of it. It is no defense to such a claim that defendant is the assignee of a subsequent contract between that player and Russell, purporting to make a grant to Russell or its assignees. For the prior

operative legal doctrine became as follows: If a person contracts to allow another to use his or her photographs, and also subsequently contracts with a third party to also use his or her photographs, then the first contracting party has a property claim against the third party.

3. Palimony

In Marvin v. Marvin,[37] the California Supreme Court held that unmarried cohabitants could enforce rights against each other as to assets acquired during the duration of the cohabitation.

In terms of the DCLC, Social Reality prior to the court's decision refused to acknowledge the existence of unmarried cohabitation. The Norm (or "should" statement) from that perceived reality was that people should not cohabit other than in the status of marriage. The courts, as the instruments of implementation of that Norm, followed the Legal Doctrine that, if property had been acquired only in the name of one of the parties to such relationships (typically the man in a heterosexual relationship), then all such property belonged to that party.[38]

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grant to plaintiff renders that subsequent grant invalid during the period of the grant (including an exercised option) to plaintiff but not thereafter. *Id.* at 869.

[37] Marvin v. Marvin, 557 P.2d 106 (1976).

[38] This was the ruling of the lower court in Marvin v. Marvin:

> In the instant case plaintiff and defendant lived together for seven years without marrying; all property acquired during this period was taken in defendant's name. When plaintiff sued to enforce a contract under which she was entitled to half the property and to support payments, the trial court granted judgment on the pleadings for defendant, thus leaving him with all property accumulated by the couple during their relationship.

Id. at 110.

Michelle Marvin persuaded the California Supreme Court to acknowledge the existence of a different Social Reality: "The 1970 census figures indicate that today perhaps eight times as many couples are living together without being married as cohabited ten years ago."[39] The court derived a new social norm: "The courts should enforce express contracts between non-marital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services."[40] Accordingly, as the instrument of legal change, the court modified the Legal Doctrine:

> In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.[41]

B. Legislation — Legislatures as Institutions of Legal Change

1. Crime Victims' Bills of Rights

In 1994 the Utah Legislature proposed for adoption[42] what subsequently became the Victims' Rights

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[39] *Id.* at 110 n.1.
[40] *Id.* at 110.
[41] *Id.*
[42] S.J. Res. 6, 1994 Utah Laws 1610, 1610-11.

Amendment to the state constitution.[43] The Amendment and the subsequent implementing legislation gave crime victims numerous substantive and procedural rights that they did not have before, including the right to be informed of, be present at, and be heard at important criminal justice proceedings and to have the judge consider victims' statements as relevant information in sentencing.[44]

In terms of the DCLC, Social Reality prior to the Amendment did not view crime victims as proper participants in criminal justice proceedings involving the crimes committed against them. The derived Norm was that crime victims should not be allowed to participate in criminal proceedings. Legislatures and common law courts, as the instruments of implementation of that Norm, followed criminal procedure rules that excluded evidence from such crime victims as well.

My colleague, Professor Paul Cassel, was extremely instrumental in getting the Utah Legislature to acknowledge a different Social Reality: Victims of crime are deeply affected and are often anxious to participate in subsequent criminal proceedings involving defendants charged with the crimes against them. The new derived Norm became as follows: A crime victim should have a right to participate in criminal proceedings involving his/her victimization. Accordingly, both the Utah

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[43] Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373. Professor Cassell was also instrumental in the subsequent enactment of The Crime Victims' Rights Act ("CVRA") in 2004. Pub. L. No. 108-405, tit. I, 118 Stat. 2260, 2261-65 (2004) (codified as amended at 18 U.S.C. § 3771 (2006)). Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164 (2011).

[44] Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1386-1416.

Legislature and the populace enacted a new legal doctrine: A crime victim has the right to offer evidence in subsequent criminal proceedings involving his/her victimization.

2. Same-Sex Marriage Statutes

Same-sex marriage statutes are increasingly proliferating across the United States.[45] In terms of the DCLC, Social Reality prior to the statutes viewed the status of marriage as reserved for couples comprised of a man and a woman. The derived Norm was that same-sex couples should not be able to marry. Accordingly, marriage licenses were issued only to heterosexual couples.

The gay and lesbian community and their supporters, in an ongoing struggle, have been able to convince state legislatures to acknowledge a different Social Reality: Same-sex couples are "couples" in the same sense as heterosexual couples. The newly derived Norm, still in the process of development, is that same-sex couples should be able to acquire the status of marriage. Thus, at least some states have enacted a new legal doctrine: Marriage licenses may be issued to same-sex couples.

3. Solar Acts

The rejection of the "right to light" doctrine at common law meant that landowners with solar collectors could not prevent their neighbors from shading the collectors.[46] In terms of the DCLC, this reflected a Social

[45] *See generally* Clifford J. Rosky, Perry v. Schwarzenegger *and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913 (2011); Laurence H. Tribe, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471 (2012).

[46] *See* Prah v. Maretti, 321 N.W.2d 182 (1982) (discussing evolution of "right to light" doctrine at common law).

Reality whereby access to sunlight was viewed as merely for aesthetic purposes. The derived Norm was that solar collectors, whether in the form of trees, swimming pools, or solar arrays, should not be allowed to prevent development of adjacent lands. Thus, landowners could develop their land regardless whether such development shaded adjacent parcels.[47]

Environmentalists have persuaded state legislatures to acknowledge a different Social Reality: Solar collectors aid in reducing dependency on other forms of energy.[48] The newly derived Norm is that solar collectors — variously defined among the different statutes — should be protected against shading by neighboring landowners.[49] Solar acts embody a new legal doctrine: Landowners with solar collectors have rights against neighboring landowners who would shade the solar collectors.

C. Direct Democracy — The Populace as the Institution of Legal Change

California voters passed Proposition 20 in 1972 because of concerns that cities and counties along California's coastline were allowing overdevelopment of coastal lands.[50] The initiative measure enacted substantive

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[47] *See, e.g.,* Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. App. 1959), *cert. denied*, 117 So. 2d 842 (Fla. 1960) (hotel owner may shade adjacent hotel's swimming pool).

[48] *See generally* Uma Outka, *Siting Renewable Energy: Land Use and Regulatory Context*, 37 ECOLOGY L.Q. 1041 (2010).

[49] For an analysis of the different definitions of solar collectors in solar acts, see Troy A. Rule, *Shadows on the Cathedral: Solar Access Laws in a Different Light*, 2010 U. ILL. L. REV. 851 (2010). *See generally* Sara C. Bronin, *Modern Lights*, 80 U. COLO. L. REV. 881 (2009).

[50] Codified originally at CAL. PUB. RES. CODE § 27000 as a temporary measure and subsequently replaced by the Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900. *See* Marc B. Mihaly, *Living in the Past: The* Kelo *Court and Public-Private Economic Development*, 34 ECOLOGY L.Q. 1, 50-51 (2007) (popular concern about

and procedural constraints on such development and provided that those restrictions would be administered by a state coastal commission and regional coastal commissions.[51]

In terms of the DCLC, land use regulation along California's coastline prior to the coastal initiative reflected a Social Reality whereby city and county governments were responsible for such regulation. The derived Norm was that coastal landowners should only be concerned about what such local governments demanded — or did not demand — in regard to coastal land development. Thus, the operative land-use regulation rules were contained only in the land-use codes of the coastal cities and counties.

Environmentalists seeking to prevent overdevelopment of coastal lands, as well as inland residents who could not influence the land-use codes enacted by coastal cities and counties, mobilized on a statewide basis and passed the coastal initiative. The initiative reflected a different Social Reality: Development of the coastline was a concern not only of coastal landowners and coastal cities and counties but of all of California's population. The newly derived Norm was that coastal landowners should be accountable to a statewide agency, not just to local cities and counties. The initiative thus enacted a new legal doctrine: Coastal landowners became subject to the statewide initiative and the regulations promulgated by the state coastal commission, pursuant to the initiative and subsequent statute.

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overdevelopment of the coast led to passing of California Coastal Initiative).

[51] *See* Avco Cmty. Developers, Inc. v. South Coast Reg'l Comm'n, 553 P.2d 546 (1976) (discussing coastal initiative and subsequent statute).

Conclusion

The Dynamic Cycle of Legal Change primarily seeks to describe how the legal system operates. It may also have a prescriptive dimension if it helps understanding of how the processes of legal creation and change *should* work.[52] However, I will leave that task for a future article.

[52] *See* HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 138-39 (2009) (descriptive norms merely purport to represent reality; prescriptive norms seek to mandate that certain actions be performed).

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SUMMERS-WYATT SYMPOSIUM

"NAVIGATING THE COMPLEXITIES OF OUR MELTING POT: HOW IMMIGRATION AFFECTS LEGAL REPRESENTATION"[53]

FRIDAY, APRIL 12, 2013

THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW

[53] EDITOR'S NOTE: Readers, please be aware that this transcript has been only lightly edited. The reasoning behind its light editing is so that the transcript reflects the actual words used by the presenters, as captured by the transcriptionists, and the actual punctuation marks chosen by the transcriptionists. Therefore, words have not been added in or taken out, except for filler words, such as "I mean," "like," "right," and "you know," and punctuation marks have largely been left unchanged, expect in limited circumstances. The editor's assumption is that all readers understand that this transcript reflects spoken words and thus will not follow the flow of written form and will mostly likely be able to piece together the statements of the presenters into coherent sentences where the transcriptionists may not have been able to be exact.

WELCOME AND INTRODUCTIONS

Douglas A. Blaze
Amy Williams

DOUGLAS A. BLAZE: It looks like it's going to be an exceptional program. The turnout continues to come in, and I'm sure it will get more full. I know that it was great because it was crummy weather it looked like when we started. I just looked out, it's actually going to be beautiful today. So when you have a chance, get out and enjoy the weather of Knoxville as well for those of you from out of town.

I want to welcome you to the College of Law. I think we are justifiably proud of our program, our faculty, and our staff. You'll see a little bit of that today. We're also very, very proud of our building, although we do have feelers out to try and find our maintenance guy so we can get it a little bit cooler in here. Hopefully, we can take care of that for you.

Thanks to all the presenters for coming in. We appreciate it very, very much. It makes a big difference. The *Journal of Law and Policy*; our newest journal, the *Journal of Race, Gender, and Social Justice*; and the Center for Advocacy and Dispute Resolution are all sponsoring, along with the College of Law, this program.

I want to thank a couple of people: John Craig Howell, who is now getting ready to sit down, from the *Journal of Race, Gender, and Social Justice*; the *Tennessee Journal of Law and Policy*, Amy Williams is the editor in chief. But in particular, the person who has really put this whole thing together is Katie Doran, and Katie, congratulations and thank you. It looks like it's going to be a great day. And then I just have to mention for the Center for Advocacy, the incomparable Penny White, who does so much for the law school, our profession, and our State.

The program looks impressive. We're already five minutes behind. And I need to make sure that I get my CLE credit since our rules have been changed in the State of Tennessee. At any rate, I look forward to the program and being with you off and on during the day. Thank you. And I turn it over to Amy Williams.

AMY WILLIAMS: Just for a second, I promise. Thank you. I'm Amy Williams, I'm editor in chief for about thirty-six more hours, I think, for the *Tennessee Journal of Law and Policy*. And on behalf of our journal and *Race, Gender, and Social Justice*, we just want to welcome you to the symposium. If you haven't figured it out already, the bathrooms are down the hall, as soon as you leave this room, you just take a right. And the bathrooms will be on your left not very far down the hallway. We've got, as I'm sure you saw, doughnuts and coffee outside. There's a commons area where there's also a little snack shop and vending machines. If you just keep going past the bathrooms and then turn left, you'll see it.

Also, those of us who have the volunteer tags on, there's several members of both journals here to help you, so if you need anything, just find somebody with one of these badges and we'll help you out. If we can't figure it out, we'll find somebody who can. And we want to thank you for coming.

MORNING KEYNOTE ADDRESS I: *PADILLA V. KENTUCKY*: HOW THE SUPREME COURT CHANGED THE RULE OF COMPETENCY IN LEGAL REPRESENTATION

William Robert Long, Jr.

KATIE DORAN: Good morning, everybody. It is my pleasure to introduce to you our first keynote speaker today, Mr. Robert Long. A brief introduction, Mr. Long is a graduate of Kentucky University of both undergrad and law school. He is currently the manager of the Capital Litigation Branch at the Kentucky Attorney General's Office. And as part of his job with the Kentucky Attorney General's Office, he is the attorney who argued the *Padilla v. Kentucky* case in front of the Supreme Court, and that is what he is here to talk to you about today. Mr. Long.

WILLIAM ROBERT LONG, JR.: I want to get started by first thanking the University of Tennessee and the different journals for inviting me. I was a little surprised by the invitation initially. It's been quite a while since I've been asked to speak about the *Padilla* case, and quite frankly, I'm a little bit intimidated by it. I'm used to having the crowd to my back and addressing my comments to judges and in a more conversational manner. And so this is a little different for me, but I think I'll manage.

Before I get started, I don't want to mislead anybody. I am in no way an expert or have any real working knowledge of immigration law. So probably you're asking, Why am I here? I kept asking myself that over and over, trying to figure out how to frame my comments for this event. And I figured the best thing I can offer is some background into how I got involved in the case and really the prosecution's take on it. And since I'm no longer having to be an advocate, perhaps provide a little more of a candid

inside look as to what the prosecutorial side or the State's side of the *Padilla* case really looked like and what we really thought of the case and what we fear and what we see the effect may be as the case has evolved.

So first of all, it was really odd for me to be involved with *Padilla* to begin with. As Katie mentioned, I'm the manager of the Capital Litigation Branch, which means I oversee all the death penalty cases in Kentucky. I had assumed that position just in September of 2008 and was taking over for the man who essentially had created that position who retired at the end of '08. I had never heard of Jose Padilla and never worked on any of his cases in the state court. And then I came back from the holiday break to find Jose Padilla's cert petition laying on my desk with a note from my predecessor saying, "This looks interesting. It has potential." And so I did not know anything about Mr. Padilla until I was attempting to draft a brief in opposition to his cert petition, which admittedly was extremely difficult to do because it did, in fact, have great potential, and this looked as if it might be my best and perhaps the only chance in my career to get to argue a case before the United States Supreme Court. And also, it was ultimately kind of daunting because, while the opportunity to argue was alluring, the position that I kind of was forced to take was not the greatest position in the world.

I guess we should start off basically by making sure everyone is a little bit basically aware of what *Padilla* was charged with, how he got to the United States Supreme Court, and explaining the law and how Kentucky's ruling departed from the general rule and thus justified the cert petition.

Padilla was traveling through Kentucky, and he was doing so on a semi-tractor/trailer and was found to be in possession of about half a ton, a little over a thousand pounds, of marijuana, a relatively large amount of marijuana. And from a prosecutor's side, these are great

facts. He waives his right voluntarily, he gives statements that seem incriminating, and he's in possession of the drugs. And so from a prosecutor's standpoint, this is a great case. However, he is appointed counsel, his appointed counsel allegedly tells him during the plea negotiation process that "if you accept this plea," "that I've looked into it, and that I really wouldn't worry about the chance of removal." You've been in the country for so long, and given your military service, I feel pretty good about it. Needless to say, that was not the best advice in the world. Now, it was good advice in the sense that Padilla was sympathetic. He had come to America, I believe, in the late '60s or early '70s as a young man, had served in the military in Vietnam, was honorably discharged, and he didn't have a long laundry list of criminal convictions. I'm only aware of one other prior conviction, I believe I recall, for receiving stolen property. Mr. Arnold comes next, he'll be filling you in on all the background.

But the state of the law at the time Padilla entered his guilty plea was such that — it was universally accepted that, in order to enter a voluntary guilty plea, knowingly, intelligently, and voluntarily entering a guilty plea, the defendant needed to understand the direct consequences of that plea and that generally a misunderstanding with regard to something that was collateral would not have any impact on the voluntary basis of the plea. And in fact, there was no duty for an appointed counsel or any criminal defense counsel, for that matter, to advise his client with regard to a collateral matter. Importantly, we need to identify the differences between a direct and a collateral matter. Direct matters are those things such as your right to trial by the jury, the right to confront witnesses, your right to appeal, all those kind of things you're going to waive as a result of your plea. Your attorney has the obligation to inform you of the offense, its potential punishments, any defenses that there may be, and to give you accurate advice so that you can

weigh the determinations of guilt and innocence and enter an intelligent plea.

But again, at the time Padilla entered his plea, it was well settled amongst all the circuits and in Kentucky that it did not need, there was no obligation for that counsel to go further and inquire about something that was collateral. And immigration consequences had always been deemed to be, in fact, collateral. Collateral not because they don't always apply but because they do not stem directly from the criminal convictions themselves. The state courts have no power over any of the immigration laws, they cannot deport anybody or remove anybody, and so it is something that happens collateral to and separate and apart from the conviction. Just like a citizen who loses his right to vote or loses his right to carry a weapon under the Second Amendment, those are also considered collateral consequences for which there is no obligation to advise.

However, that led to some negative results. Consequentially, criminal defendants are going to be concerned potentially about these collateral consequences. In Kentucky, one of the most collateral consequences that we see affected most often is parole eligibility. Parole eligibility does seem to be closely tied to the criminal proceeding, but it is enforced by the executive branch, not the judiciary. It is a gift of legislative grace that that's even available, and that is ultimately given to you at the discretion of the executive. So it has always been deemed to be collateral.

But you have a series of cases that would start coming up in Kentucky and throughout the circuits in which criminal defendants would ask their criminal attorneys, "Well, what about my parole eligibility, what about my immigration consequences," and they would ask about these collateral matters. If the attorney undertook — or attempted to answer those questions, a rule of law developed which we call in Kentucky, at least, the *Sparks* rule, it was the *Sparks*

case in the Sixth Circuit that said, if you mis-advise that defendant with regard to collateral consequences, even though you had no affirmative duty under the Sixth Amendment to even answer the question, if you chose to do it, you must be accurate. Failing to be, you gave mis-advice that would be — or you would risk being ineffective under *Strickland v. Washington.*

So now what we have here is Padilla alleging after entering his guilty plea that his counsel was ineffective for having failed to accurately tell him that he would be deported as a result of his conviction. After his conviction, a federal detainer or an immigration detainer was filed against him, and he was going to at least be put on track of being removed from the United States.

Initially, the state trial courts that reviewed that said, "No, it's a collateral matter, there's no ineffective assistance of counsel here," and affirmed the conviction. The Kentucky Court of Appeals said, well, no, under the *Sparks* rule, he's at least alleged mis-advice, he at least gets a full-blown hearing to determine whether or not this advice was really inaccurate and whether it impacted his decision. And if it was, then counsel was ineffective. All keeping with the precedent that existed throughout the nation. However, the Kentucky Supreme Court went kind of astray. And they did so for a logically consistent reason, but it left a bad taste, believe me, in just about everyone's mouth.

Essentially, the Kentucky Supreme Court reasoned, Well, if there is no affirmative duty to advise on a collateral matter and it's well settled that it is not a constitutional violation to not advise, to fail to advise on those matters, then really, what is the difference between failure to advise and mis-advice? And there is no real relevant distinction there. If you don't have a right to that advice, whether you got zero advice or bad advice, if they're equally as bad, which is very logically consistent, but essentially it boils down to the Kentucky Supreme Court saying, "We think it's

okay for criminal defense attorneys to give bad advice." When I ultimately was handed off the case, no matter how we tried to argue it or tried to come up with a way of defending the Kentucky Supreme Court's decision, you're still left with that what they're really practically saying is that bad advice is okay.

So it became a more and more daunting task, and I quickly realized just how daunting a task when I got summoned to Washington, D.C., by the Solicitor General's Office asking me to convince them not to file a brief on behalf of Padilla. Their initial inclination was to file a brief in support of Padilla saying Kentucky got it totally wrong, and I was left with my hat in hand at the Solicitor General's Office begging them not to, in fact, do that and trying to convince them that there was a rational basis for Kentucky's decision.

And really what that rational basis consisted of is that, under the existing precedent, it was logical to say that you have no right to be advising really does not impact waiver of your constitutional rights and the scope of representation under the Sixth Amendment need not extend into collateral matters, and we were able to basically present a kind of a parade-of-horrors type case. That if you start opening the door or requiring advice with regard to collateral matters, you make the criminal defense job extraordinarily difficult. You make criminal defense attorneys obligated to be expert in any number of areas of law where they don't have any expertise. The number of collateral consequences that affect someone that's been convicted of a felony is extraordinarily long. I think at some point, our list just in Kentucky was well over four hundred different types of consequences that are statutorily enforced in some way, and they go from losing your right to vote, to losing your right to bear arms, to immigration consequences, to being denied the ability to serve in the military, denied federal student loans for education. Chances are it's going to

affect your child custody situation. It's going to affect potentially everything because those felonies, especially in a state like Kentucky, exist on your record forever.

So the real fear of the Commonwealth was that if Padilla, who wasn't simply just asking, his was an alternative position that immigration be made kind of a special exception, but he was essentially asking that the *Sparks* rule was a bad rule, that there should be, in fact, an affirmative duty to inform criminal defendants about collateral consequences. I think to some degree they try to limit it to say, well, it was the duty of the attorney in a criminal defense situation to basically interview this client to try to determine specifically what was important to that client and then research and determine what collateral consequences were most likely to impact his decision to choose to go to trial or choose to accept a plea and then educate the client with regard to that. From a prosecutorial perspective, that was scary. The plea bargaining process is an extraordinarily useful tool to manage caseloads and to assure some sort of finality to convictions, and the main reason to engage in plea negotiations is to get that finality and to know that we have extinguished the case and we are not going to suffer years and years of further litigation. However, by introducing an obligation of counsel to advise on a collateral consequence, we open ourselves to a lot of uncertainty potentially. Kentucky has a three-year window in which you may raise collateral consequence claims or collateral claims relating to your criminal conviction. So for three years the criminal defendant, who may or may not or most likely is not going to be satisfied with his plea agreement and he's actually sitting in prison now, has three years and a lot of time to discern whether or not, what, "my attorney really should have advised me about one of these myriad of collateral consequences that is now particularly important to me" and bring it via a criminal rule 1142 claim for ineffective assistance of counsel. And if there is a duty

to advise, then we're stuck on the prosecutionary side some three, maybe four or five years later by the time the motion is filed, counsel is appointed, having to have a hearing to determine whether or not mis-advice or no advice was given on a collateral matter. And it creates this huge element of uncertainty in due process that scared the states to death.

And so we feared very much that if you open the door to — so our primary focus was trying to make the Court understand that kind of parade of horrors and suggest that adopting Padilla's position would be detrimental to the criminal justice system. It would, in fact, encourage prosecutors to avoid or, if you would, be reluctant to enter into the plea process. And people who deservedly so, perhaps, or could have benefited from the plea may lose out because of the uncertainty that would now be attached to those pleas.

And to some degree I believe we were successful. Ultimately, the United States Supreme Court chose once again not to weigh in on this direct collateral consequence component of the effective assistance of counsel. They made a point of saying that the fact that the prior rule, this rule that said you had to advise with regard to direct consequences, that no advice was mandated with regard to collateral consequences — they made a point to notice that that was not the United States Supreme Court's rule, it was a rule that persisted in the circuits, and that the Supreme Court had never really weighed in on that topic, and they once again had sidestepped it and did not choose to weigh in on it once again. Instead, opting to elevate immigration consequences or removal because of its kind of punitive, potentially punitive nature, and severity of that consequence, basically making a special exception. And from our perspective carving out a new right under the Sixth Amendment that didn't prior exist. And to some degree, we've been affirmed in that belief because now the United States Supreme Court in *Chaidez*, which I'm probably

mispronouncing it, just recently, I think in February, entered the opinion finding that the *Padilla* case was not retroactive, that it was, in fact, a new rule of law. So it only applied prospectively.

In some ways the State is somewhat pleased with the decision. It's not so much that we don't want immigrants or non-citizens to be informed of their negative consequences, we just wanted it limited in a manageable way not to open the door to every possible collateral consequence. And to that effect, prior to *Padilla* actually reaching the United States Supreme Court, Kentucky had already amended its standard plea form to include a statement indicating that, if you are a non-citizen and pleading guilty, you understand that you may be risking deportation or removal as a result of that guilty plea. Whether or not that waiver will truly carry the day waits to be seen. I've not yet had the case where someone signed that particular waiver form but then has alleged that their counsel was ineffective for giving them mis-advice with regard to immigration consequences. So that would be an interesting thing to happen when that does happen.

But what the Commonwealth does fear or does have a potential concern, and what we expressed at the United States Supreme Court, is that elevating immigration to this special place of being protected under the Sixth Amendment essentially grants citizens or non-citizens greater protections than citizens that we would likely see if they made that kind of choice in resolving this situation, we would likely see citizens making claims that will for me, my right to vote or my right to bear arms or whatever collateral consequence is particularly important to me, is just as important, is just as automatic, is just as crucial to my decision to plead guilty and thus should be also elevated and given special status just like immigration consequences. And while we have not seen that widespread throughout the nation, we have seen it quite a bit in Kentucky, and in fact, there is a Kentucky

decision right now that's not yet final, it's on a petition for rehearing, waiting to become final. But that says that, at least in Kentucky, Kentucky is going to use the *Padilla* logic or the logic employed by the United States Supreme Court to elevate the parole consequences. Which again, it's not that we're going to necessarily deny a criminal defendant his right to accurate information with regard to parole information or parole consequences to make it a constitutional right, and then to create further exceptions to this distinction between direct and collateral starts to whittle away again that certainty with regard to plea deals.

To some degree the State then advocated that what the United States Supreme Court should really do is criticize the court, criticize the Kentucky Supreme Court in its decision. But it ultimately acknowledged that it was a reasonable distinction and, under the existing body of law, that this is a collateral matter and that ultimately that this is a matter that should be addressed by the court rule-making, state legislatures, or even Congress, that, if this is a real problem that we want to protect, it can be addressed that way. In fact, at the time that we argued *Padilla*, I think there was somewhere between twenty-two and twenty-seven, I forget the exact number, states that had in some way or another addressed this problem with regard to immigration through changing their own court rules, adopting some sort of statutory scheme that required explanation of immigration consequences, and so forth.

That would have been kind of the perfect world for the Commonwealth because we're now not only elevating it to a constitutional issue, it is a statutory right that is specifically given to a specific situation. By elevating it to a constitutional right, again, we feared this onslaught of additional litigation and feared that courts will slowly but surely expand the number of collateral consequences in which there's an obligation to advise and that at some point the numbers become too unwieldy and too difficult for

criminal defendants and, again, that certainty will disappear. And in fact, it's already happened to some degree. I think our prosecutors, and to some degree our judges, are hesitant to really believe that the criminal defense bar with the fact that they do have too many clients, that they are over-worked, that they're not really prepared to give accurate immigration advice or advice on any number of collateral consequences — And I've seen prosecutors demand that, if you're going to take a plea, especially a non-citizen, that we do want to use our waiver form, that we want it to be put on the record. And we want the judge to instruct that, "I don't care what your attorney has told you," "I don't care what advice he's given you with regard to immigration consequences," "You understand that by pleading guilty you risk being deported, and if that's not a risk you're willing to accept, I won't accept the plea." And in effect, kind of get around *Padilla* and ensure that that plea will have some sort of absolute certainty.

The Court did not necessarily have to go with the Sixth Amendment, elevating this to a Sixth Amendment claim, and could have gone through criticizing the court and encouraging courts to address it statutorily through the court rule-making procedure, it also could have looked at it through a due process angle. A due process angle means that it is ultimately the obligation of the State or of the judge to determine whether or not the person entering the plea is doing so knowingly, intelligently, and voluntarily. And put it upon the judge to make some sort of affirmative inquiry. I think ultimately they were hesitant to do that because, first of all, it was not the key issue of the case and it would have been departing from what the parties had argued. But it was also going to put additional obligations on judges, who are equally unprepared to advise someone on immigration consequences. What was a judge to do other than to just say, Well, you're always risking this, and you're really not entitled to this information? If the person is asking for — I

want to know my immigration consequences with regard before entering this plea — I think there is an impetus or a good reason to try to give them that information. In the long run, it aids the prosecution in making them have a better decision. But how you go about ensuring that that right is given to them is problematic.

And so ultimately, I think the State is ultimately satisfied with the result. We harbor still some sort of fear that this constitutional right under the Sixth Amendment will be further expanded and that we will have citizens claiming that they are somehow being treated differently than non-citizens, and to some degree they are. It's just the fact of the matter. Citizens possess a constitutional right to bear arms, a constitutional right to vote, and under the current state of the law, there is absolutely no obligation for a defense attorney to inform those citizens that a guilty plea will rob them of those rights. And for that matter, the *Sparks* rule that says if I give you mis-advice, if I misinformed you, thus making me now ineffective, it's essentially kind of out the window as well. While the United States Supreme Court chose to raise immigration, they ultimately agreed with the Kentucky Supreme Court that this distinction between no advice and mis-advice was really arbitrary, and they ultimately found that there was no relevant distinction between an act of commission versus an act of omission in the reviewing of the *Padilla* case. So I take a little pat on the back there that we actually managed to get the United States Supreme Court to agree with the logic of the Kentucky Supreme Court but ultimately could not get around the fact that, even applying that logic, you're still left with a decision that says it's okay to give bad advice to criminal defendants. And how is that ever going to be palatable? And so I think the Court was faced with this daunting task of trying to eliminate the risk of opening the door to the parade of horrors that I spoke of before and undermining the certainty of the plea process but at the same

time trying to protect a group of individuals who in many cases are not very well versed in their rights. In fact, some don't really have rights because they're not citizens, who are typically poor and are scared and are just trying to get through the process as quickly and as easily as they can and don't know exactly what to do.

That being said, to suggest that immigration consequences, something like removal, is always a terrible thing is a little bit of an overstatement too. It would obviously have been for Jose Padilla. Jose Padilla at the point of his conviction had been in the United States for more than half his life. He had established an entire life here. Just to ship him back to Honduras at that point would have been a real, true hardship. But the college student who is here to study who gets in trouble at a party on campus and is going to be sent back to London or to Paris or somewhere, it's not really a terrible hardship that they would be removed because of some behavior that he had. So immigration consequences are not necessarily harsh, but they can be extraordinarily harsh. And so it does make sense that the Court would want to address it, and it does make sense that the Court would ultimately want to get rid of this idea that bad advice is never okay.

But again, we've only done that with regard to immigration. If an attorney gives bad advice with regard to any of the other collateral consequences, until they've said something otherwise, they've eliminated that distinction between no advice and mis-advice, or at least called it into serious question with their comments at the end, and have made it now that, I think, if you want to be an effective advocate for your client, at least effective in the sense of the Sixth Amendment, you should restrain or absolutely refuse to ever answer questions with regard to collateral consequences. If you undertake — well, for that matter, I guess they've eliminated that too. You can feel free to do it and do it with impunity because they're collateral, there is no

right to have that advice, and whether you give bad advice or no advice doesn't matter, it won't impact the validity of the plea or at least arguably won't.

Well, I have not used quite all my time, but I think I pretty much hit the high points that I wanted to address. I know this is kind of an odd setting, but is there any kind of question you might have for me? Yes, ma'am.

UNIDENTIFIED SPEAKER: I have a question, not related to *Padilla* specifically, that might be interesting for students to hear about, but how did you prepare for your Supreme Court argument? And then tell us a little bit about the experience of actually arguing this case.

WILLIAM ROBERT LONG, JR.: Well, it was an amazing experience, to be honest. It dominated the better part of my life for 2009. It was very unique. Answering the phone to have the solicitor generals on the other line say, "We need you to come to Washington, like tomorrow," and trying to get that arranged, again, provided all sorts of weird opportunities that I never would have expected. But the preparation is basically the National Association of Attorney Generals operates in Washington, and they have a great contact person named Dan Switzer, who provides some support to the Attorney Generals' offices. And so I contacted him to give me kind of the basic playbook of how this process works. He offered his services to review our brief and to offer suggestions, and then ultimately they set up a moot court in Washington the week before oral arguments.

But in preparation back in Kentucky, I just wrote and wrote and rewrote and rewrote. It was much different than the normal process. In most of the cases I handled — you're expected to handle a numerous number of cases, so you write it, if you're lucky, you get a chance to really edit it and re-read it multiple times. And you're trying to get it out

and filed just to meet your deadline. But with this case, everything kind of got put off on the side. I think we went through at least seven drafts of the brief before we finally settled on something we liked. It was a new experience for me. In every other instance that I've ever had with the United States Supreme Court trying to create these cute, little booklets, Kentucky is such a penny-pincher, that unless cert is actually granted, we attempted to create these things in-house. And my past experience has been that we don't always get it right. And I got some really bad versions of this from our print shop and was stuck in one instance literally in a brief in opposition in the *Padilla* case hand-cutting the paper to make it fit.

I did one in-house moot with the Attorney General's Office. It did not prove particularly helpful. A bunch of like-minded people trying to convince me that I had a reasonable case and despite the fact knowing that I have a position that's going to ultimately be not very palatable to most people. I contacted the University of Kentucky and got a panel of three — I think it was four law professors — that would agree to sit in judgment over me and allowed me to have a moot court there. They found a three and zero to argue Padilla's position, and we went through a full kind of moot court there. It proved more helpful but also disconcerting. As you might imagine, the faculty and staff there was also very skeptical of the State's position, proved to be much more so than even the United States Supreme Court itself, and they beat up on me quite well for about an hour or so. And then finally I had a video-taped moot court at the National Association of Attorneys General, and Dan Switzer had arranged to have several Washington attorneys who had all had some level of Supreme Court experience come read the materials and put me through a moot. And they were actually paid participants. They got some sort of stipend pay, and so they were well prepared. There were no time limits, and they drilled me for about an hour and forty-

five minutes. Interestingly, that grilling also included Michael Dreeben, the deputy solicitor general that ultimately argued the case. I had this really weird relationship with the Solicitor General's Office. Because they took a hybrid position, they said ultimately Kentucky was wrong and the mis-advice rule was good but that Padilla could never prove prejudice under the second prong of *Strickland*, they nevertheless supported the State. They demanded, and I somehow was intimidated and relented, in allowing them to participate in my moot, but I was forbidden from participating in their moot. It didn't seem quite fair. But ultimately Mr. Dreeben, at the time I think he had argued something like seventy cases before the United States Supreme Court, was extraordinarily gracious and perhaps the most helpful person as far as preparing me for oral argument of anyone in the room. The other hired members of the panel seemed somewhat just outright dismissive and could not understand why the Court could not really comprehend the concerns of the State or why the Court would even grant cert. Michael Dreeben seemed to get it. He seemed to kind of change the mood in the room. Before he got there, the paid participants were really kind of rude to me, to be honest. And then when Michael Dreeben came in, they all said, Well, what's he doing here? He's not arguing this case. This can't possibly be important enough for him to be involved in. And the fact that he believed it to be of some import kind of changed the mood and made the experience of that moot more beneficial.

And then the United States Supreme Court itself, what can I say? It is a neat place. The place is filled. You get to walk in the side door, you walk into the attorneys' bench down in the basement, and all the attorneys are lined up trying to get their tickets to just come and watch. And you walk up to the counter and say, "I'm arguing counsel," and then things suddenly change. And you are whisked away to the attorneys' lounge, you are escorted by a marshal

through the building, through the crowds. There's much less security required. They make it a big point to say that you can't take cell phones or anything else. And I said, Well, do I need to run down to the locker? No, you leave them at the clerk's office on the counter. I'm just supposed to leave my cell phone? You're at the United States Supreme Court for God's sakes. You just leave all your stuff just laying there. I would have never in my life dreamed of doing it, but I did.

And then the courtroom was a unique courtroom. In all the other courtrooms that I've ever argued in, in the appellate court, the justices sit up high, kind of pushed back away from you, and you're kind of at a podium. And it has some distance, and they kind of lord over you. At the United States Supreme Court, it's a curved bench, your podium is pushed right up in between them to some degree, and I really almost felt as though I could reach across the bench and shake Chief Justice Roberts's hand if I wanted to. There was a little more distance than that, but it doesn't really feel that way. The room being so tall and so wide and the way you're kind of pushed up — they also have the acoustics so that the sound behind you kind of melts away, and they do have a speaker system set up that tries to pinpoint the sound to the podium. Another odd setup is that that podium, attached to it are counsel desks. In every other situation, counsel desks are several feet away, these big tables here, it's a relatively small table that's literally attached to it. So as my opponent Stephen Kinnaird or Michael Dreeben are arguing, I'm literally right here, and there's the podium. I'm literally standing right beside them while they argue. And from the bench, it appears that the Court can actually look down and see any of my notes that I'm taking. And that's kind of a scary thought. I'm not just on display or performing when I'm actually at the podium, but I'm on display and performing the entire time that I'm standing there.

The way it ended up being set up, because the solicitor general had taken this odd position, we agreed that Padilla's counsel would go first, solicitor general — who at the end his brief would typically go last — would actually go in the middle, and then I would respond to both because I was going to take issue with some of the solicitor general's positions.

Once they called it to order, I was good, I was fine through Mr. Kinnaird's arguments. I felt good, I felt like I had confidence. And then Mr. Dreeben got started. And in the last five minutes of Mr. Dreeben's arguments, I probably did not hear a word he said. It became suddenly very real to me that I was about to stand up, and I got really scared, to be honest. Yes, sir.

UNIDENTIFIED SPEAKER: Do you know what happened to Padilla personally? Did he plead out later, or did you go to trial –

WILLIAM ROBERT LONG, JR.: Well, I can give you a little bit of an insight to that. I'll limit my comments a little bit because Mr. Arnold, who represents Padilla, and he'll be speaking next. But ultimately it came back to state court. He was given a hearing to determine whether or not this mis-advice was really given, whether it really did affect his decision. The trial court ultimately said, he could not prove the prejudice prong, he appealed to the Kentucky Court of Appeals, who said that he could. We chose not to take that any further. And he's currently back in the circuit court. It's still not quite resolved. And I'll let Mr. Arnold explain further.

One last comment, just because it was so unique and I still remember. As nervous as I was, when I stood up to the podium and said, may it please the Court and that, and Mr. Chief Justice — it's bizarre, but the look or the comment that — I don't even remember exactly what he

said — but that Chief Justice Roberts said, he just looked like he was very encouraging. And suddenly I calmed down quickly. And I found the Court as a whole, even though Justice Stevens and Justice Sotomayor — and it was her first week on the bench, by the way — gave me a little bit of grief, for the most part, they were a much more friendly court than, say, the Sixth Circuit, all right. I've had the Sixth Circuit not be very kind to me at all. They've been extraordinarily mean to me at times, in fact. Ultimately having done it, I felt more comfortable there.

And then from that point, the biggest impact on my practice is it changed things a lot. Seven or eight days later I had an oral argument before the Kentucky Supreme Court, and that felt like nothing. I mean no offense to the Kentucky State Supreme Court, but it was a wonderful feeling to walk into that courtroom now with an immense amount of confidence and absolutely no fear. Now, some of that has dissipated, but for the most part, I'm much more comfortable now with the courts having done it because I can always remind myself having done that, I've done something unique. And if I can get through that without passing out, I can get through about anything.

Unless there's other questions, I'll wrap up. Thank you.

KATIE DORAN: Thank you, Mr. Long, for speaking, and as a token of our appreciation, we want to give you this.

MORNING KEYNOTE ADDRESS II: *PADILLA V. KENTUCKY*: DEFENDING AN IMMIGRANT'S RIGHT TO COMPETENT REPRESENTATION

Timothy Arnold

MS. SWIFT: Good morning, everyone. We here at the *TJLP* are delighted to have this next speaker. We are delighted because this next speaker will be talking from personal experience, his personal experience of representing Mr. Padilla. This next speaker, Mr. Tim Arnold, has been involved in *Padilla v. Kentucky* from nearly the beginning, all the way from nearly the beginning to the United States Supreme Court and back to the state on remand. So Mr. Arnold has quite a bit to say, like the previous speaker, about *Padilla v. Kentucky.*

Now, even though Mr. Arnold has been involved with this case from nearly the beginning, he shared with me that he didn't actually foresee himself becoming involved in such a case, and that's because Mr. Arnold didn't start out practicing immigration and criminal law. Rather, he started out in the Juvenile Post Dispositional Branch of the Kentucky Department of Public Advocacy, which is that state's public defender system. A few years later he became manager, and now he serves as the post-trial diversion director. So Mr. Arnold has had quite a career, has received quite a number of awards, including the Kentucky Association of Criminal Defense Lawyers Juvenile Justice Award, the *In Re* Gault Award for excellence in juvenile representation, the *Furman v. Georgia* award for excellence in death penalty representation, and most recently the American Immigration Lawyers Association Jack Wasserman Memorial Award for Excellence in Litigation in the field of immigration law.

So once again, Mr. Arnold has some very valuable information to share. Without further ado, Mr. Arnold.

TIMOTHY ARNOLD: Thank you very much for that very gracious introduction. I'm certain not to live up to the expectations that have been created.

I want to thank the University of Tennessee for inviting me and inviting Mr. Long as guests to speak to you about this case. I want to be clear before we begin, in light of some of the other questions, this was sort of mentioned in the introduction, it would not be fair to say that the *Padilla v. Kentucky* that all of us are here to talk about is somehow my doing. The person who is responsible for this more than anybody else would be Steve Kinnaird and then Stephanos Bibas of Penn. We wrote the cert petition. I'm sure it was okay. They got involved in the reply stage, wrote a reply that was exceptional, and I think made it really possible for the court to grant cert, and then they were responsible for the briefing and for the argument. They allowed us to participate, and I had a wonderful experience. And I'm grateful for them everyday. But they — it's really their case in terms of what happened there. And I wanted to make that clear. As much as I would like to take credit for it, I really can't.

So we're experiencing minor, technical difficulties. Ninety seconds. Seriously, could you tell that? So I'll tell a story. Could the court reporter stop for a second?

(COLLOQUY OFF THE RECORD)

I am a criminal defense lawyer first and foremost. I learned some immigration law because of this case, but I am not an immigration lawyer and didn't take immigration courses in law school. To this day, I would not be probably the first person you would turn to for immigration advice on a criminal case. I probably could give some advice without completely screwing it up but not a lot. So this has always seemed to me like this sort of situation. This slide is apropos for two reasons. First, *Padilla* is sort of a collision of two different universes of law; you have the criminal law on the one hand, which I'm familiar with, and the

immigration law on the other hand, and those two things are sort of colliding in this case in a big way. The other is, people really did think the world was ending when the case was decided in some circles because suddenly there was all these additional obligations that were going to be expected.

For me, where I want to start is with criminal law since that's the area I'm the most comfortable with. And my journey with this starts with this guy. Does anybody know who this is? Gideon, that's right. Clarence Earl Gideon, who was alleged to have stolen fifty dollars in coins and some — he was acquitted, so we could not say he did it. Was alleged to have stolen fifty dollars in coins and some liquor from a liquor shop in Florida, went to trial, didn't have a lawyer, was convicted, sent a letter to the Supreme Court of the United States, who took that as a cert. Goodness knows that wouldn't happen today. An assigned attorney argued the case, established *Gideon v. Wainwright*, and of course, he comes back, tries the case. It turns out that the taxi driver who sort of was seeming to give damning evidence, for him to say he wanted to keep the ride a secret also, could say — well, he said it was because he was in trouble with his wife, that he didn't have liquor or anything with him or any of the proceeds of the crime, and was able to demonstrate that there was some possibility that the person who was the principal eyewitness in the case was actually a lookout for a gang of other people who might have done the robbery. And as a result of that, he was acquitted. I think at the time of *Gideon*, when *Gideon* was decided, people really thought this was going to solve the problem. Like we had a system where people were coming to court, and they didn't have the advice and the assistance of counsel. And we would be better off if now everybody has a lawyer, so it's all going to be okay. And I think that hasn't really proved to be the case.

I won't ask you what this is. This is the — why is it yellow? Okay. The slide on my computer looks nice, this

slide looks like it's radioactive. This is the Florida electric chair. The reason that I'm putting this up is I couldn't find a mug shot of the next person, which is David Leroy Washington, who was really involved in three separate murders in Florida. He pled guilty to those offenses. He confessed to the crimes. His lawyer was sort of flummoxed by the absence of any kind of factual defense of the crime. And instead of — it was a miserable investigation. He talked to his client's mother about his family history but did not investigate that much further. Advised his client to plead guilty, and believing that the judge had indicated at some point in the past that she would be reluctant to impose a death sentence on somebody who really expressed remorse for the crime, told him to go in, express remorse for the crime, and that was it. Did not conduct a sentencing hearing at all, waived the sentencing hearing, relied on the testimony of the (inaudible). He was, of course, sentenced to death.

The United States Supreme Court heard this case and for the first time sort of established what counsel's duty toward the case was, what was the obligation that counsel had in terms of representing a client. The Eleventh Circuit had found that whatever that rule was, that his lawyer hadn't met it. The United States Supreme Court found that the obligation basically fell into two categories; deficient performance, which is sort of acts or omissions that fall below prevailing professional norms — to apply an objective standard of reasonableness and prejudice, which is that, but for counsel's errors, there is a reasonable probability the result would be different.

In doing that, in reaching that holding they, I think, really — and this is my opinion — really substantially impaired what the right to counsel represented because now there was no real incentive for states to fund counsel systems, there was no means to ensure that counsel was not merely sort of the person with the law degree standing next

to their lawyer but that they were actually performing the essential functions of representation. Because most convictions are going to be sustained under the standard. Almost all convictions are going to be sustained under the standard because it's very hard to prove that the result would be different once — I get a counter-factual, Mr. Long gets a counter-factual. His counter-factual is going to be, well, if they had done this, then this would have happened or this would have happened or this would have happened, and those are all reasonable. And so it's very difficult to ever say that there's a reasonable probability of a different result under those circumstances. And the standard itself is not judged by what counsel was doing in reference to his clients so much as it is whether counsel had a notion that this was a good idea that was reasonable. It was more about judging the attorney than judging the effect of the attorney's involvement on a case.

So what happened with Mr. Washington was that the Supreme Court found that because his lawyer did have a notion about what he was doing and he was doing this for a reason that he could articulate and that that reason was not insane, that he was — that that was sufficient. His case was remanded, and Mr. Washington was the twenty-second person executed after the reinstatement of the death penalty. To me, the significance of — so I've been practicing law, and I've been practicing doing post-conviction cases for much of my career. That standard has been a real impediment to dealing with cases where there really does appear that the attorney's errors are significant in terms of the outcome of the case. An attorney's function as an attorney has been somehow — that the attorney has not functioned in a manner that counsel really ought to be working for their client.

You fixed it. It's like the magic of the internet or something.

So for those who can't see in the back, the caption is "Here Are Your Choices," you can plead guilty. In the system that we have these days, it's been commented that we have such a thing as the incredible, disappearing American jury trial. Courts have estimated, although there is no clear data on this, that about ninety-five percent of cases end in a plea. I think that actually that number may be a little higher. However, this is for illustrative purposes only, I don't know if that second bar is really truly accurate. The Supreme Court in terms of its decisions regarding ineffective assistance of counsel and its description of how that is, was it ruling on that? If you look at the cases, they were dealing with a variety of areas, but there was only one case that dealt with guilty pleas specifically in regards to counsel's involvement in the guilty plea. And in that case, for the most part, they passed on the question. What they said in *Hill v. Lockhart* is, in a guilty plea case, the test for whether the result would be different is whether, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial, which is a little bit of a different formulation than a different result. And that's the only case where they were dealing with a guilty plea specifically in terms of a guilty plea. *Strickland*'s, they were talking about the sentencing hearing. *In Flores-Ortega*, they were talking about the right to appeal. Those were cases that had guilty pleas, but there was no guilty plea discussion.

So this is — the Supreme Court was talking a lot about what the obligations of counsel were, and as time was going on, they were raising the bar a little bit. I'm not sure that *Strickland*'s facts, were they to be presented today, would be considered satisfactory under the Supreme Court precedent that exists now. But they weren't dealing with guilty pleas, and guilty pleas were most of what we were doing. So that is some — if you're looking for context about what this case was like, part of it is — this is part of the

significance of *Padilla*, from a criminal law perspective is, it's really the first time the Court has dug into what it means for a lawyer to be involved in a guilty plea. That's the first time that that happened.

So now we're talking about criminal law a little bit. The other side of this equation is immigration law. For those that can't read it, that is Sandy trying to climb over the wall on immigration law. The little caption down there, "Some of you yelled either higher or higher." The immigration system that we have been focused — has become increasingly a function of — it's increasingly focused on criminal action as a basis for deportation. This is a chart from the Immigration and Custody Enforcement, Customs Enforcement, Homeland Security. This is the chart of deportations based on criminal convictions. And as you can see, this is 2010 that this case is decided. These cases were probably in the process further back. As I understand this chart, this is a chart showing when individuals were actually deported. So, obviously, the deportation process takes a second, and so there is — these charts have sort of shifted. But as you can see, as *Padilla* is being decided, there's a real growth in how deportation cases are being used and how the law is being used now to affect a person's status. And so this has become a more and more important issue. I think that some of this can be explained by better record keeping and better communication, interaction between state and federal authorities. I think that there was a long time when you could be convicted in a lot of jurisdictions, and nobody would ever know about it. And so there would not be an actual threat of deportation simply because the relevant authority wouldn't know that you had been convicted. As time has gone forward, I think that's been largely eliminated, and so we're seeing that.

Which brings us to this handsome, young fellow. This is Mr. Padilla's green card. I hope I've eliminated all the relevant numbers. Yes, this is — his case, the facts of

his case were fairly significant to how this case proceeded. He came to this country — I think Mr. Long mentioned some of this but just to flesh a few of them out — he came to this country as a teenager, I think he was thirteen. He joined the military. Upon graduation from high school, served in combat; volunteered to serve in combat because, as a non-citizen he could not be required to serve in combat, but elected to stay with his platoon; served in combat in Vietnam; was honorably discharged as a result of that; in fact, was decorated. He then got married, lived a life in California. During the hearing the circuit judge asked him, "Why didn't you just become a citizen after this," and his response was, "Well, this was the Vietnam War, and nobody liked that I was involved in this," "And the government was a pretty bad actor, and I just didn't want to have anything to do with them." It wasn't important to me, I always thought I was going to be here. I never thought I was going to go anywhere else, but I just didn't want to have to go through the process of having to interact with this government that I was so frustrated with. And so he doesn't seek citizenship upon his return. He continues to work and live in California. He becomes a truck driver. He is carrying a load. His testimony was and would be that he was carrying a load of candy bars that he had been asked to carry. He was not a long-haul truck driver in general, but a friend had asked him to carry this load. The load was not sufficient to fill his truck, so he asked the agent for a second load. He picked up the second load. When he was apprehended, that second load, which was packaged to resemble legitimate freight, was, in fact, marijuana. Mr. Long mentioned that it was about a thousand pounds of marijuana, which is what we, being a defense attorney, the defense community, like to call a modest quantity of marijuana. I think it's not really. My view is, it's not even really a crime, he was bringing happiness to college students across the Midwest.

But the principal fact that I know was argued about in the Supreme Court was, this was a lot of marijuana, and so what would be the effect of this if he was to go to trial? He made an agreement with the DA to deliver his load and complete his delivery so they could apprehend the people to whom it was going. The DA in return agreed he would not be prosecuted federally. He was prosecuted in the state court, and his lawyer advised him that he had looked into it. And his lawyer had been specifically directed, in fact, to look into immigration consequences because, as he was prosecuted, it was being reported in the local paper that he was an illegal immigrant, meaning that he was undocumented, which was not true, he had his green card. He was then — so they approached the attorney and asked, "Can you research deportation?" Consequently, he had a little note in his file saying — he then turns around and advises his client — and this is disputed, what was the attorney's advice was disputed. His family believed in his claim that the advice was, "I'm sure you won't be deported because you've been in the country so long." He says that the advice was, "I thought you may have a problem, but you have been in the country a long time." "Maybe you can work that out because of your service or because you've been in the country," which was well short of what the actual truth was, which was that he was pleading guilty to an aggravated felony, deportation was mandatory, nobody in the Department of Justice really had the power to stop that train once it started to roll, which is unlike other cases. If you're familiar with immigration law, you know immigration offenses fall into a number of different categories, and the most severe of them, they are aggravated felonies, which cannot be canceled. Some lesser offenses, some lesser categories are sort of crimes involving moral turpitude or other things where the Department of Justice does have some authority to cancel deportation if they find under the circumstances that the individual is not somebody

for whom deportation is appropriate. That's not always an easy thing to accomplish, but it is at least a possibility. And his case would be a particularly strong case for it. He had served in the military, he had lived in this country for a long time, he was married, he had several children, some of whom were disabled and would not be able to travel with him. This was going to be an extremely big hardship for him, and it was not going to be — he had demonstrated a pretty strong commitment to being in the country, and he had, in fact, served the country. So under the circumstances we thought, if we can get it to that, that would significantly improve his chances of remaining here.

How I ended up getting involved in the case is, he was — it requires a little bit of understanding of where Kentucky was at the time. In the case that preceded *Padilla*, *Fuartado*, the chief judge of the court of appeals, who I think was something of an advocate for — well, I don't think it, I know she said it — something of an advocate for the rights of immigrants in the criminal justice process, had rendered a decision that suggested that counsel had a duty to advise clients about immigration consequences. And the Kentucky Supreme Court had accepted review of that case and reversed it and said that there was no duty. And so this opinion comes along a few weeks after the supreme court opinion is final, and the court of appeals, again, same judge from the court of appeals, writes this opinion. It says, "We understand *Fuartado*, but this is different because this was flagrant mis-advice." And there was a body of law within the circuits and throughout the country that, while you didn't have to advise of collateral consequences, if your advice was flagrantly wrong, that that might be a basis for an ineffective assistance of counsel claim. And so that was the authority that they were relying on.

The Commonwealth sought discretionary review of that case, and at that point I was not on it when the discretionary review was being pled. I got on it — the

attorney who had been on it in the court of appeals was Rick Neal, who got back on the case for the cert and the Supreme Court stuff, but he was joining a private practice. He gave it to me, so far as I know, because I was a juvenile lawyer and juvenile law is crazy and immigration law is crazy. And so it kind of works, so I'm crazy, he's crazy, and we'll be okay.

The first order I get in the case is an order granting discretionary review and in the order denying oral argument, which I had never seen before in years of practice before the Kentucky Supreme Court and which I could understand completely as, "We believe Judge Combs has gone crazy again," "You're welcome to have your brief, but we know what we're doing with this case"— Like it was not — whenever the Supreme Court is denying oral argument as part of the order granting discretionary review, they are communicating that at the very least they don't think this was a hard issue and they have an opinion because, if they didn't, they would have oral argument.

We briefed the case, the Supreme Court rendered its decision. Ironically, about, I want to say about two weeks, three weeks after the decision was rendered, before a rehearing was even due, we had an appellate conference in my office, and we had invited some judges to speak. And among them were a couple of Justices from the Supreme Court, who I will not name, and the chief judge of the court of appeals who had written *Padilla*. So the chief judge stands up and says, "So I'm here to talk to you about whatever you want to talk about." Before we do, I've got these Justices over here, what's up with this *Padilla* case? And so the Justices — one Justice was in the dissent and one Justice was in the majority — the dissenting Justice said, "I was in the dissent," and sat down. Like I had nothing to do with it, it's not me, and sat down. The other Justice said, "Well, the reason we were concerned about this case" — and I think you've heard Mr. Long express some of that concern — "is because of you all." We're concerned

that public defenders are not going to be able to do this, and so we didn't want to put that on you. And that drove me insane because my view is, What's the point of having a lawyer if not to do this? Why have a lawyer except to deal with the complexity of the law and to figure out the things that are hard to figure out and to make it possible for the person who is being accused, who is facing all of these consequences, to make an intelligent and informed decision about what to do in a court of law? What's the point of it? So to me, that was, I think it was, a telling expression of where people were at and what people — I don't want to say, I don't want to imply that that Justice's comments were not kindly expressed or that they were not meant kindly, they were all that. The reality is, though, I think it speaks to me that it is a failure of our system to achieve what we thought we were going to achieve when *Gideon* was decided, that we have to make that kind of decision that says we are more comfortable with a person pleading guilty and not being aware of significant adverse effects associated with that plea than we are requiring attorneys to actually advise on that. That is a failure. So they make this decision, obviously. I think that we looked at that and thought it had potential. Rick Neal and I filed a petition. Steve Kinnaird then got involved, filed a reply, and the rest is history.

In terms of what the decision actually was, I'm not sure if I completely share Mr. Long's interpretation of what the Court was doing.

WILLIAM ROBERT LONG, JR.: I'm confident you don't.

TIMOTHY ARNOLD: Among the things that they said was that they've never applied distinctions between direct and collateral consequences. They concluded the advice regarding deportation is not categorically removed from the ambient of the Sixth Amendment right to counsel and therefore *Strickland* applies. That the weight of prevailing

professional norms supports the view that counsel must advise their client regarding the risk of deportation. I think what the Supreme Court was doing was saying that here we have this basic Strickland standard, and as time has gone on, as I said, they've sort of been raising what that means. And now they're saying, there is no magic to its direct or it's collateral. The magic is what would reasonable attorneys be expected to do in this context, and did you get that? That's the standard. And that's the only standard, and we don't need to have any other funky tests than that. And that under the circumstances this is — by that point, the Supreme Court had said in *St. Cyr*, an immigration case, that any reasonably competent defense attorney would, of course, advise their clients of the immigration consequences. There was a clearly established body of authority within the defense bar, the NOAGA standards, the ABA standards, that had said counsel's duty included the duty to advise on all consequences, including immigration. And so that was already a well-established principle that ought to be accepted. Now, I think that a lot of people in the defense community probably regarded that as a surprise. There was not a lot of advice and a lot of words about immigration. And in fact, immigration was one of these things that we all sort of felt like we knew we had to be aware of, but getting aware of it was difficult. And that was going to cause problems. But I think that, in terms of what the duty ought to be, they were darn right. The duty ought to be to make sure that your client knows what they're doing when they plead guilty. The reason we have attorneys in courts more than anything else is because the law should not be a black box to your client. I'm pleading guilty to a crime, and there are many consequences that flow from that. Some of those consequences are not going to be consequences that the state imposes, and I can't as an attorney advise on every possibility. But I can if the state is going to choose to do something to you because you've pled guilty, you're entitled

to know it before you plead guilty. That would be my position. And while *Padilla*, I don't think, went as far as to say that that is always going to be the case in every case, it did take a step by saying it is the case some of the time when the penalty is especially severe.

What it means for the non-citizen clients for today, I think that, generally, in terms of your professional ethics, you obviously have a duty of competence, you have a duty to provide reasonable advice to your client about all matters that they are concerned about. In terms of what the Constitution is going to require and what will be sufficient for a guilty plea to remain valid, it needs to be, either you tell your client specifically what the consequence is or, if the consequence is in some form or fashion unknown to you because it is complicated, you need to give the complicated answer. You need to say, "Deportation is a possibility," "I have looked at the law," "It's not clear to me whether it's there or not," and "It's complicated." I would say going forward, now that that's the standard, that whether or not this is going to result in a finding of deficient performance, maybe it won't, but that as an ethical matter, I think it's our obligation, now that a button has been placed on this particular issue, to try to make sure that we're making reasonable efforts to identify with the consequences specifically. So that means that we need to become more acquainted with the immigration bar and the people in the immigration bar who can offer us assistance in trying to figure this out. Because, honestly, my experience with the Immigration Department is that they are generally a pretty helpful group. There are various immigration organizations, LL (inaudible) being one of them, where there are — most of their practice is in immigration law and that — if they get a call from somebody saying, "Can you help me figure this out," they're generally willing to try to the extent that they can do so and still have a practice. And that is something that we as criminal defense lawyers need to be taking more

advantage of. In our system we're trying to create that in-house as well. We're trying to create a position of somebody who is basically an immigration lawyer within the public defender system so that they can receive those calls and be able to answer those questions so that we can give specific advice about what that means because we think that's our obligation. In twenty years, the next *Padilla* may be a case where somebody didn't do that. But for the moment, I think it's a matter of our professional responsibility to our clients in achieving the vision that *Padilla* had for us, we need to be pursuing that.

What it means for other cases, there are a lot of collateral consequences. And I think that one of the things that is significant to me about this case that I learned from practicing this case is that for people who are lawmakers and for people who are policy makers and people who advise on policy, you need to recognize that collateral consequences are not free, there's not a free lunch to give somebody collateral consequence, we tack on this thing and "don't be convicted." And we don't do anything to make that really work for the people that it will apply to. Like I said at the beginning, there were some people who sort of felt like the world was going to end because we had to advise on this. My feeling is, the blame for all of that really doesn't lie at the feet of me or Mr. Long or the Commonwealth of Kentucky or Steve Kinnaird or the Supreme Court of the United States but lies at the foot of Congress, who created a law that was extraordinarily difficult to manage and never asked the question about how that would be managed. We need to be better as rule makers in understanding what those are and finding ways to make sure that that is something that can be communicated to somebody who is facing it so that they understand what they're doing, not — Mr. Long's point is a fair one. We want the system to be final. We want decisions to be made that are made, we don't want to be reopening convictions,

we don't want to be reopening pleas, but I think it's important that as part of that that we are doing everything we can to make sure that the people who are entering those pleas know what they're doing when they do it and are making decisions that are intelligent and informed because why would we expect anything else.

The only other points I wanted to make before I conclude are these: First, I think it's important to keep in mind as you're thinking about this case that this case very much is a function of and controlled by its facts. Mr. Long alluded to this when he was talking, and I agree with it. If Mr. Padilla had been a college student from London, this case would never have been granted anyway, no matter — even if the consequences were about the same, it wouldn't have been the same. The reason why this case was chosen was in part because virtually everybody who looks at it thinks, "I kind of feel uncomfortable about deporting that guy because he served his country, because he served this country, because this is his country, because his family is here, because his children are here, because he's made a life here." And in general, we give people a second chance in this country when they've made mistakes, and we don't want to do that here. But that ties into a second point, which is, if you are looking to be in the business of representing criminal defendants in general, but if you're looking to be in the business of representing immigrants in particular, I think it's important to keep in mind that the category of immigrants is not a single homogenous group. It is not the case that all of your immigrant clients speak Spanish. It's not the case that all of your immigrant clients have a darker skin tone or that all of them are from Mexico or some other country. They are a group that is highly diverse. They are diverse in a lot of ways. And they are diverse particularly in how their story relates to what they're facing. So if you are Mr. Padilla and you've been in this country a long time, there is — this is a highly significant thing to you. Our laws

right now don't recognize that, and I think that they should. And I hope — they're talking about reforming immigration, God help me. I hope they do something about that. I'm not optimistic, but I hope for it. But it's also the case that when you are representing them, you can't treat them as a homogenous group. That's true in general for public defender work, that's true in general for criminal defense work. Your clients come from a variety of circumstances. You should try to refrain from making assumptions about any of them. But in particular with this category, I think the tendency has been to talk about representing your immigrant client, and that is not a group that is easily labeled or described.

With that in mind, I think that concludes my remarks. Does anybody have any questions?

UNIDENTIFIED SPEAKER: Mr. Long had indicated that Kentucky's values in the written plea that has some brief immigration and advisal in it, that that had not been challenged. And I just wondered if you have any thoughts about that, if it 's sufficient, do you see a challenge?

TIMOTHY ARNOLD: I don't know that any of the — the advising form says that you are not a citizen, you understand that the plea may carry consequences related to immigration. It has not been challenged that I'm aware of in a particular case. I'm not sure — I think there have been some cases where there was some element of that advice in the form where it was also not raised as a defense to the challenge that was based on immigration advice, so it thus far hasn't risen to be the issue.

In terms of its sufficiency, I think, again, it's going to depend on the facts of the case. If this was a case that falls into the sort of second category that Stevens was talking about, a case where the immigration consequences are unclear, the advice and the form is consistent with the

advice that you would be expected to give as an attorney, maybe in those cases it would be considered sufficient. If it is, however, a case where immigration consequences were reasonably easy to ascertain and were mandatory or presumptively so, that isn't sufficient because now you haven't told them that. So to me, it's going to be sort of a fact question as to what you're looking at. I think it's one of these things — I have a mixed feeling about that form. On the one hand, I like that they're trying to make an effort to be more inclusive. I do care that people are informed. More than anything else, I think somebody should know what they're doing if they're going to plead guilty, it's a serious decision. At the same time, I worry about situations where I give specific advice on something and the judge sort of seems to be overruling my advice incorrectly. I don't mind it if they're saying the same thing I'm saying, that's fine. But if he's overruling my advice and saying something that I think is wrong, that's now a difficult situation for the client to work out because the judge is wearing the black robe and presumably knows and I'm not, and that creates an issue. But so far that issue hasn't presented itself.

UNIDENTIFIED SPEAKER: Do you get a sense that defense counsel is really engaging in the issue, or are they relying on the form to —

TIMOTHY ARNOLD: Well, my agency is. We're the state public defender system, we have created the whole chart of immigration law. We're — charge related statutes to immigration consequences for those particular convictions. We identify the person to provide specific advice on immigration issues. We are trying our best to make sure that we are living up to everything that is expected of us. There are other jurisdictions that are doing the same. There are some jurisdictions that are not. Certainly, I think within the private bar in Kentucky, I think that there is a recognition

that there's some need to do something, but I don't think that there's necessarily the same degree of concerted efforts because the private bar itself is not as concerted in its approach to that. So, I don't know if — you're going to find private attorneys who do a very good job of it, and you're going to find private attorneys who don't.

(Whereupon, a break was taken.)

PANEL DISCUSSION I: UNDERSTANDING IMMIGRATION: SATISFYING *PADILLA*'S NEW DEFINITION OF COMPETENCE IN LEGAL REPRESENTATION

Jennifer Chacón
Christopher Lasch
Yolanda Vázquez

MS. HARTILL: We have our panelists, Jennifer Chacón, Yolanda Vázquez, Christopher Lasch. All of them have researched in the area of immigration law and its connection to criminal law.

Jennifer Chacón received her J.D. from Yale Law School and is now a professor at the University of California, Irvine School of Law.

Yolanda Vázquez is a professor at the University of Cincinnati College of Law, and she helped on the *Padilla v. Kentucky* case.

Christopher Lasch received his J.D. from Yale Law School and now teaches at the University of Denver's Sturm College of Law.

This morning we're pleased to announce Paula Schaefer as the moderator. She's an esteemed professor here at the University of Tennessee College of Law.

So without further ado, I'll introduce Jennifer Chacón.

JENNIFER CHACÓN: Good morning. It's a real privilege to be here, and I wanted to take a moment to thank the university for having us; the Dean, for his gracious welcome; and also the many journals who are co-sponsoring the event. I appreciate the support that they've given us, and particularly a shout-out to Katie, who has been just a tremendous guide to our experience and a never ending stream of useful emails that got us where we were supposed

to be and has just been great. So thanks to everybody for making this so easy for me.

I am basically going to give a little bit of a general overview about how we got to *Padilla* and what happens now. And then my co-panelists are going to take it from there and delve into some of the specific issues that *Padilla* raises for practitioners. And then we're hoping to have a fair amount of discussion and make sure that our comments are responsive to your interest and your questions in the coming hour. So I'll talk for about fifteen minutes just to provide a little bit of overview about how we got where we are and what we can expect I think in the near future, at least, with regard to this merger of the criminal and the immigration world. I really appreciated the world's colliding slide. That was kind of emblematic I think of how particularly criminal counsel saw the events leading up to it and its ramifications.

I've taught immigration law in the law school setting now for nine years, and I also teach criminal law to first-year students. And I routinely tell my first-year students who are entering criminal law, "You're living in California, if you're interested in criminal law, whether that be on the defense side or the prosecution side, you really should take an immigration class." I actually think it's really important. It's become sufficiently important. You have a sufficient number of non-citizens who are in the system, and the kind of interwoven consequences are unavoidable. So it is something that I tell my students. It's a little bit daunting, I think in part, because, as we've been told, the immigration code is ridiculously complex, unnecessarily complex, and that in some ways raises challenges. And of course, it's federal and doesn't completely map on what happens at the level of state practice, creating additional complications. And we'll talk about all of those things.

But I do think it's important to have an awareness of what's happening in the immigration world, and hopefully, we can kind of talk about some of those issues today.

So I wanted to just start by talking a little bit about the "how we got here." And in a way, the *Padilla* decision navigates some of that for us. You see the discussion in the majority's opinion about how the nature of the relationship between immigration law and criminal law has changed fairly gradually over the past few decades. In the past, kind of certainly throughout the nineteenth century and into the early twentieth century, there really weren't immigration consequences to criminal violations. So you had this immigration law on the books. You had at least some type of prohibitions on entry. It started in 1875 really. But you didn't have immigration consequences to criminal activity that occurred within the United States really until 1917, and even then, it was very, very limited. So only happening in a few situations of crimes involving moral turpitude. There were pretty strict limits on how long after somebody entered those that the consequences could actually be applied. So by and large, there really wasn't much overlap between the way immigration law functioned and the criminal law. All of this really started to change, and it changed radically, I would say, beginning in the late '80s and proceeding through the mid-'90s. At that time, you had a series of changes to the law that really caused a merger between the immigration law sphere and the criminal law sphere. Because in a series of moves in revising immigration law, Congress attached all manner of immigration consequences to a wide variety of criminal convictions. And so they started out kind of in the height of the war on drugs period by attaching immigration consequences to drug crimes and extended that to a laundry list of other offenses.

And probably most notably, and this was singled out in the comments earlier this morning, developed a very expansive definition of aggravated felony that had severe consequences in the immigration world. So aggravated felony sounds bad. It can be abstract, and many of them are. But Congress has so expanded the list of crimes that

constitute aggravated felonies that the old saying now goes that they need be neither aggravated nor felonies to fit into this category, so you have anything that — you have crimes that in some cases could be state misdemeanors but that will trigger the consequences of aggravated felonies. And the consequences of aggravated felonies are severe. And I'll talk a little bit more about kind of what that looks like in a minute. But essentially the first point I want to emphasize is that for a broad array of criminal convictions and a much broader array of criminal convictions than you might think, there are immigration consequences that follow. So that's point one, which is almost any criminal conviction should put you on alert that there may be criminal consequences. And that's true whether you're talking about misdemeanors or felonies, it's true whether you're talking about state violations or federal.

The second major point that I think is important to make is that, in those changes stemming from '88 to '96, and particularly '96, the changes in the law really eliminated a lot of discretion that immigration officials have to mediate or moderate the impacts of the immigration consequences in criminal convictions. So if you have an aggravated felony, if you are charged with and convicted of something that qualifies as an aggravated felony, there is really no room for discretion no matter what the equities of the case might look like otherwise. And this is different from what the law looked like in the 1996 when there was a possibility for cancellation of deportation in cases where there might be sympathetic facts like the ones that Mr. Padilla presented with. So a lot of the discretion is gone, which means that, once that criminal conviction has attached, there's no going back once somebody is in the immigration pipeline, and that means that it's much more important to be aware and cognizant on the front end of the immigration consequences. Because no matter how sympathetic a person might look, no matter how long they lived in the United

States, those kinds of equities aren't going to be taken into account in the deportation proceedings.

I think the other thing that's important to flag is that a lot of people have tended to assume that these consequences apply and flow primarily to individuals who are present without authorization. And this, I think it gets it exactly backwards. Individuals who are present without authorization are removable because they are present without authorization, the criminal consequences may in some ways be less significant to them although it raises a host of issues about their possibility of return. But where criminal consequences often surprise people, your thinking is like Padilla's, where you have a long-time lawful permanent resident or people who are otherwise authorized to be here who seem to live here in all meaningful sense of the term but who become permanently deportable and permanently barred by virtue of criminal convictions.

So these are the ways in which I think the criminal law has really merged with immigration over the past twenty years or so, making it really important for individuals to be aware of the possible immigration consequences of any criminal conviction or any that the client undertakes.

I think the second point that should be made about this is, if we were talking about a small number of people kind of going into the deportation system, maybe that wouldn't be that significant, but one other thing that's changed, particularly over the past decade, is the degree of enforcement of immigration law in the country. So this has been kind of a theme of common observations, and I think it's worth stressing, since 2003 with the reorganization of the immigration bureaucracy and with the placement of the immigration agencies under the umbrella of the Department of Homeland Security, there has been a massive increase in resources dedicated toward immigration enforcement to the tune of fifteen to twenty billion dollars a year spent on immigration enforcement issues at this time. And so what

that means is you have large law enforcement agencies, including the Immigration and Customs Enforcement Agency, that are dedicated to not only enforcement at the borders but interior enforcement. And what this means, of course, is that large numbers of people who are here who have been present for long periods of time who might in the past not have come to the attention of the immigration bureaucracy have a much greater likelihood of actually coming to the attention of the immigration bureaucracy. And added to this is a point that was made earlier, increased information shared between the federal government and state governments and better databases, which means that individuals with criminal convictions are more likely to be identified in various proceedings. So for all of these reasons, you have more immigration enforcement, a more accurate understanding of the records of immigration coming into the system, and once they're in the system, decreased discretion to deal with the potential consequences of this on both sides. And that decreased discretion applies not just to immigration officers but also to judges. In the past, in the early days of immigration law, looking at the early twentieth century, judges had the discretion when they sentenced people in criminal court to make a determination that those individuals should not be subject to deportation. So the judge who sat in judgment on the crime could make a call about whether this should also have immigration consequences, and that, of course, is not the case anymore either. So all around, once you're in the system, the degree of discretion is really limited.

So those are kind of all reasons in which I think we're seeing more of this linkage between criminal and immigration. And the final reason that I'll flag that I think is important that a later panel will be talking more about is because there's a great deal more state and local involvement in the enforcement of immigration laws, both under formal programs like the 287(g) program, which I think is the

specific topic of the upcoming panel, but also informally-led, individual law enforcement agencies, who decided for whatever reason that immigration enforcement is a priority with them and who accordingly select and profile potential suspects when they think there's a likelihood that they might also be immigration violators. So you have a lot more enforcement on the ground, not just because there's a lot more federal resources for the immigration enforcement but also because states and localities in a variety of guises are also taking a role in immigration enforcement. So consequently, many more people have come into the immigration pipeline by the initial point of entry of the criminal justice or criminal law enforcement system.

So that's the crim-im merger that people talk about, sometimes refer to it as crimmigration, and it's been a phenomena of the past really fifteen years. A little bit more than that but really kind of ramping up over the past fifteen years.

Padilla is in some senses a response to this and also a response to sort of the formalistic distinction that exists in the law between deportation, which is viewed as civil, and the criminal sphere. So *Padilla* comes against a background of a long-standing line of case law that says that deportation in itself is not a criminal consequence. This, obviously, has huge implications for people in removal proceedings because it means that the standard criminal procedural protections that would apply in a criminal trial don't apply in a removal proceeding. You're not entitled to counsel at the government's expense, and things like detention, incident removal is not viewed as incarceration with all of the protections that that would entail. So you have this sphere of removal and detention, incident to removal that exists in the civil universe. And then you have the criminal world, criminal convictions, which may and in many cases do trigger immigration consequences in the civil sphere. And so as the *Padilla* case makes clear and as the comments

earlier made clear, the immigration consequences of the criminal conviction are viewed as collateral or were viewed as collateral as a collateral consequence of the initial criminal conviction but not in and of themselves criminal and, therefore, not necessarily covered by the same laws and guidelines that provide for procedural protections in the criminal sphere.

Padilla, in some senses, acknowledges the fictitiousness of this boundary without totally dismantling it. So it is, I think, a curious feature of the *Padilla* decision that it doesn't say it is a requirement of defense counsel to provide information on all collateral consequences. They don't want to go down that road; they very clearly don't want to go down that road. And so the road that they take is to instead say that there's something peculiar about immigration law. And the comments from both of the earlier speakers highlight the kind of uncomfortableness of that position. But it is true that, for some, immigration consequences are probably more important than the criminal conviction itself, but it might also be true for a sex offender, who has to then go on the registry and can't live or work in certain places, that those collateral consequences might also be more consequential than the criminal conviction itself. The right to vote might also be more consequential. If it involves a professional license for somebody whose profession is invocated by their criminal conviction, that might also be more important. So there is something uncomfortable in some ways about the distinction that the Court carves between deportation and everything else. That said, I think they were looking for a way to deal with the severity of immigration consequences for criminal convictions in the post-1996 world. You are dealing with a situation where there is no opportunity for discretion. This is in some ways an almost unique feature of immigration law. And so if there is mis-advice, there's unfortunately no

way to deal with that mis-advice once the ball gets rolling on deportation.

And so you have this sort of a hybrid decision, which basically says that it is true that there are limitations on what counsel is required to do with regard to collateral consequences. But these are not classic collateral consequences, there's something different about immigration, and it can consequentially misadvise in this context. And even no advice in this context constitutes ineffective assistance of counsel. And we'll elaborate I think a little on that in the upcoming discussions.

What then is required by *Padilla*, well, obviously, I leave that a little bit to be fleshed out by my co-panelist, but I do think there are a couple of points that I want to make. And point number one is it obviously becomes the prerogative of everyone who is dealing with a criminal defendant to identify what their citizenship and immigration statuses are. So if it's not one of the first questions, it certainly should be one of the questions, where-were-you-born question that then leads to information about potential citizenship status and potential immigration status. Just two words on this that I want to stress; one is that citizenship status is never ever as clear as we think it ought to be in many of these cases. I've been astounded at the number of people who find out that they are citizens in the course of deportation proceedings, so never take citizenship as sort of a given. It's not as transparent or easy as we might think, particularly when we're talking about establishing a citizenship, citizenship they have acquired by virtue of their parents' citizenship status. So it's something to be taken not at face value. And immigration history I think also is something not to be taken at face value. People often don't know their own status, and they certainly may not know about the potential immigration options for them. A criminal defense attorney may be the first lawyer that they've really ever talked to about their immigration status

and potential avenues of relief. So immigration status is also not as clear or transparent as one might hope.

The immigration code is arcane, it looks a lot like the tax code, it kind of requires that sort of approach. It's a mess. And so I think it makes it rather daunting for some people to think about advising on these consequences. That said, and I heard this stressed, I think it's important to re-stress the point that is made in a publication called *Cultural Issues in Criminal Defense*. Immigration is not rocket science. It's hard, it's complex, it's strange, it's bizarre, and it's counterintuitive, but it's not rocket science. And it is something that we can figure out, and I hope that part of our discussion can be about the best practices and how to figure it out.

Where I want to close today is really talking about what's next. Someone talked about the possibility that there might be some sort of comprehensive immigration reform, or I'll just take comprehensive right out of it because it won't be comprehensive whatever it is. There may be some kind of immigration reform that happens in the next year or so, and so we might ask the question of what the implications of that are or would be for *Padilla* obligations going forward. And I think the answer is that, even if you get immigration reform, it won't be comprehensive in any meaningful sense, and it won't eliminate these kinds of burdens and obligations and professional requirements that *Padilla* lays in place. And I'll tell you a few reasons why I think that's true.

Reason number one is the immigration code will not be simplified. I don't think Congress has the stomach, the heart, and maybe the head for actually revising the immigration code such that it will read in a sensible way that would be easily understandable to your average non-citizen or even your average citizen attorney. So I think that we can expect that the immigration code will continue to be what it is, which is kind of an arcane statute that cross references itself in confusing and sometimes contradictory

ways. I don't think it will be cleaned up. So we'll still have a very confusing body of immigration law after immigration reform happens.

The other thing that we'll have after immigration reform happens — well, two other things. One is, we'll have a group of people who appear to be eligible on their face for some kind of legalization, normalization, but they actually have convictions or other criminal issues in the past that are going to close that path for them. And the process of the normalization or legalization will bring them to the fore. So I think we'll see a group of people who may be kind of flagged for possible removal as a consequence of this, and that's just something that we should be aware will happen.

The other thing that we'll see is individuals who just are not eligible for legalization or normalization as a consequence of this packet, no matter what this packet is. There will be a substantial number of those people. And those individuals I think will be subject to heightened surveillance and increased enforcement in the wake of any immigration reform package. In fact, Congress is very clear about that border security is a prerogative, border security is a trigger for legalization, and that means more enforcement before you get any kind of legalization. So that means more people in the pipeline potentially who have criminal convictions and who are possibly removable for their criminal convictions. So the takeaway from this is we can expect to continue to see, even in the wake of immigration reform, these issues to remain on the plate.

And I think the final point I want to make, there's been brief mention of *Chaidez* made, and my co-panelists will elaborate on the significance of *Chaidez*. One possible way to read *Chaidez*, which says that *Padilla* is non-retroactive, obvious to say, is that anyone whose plea kind of is pre-March 2010 is sort of outside the *Padilla* universe, you don't need to worry about arguments around

effectiveness or mis-advice or lack of advice in the pre-March 2010 world. And I don't think that's right either. And I think in particular things like mis-advice probably may still be viable claims even for individuals whose pleas were entered into prior to the March 2010 universe, and there may also be other avenues for successful challenges to the advocacy of counsel in those pre-March 2010 days, depending on what stage the ineffectiveness of counsel claims can actually be made. So we can talk a little bit more about that. But the bottom line is, I think *Chaidez*, although it closes the door on some pre-March 2010 claims, it doesn't entirely shut the door on evaluating the efficacy of those particular pleas, and so it's important to recognize that 2010 doesn't quite stand as the staunch beginning period necessarily of everything that might relate to effective information about immigration consequences in the criminal plea process.

I think I've probably just about used my time, exceeded my time. I'm not sure. So I'll now turn it over to Ms. Vázquez.

YOLANDA VAZQUEZ: Just out of curiosity, how many are students in the room? All right. And how many are in the criminal defense attorneys, either defense or prosecutors? Okay. Great. I actually am going to do my talk more on where sort of I think the future of *Padilla*'s holding has led us and is leading us. One of the issues that hasn't truly been discussed is the holding that *Padilla* had was a split baby. And because of it, I think that it has caused a lot of confusion, both with the courts, with defense attorneys, and with prosecutors. I also am going to discuss sort of the difference, and I know Mr. Long and Mr. Arnold brought it up, the difference between sort of the Fifth Amendment knowing and voluntary waiver of your rights during the plea colloquy by the court versus the Sixth

Amendment right to counsel and effective assistance of counsel under *Strickland.*

One of the things that I thought was interesting this morning was both Mr. Long and Mr. Arnold sort of downplayed their role in *Padilla.* But I think as line attorneys they — and appellate courts attorneys — that they are probably really the front line of this issue. The Supreme Court only handles about a hundred cases a year. The fact that *Padilla* made it up to the Supreme Court was a fluke, a miracle, whatever it was, but it's not the norm. The norm is whether or not the line attorneys are there to be able to represent their client in a way that gets them what their goal is. Their duty is to provide assistance, that is the goal for the client because these millions of cases aren't going to go before the Supreme Court. And as Mr. Long said or Mr. Arnold said, that Sixth Amendment cases were rarely going up before the Supreme Court. This year marks the fiftieth anniversary of *Gideon*, so there's been a lot of symposium on whether or not *Gideon* is effective. Once we had *Gideon*, it was decided there was a right to counsel. One of the biggest complaints about *Gideon* was that it didn't establish what that right meant. Was a warm body good enough? We have Sixth Amendment case law where you can be drunk, you can be on drugs. The attorney doesn't even have to be there, he can go plug his meter while the trial is going, and it's found to be perfectly okay. So again, I would hope that, especially as students, that when you enter the world of defense, as a defense attorney, that you aren't asleep, you aren't on drugs, and you aren't clogged by alcohol while you're representing your client because, while you may be able to effectively represent your client under the Sixth Amendment, that's not really what the goal is, I don't think, of *Gideon.*

Again, *Strickland* created this two-pronged test, but *Strickland* didn't occur until '84. So next year will be, what, the thirtieth anniversary of *Strickland*, so we can decide

whether or not that was a good decision or not. And then we really didn't hear from the Supreme Court again until about 2000. As you know, *Strickland* had established a two-pronged test; the first was, Was the attorney's performance deficient? And even if it was deficient, the client has to decide whether or not he was prejudiced by that. *Lockhart* established that, in the plea negotiation, it had to be determined that, but for the ineffectiveness of counsel, they would not have pled but would have insisted on going to trial. Professional norms were used, but they only said it was one, it was a guide. But it wasn't truly what the ultimate or only goal was under *Strickland.* And so we saw it wasn't until 2000 when the Supreme Court again stated that professional norms were actually much more important than the courts were giving credence to. These were death penalty cases where the attorney failed to investigate or mitigate for sentencing purposes, and so they said there was a duty to investigate based on professional norms. And again, when we see *Padilla* in 2010, they really stressed professional norms. But hopefully, we're dealing with — hopefully again — Jennifer talked about earlier, maybe in the next twenty years, where we're going to go. But hopefully, before the Supreme Court gets there, at least the line attorneys and everyone else that really is doing this groundbreaking work is already doing it.

One of the things with *Gideon* was they were saying thirty-five states had already created a right to counsel, even though the court hadn't gotten that far yet. So they were just going ahead with what the states were already doing.

So anyway, and the other thing that they downplayed is their sort of getting there by accident. I think, for many of us, we get there by accident, so we should always be prepared. My role in *Padilla* was with — Stephanos Bibas was one of my colleagues. He was actually called by Stephen Kinnaird. They had both gone to Yale together, and they had clerked for Justice Kennedy. When Stephen got

the case, he called up Stephanos and asked if he could do an amicus. Because they believed that amicus briefs help the Court decide whether or not to grant cert. And Stephanos called me up because he knew my scholarship was in this area. I was a public defender in Chicago in 1996. I was assigned to a domestic violence courtroom. As Jennifer said, in 1996 two of the harshest immigration bills — which affected immigration — were created at that point. One of the ramifications of those 1996 bills was deportation then became possible for those convicted of domestic violence offenses. And since I was one of the few Spanish-speaking attorneys in Chicago, I was assigned to a primarily non-English speaking courtroom where many of my clients were non-citizens.

So again, I became an attorney in D.C. I just fell into this, and I got the call from Stephanos as to whether or not we were going to be able to go on to the amicus. We were originally supposed to write this amicus for two of the largest criminal defense organizations in the country. I probably shouldn't be saying it while I'm being transcribed. They actually said no. They said that they didn't want to sign on to the amicus because there was no place in the criminal justice system for immigration, and that, of course, annoyed me to no end because as Jennifer said, since 1917 immigration has been into the criminal justice world. So again, as you can see, in 2012, two hundred and twenty-five thousand people were deported based on criminal convictions. I unfortunately do believe that *Padilla* will probably not decrease it, but it will actually help, I guess, some individuals. But the three largest percentages of people who are deported for crimes — based on drugs, based on immigration violations, and based on traffic offenses, whatever that definition is. That has to do with the increased enforcement and drug crimes. As Jennifer said, the war on drugs has been instrumental in sort of this immigration-crimmigration connection.

So all this was happening in the last thirty years. You could tell in the Supreme Court cases they started to take more of these immigration-crimmigration cases to be able to distinguish whether or not some individuals would be deported based on their crimes, especially in the terms of aggravated felonies, which as you heard, either had to be aggravated or felonies, especially with drug crimes. And then because of this 1996 — 1996 also made this increase in the amount of crimes that became deportable offenses, it also made it retroactive. So for those individuals who had pled guilty, for instance, in 1970 to something that was not deportable at the time, the 1996 laws went back, so now, actually, even though they pled guilty in 1970, they now became eligible for deportation based on the change in laws. So things started really running amuck, and the Supreme Court started taking notice of this. And you could tell in one of their cases, *I.N.S. v. St. Cyr*, that they were not exactly happy about it.

So when they took *Padilla*, we decided to write the amicus anyway. We were able to write it by — it was supported by immigration professors, criminal law professors, and two or three immigration organizations. And then cert was granted, and that got the ball rolling. And I must admit that, it is true, I got phone calls saying that that was not a good idea, we shouldn't do it. I was really happy that it came out sort of good because, if not, I probably wouldn't have a career right now. But anyway, so the hearing was in October of 2009, the decision was in March of 2010. And Justice Stevens wrote the majority opinion, and he sort of split the baby. While they said that there was a duty to advise as to the immigration consequences of a criminal conviction, what he actually said or the Court said was, if it was clear the immigration consequences were clear, succinct, or explicit, that defense attorney had to give specific advice as to what those consequences would be. However, if it was not succinct and straightforward, defense

counsel only needed to advise that this could have immigration consequences if they pled guilty. But anything more than that, you would have to go to an immigration attorney and find out.

One of the biggest things during oral argument in front of the Supreme Court was an interesting — as Mr. Long said, Dreeben, who was the solicitor general under Kagan at the time, actually had a question by Justice Alito, and he said, "So in a hypothetical, if I am a defendant, and I ask you as counsel, 'What are the immigration consequences if I plead guilty?'" And he said, "Well, I don't really know, you'll have to go get an immigration attorney for that." But I say, well, I was appointed to you. I don't have money to go get an immigration attorney. And counsel will then just say, well, that's just too bad. Is that how you want our system to be? And it was interesting because, after I left oral arguments, I really thought that Justice Alito was going to go with the fact that there was just an automatic right to be able to receive specific advice. He and Justice Chief Roberts actually decided that that was enough advice, just to say there may be immigration consequences, but if you want anything more than that, you need to go get an immigration attorney, which again, you have to pay for. And since the majority of people that are in the criminal justice system are poor and too poor to afford a criminal attorney, let alone an immigration attorney, it really causes problems.

But anyway. So we have this splitting sort of the baby. How can you determine whether immigration is so complex that all I need to, as the defense counsel, is to advise as to it may have immigration consequences, or I have to give specific advice? Now, in the majority opinion, Justice Stevens states, well, in the case of Mr. Padilla's case, all they had to do was open up the immigration book, the I.N.A., and see that drug crimes is a deportable offense. What he didn't talk about specifically was that actually Mr. Padilla's conviction as an aggravated felony was his kiss of

death. Lawful permanent residents who are convicted of aggravated felonies are denied the right for cancellation of removal, which is the discretion to be able to say, "Look, judge, I've been here so long," "I have family," "Please tell me I don't have to leave." They can't do that. So aggravated felony for the drug trafficking is a little more complex, although if you look at the federal guidelines or you look at the federal definition, it became a little bit clearer, and after the Supreme Court decided a couple of drug cases on that, it became even clearer than that. But how far do you have to go? Do I have to go look at a practice manual? And the Court says that, or at least Justice Stevens implied, yes, you do. But do I have to do anything more than that?

In the immigration book, it says "a crime of moral turpitude." Congress has never defined what a crime of moral turpitude is. So is that enough? Since I really don't know, I can just tell my client? Well, I actually think that one thing that *Padilla* did that was beneficial was that they talked about plea negotiations. That plea negotiations is actually a critical stage of representation and, therefore, protected under the Sixth Amendment. *Padilla* in that respect has been expanded. Last year, in 2012, two plea negotiation cases came down, *Lafler v. Cooper*, *Missouri v. Frye*, both on the same day, which that supported the issue that, under the Sixth Amendment, you have to be able to negotiate, and that is part of your Sixth Amendment duty. So I do think that, although *Padilla* sort of splits the baby in terms of how much I have to counsel as defense, I do think that *Lafler* and *Missouri v. Frye* actually answered that question as to you need to figure it out. As a defense attorney, you need to figure it out because you cannot negotiate with the prosecutor if you don't know what the heck you're negotiating for.

Missouri v. Frye was one where they didn't convey the offer, and so that was a little bit easier because you can argue, "Well, I can convey the offer to my client, but I don't

necessarily have to know what that offer is." But *Lafler v. Cooper* was where there was a plea offer, the defendant wanted to take it. His counsel actually talked him out of it, which was really a wrong decision, and at the plea it was fifty-one to eighty-five months. He ended up rejecting the plea, went to trial, lost, and was sentenced to a hundred and eighty-five to three hundred and sixty months. And so what the court said was that plea negotiations again is a critical stage, that you have a duty — and mis-advice is ineffective assistance of counsel. It goes back to *Padilla*. *Padilla* did not — they decided that mis-advice versus non-advice is not the issue because what happens if they were to split it. First, it would create silence within defense counsel because they wouldn't say anything because I would know, well, if I don't say anything, I'm not ineffective. But if I try and I misadvise, I am. And second, it would create defendants who have the least ability to be able to represent themselves, and that's what counsel is there for. So my argument, especially after *Lafler v. Cooper*, is that you need to figure it out. I do think there are ways. ABA has developed a three-million-dollar project, which they're trying to get collateral consequences across the country on one database. As you heard, Mr. Arnold has already set up a chart. There's charts across the country in each state that are developing. Sometimes law school clinics are helping with that. It is happening. The Bronx Defenders Association actually has a collateral consequence unit. The I.L.R.C., which is out of California, actually contracts with attorneys to be able to give immigration advice. Private law firms and solo practitioners are also contracting with public defender organizations and solo practitioners, so it is something that is here to stay. And as Mr. Arnold has said, it is our duty as a criminal defense attorney to be able to help our clients with their goals, and sometimes staying here is more important than the criminal conviction itself.

One of the issues that Mr. Long did discuss was this increase. As we know, *Padilla* tried to keep it to immigration, and they said that they would not address the collateral versus direct consequences; however, across the country you are seeing it. Sorry, Mr. Long. So it is happening. Pension lost in Pennsylvania now has to be advised to parole eligibility in Missouri and probably several other states. Sexual offender registration in Michigan in Eleventh Circuit and civil proceedings in Alaska are just a couple of those that are expanding. Again, collateral consequences are — there are many of them. But they prevent our clients from being able to not only vote, to have housing, to get themselves an education because they can't get federal funding for it. It is very, very important to our clients, and I don't think we can sort of play the victim and just say, it's too complicated, because, if it's complicated for us as attorneys, just imagine what it is like for our client.

Now, this Fifth Amendment versus Sixth Amendment, the Fifth Amendment is the admonishment by the court. Sixth Amendment is the right to counsel. Justice Kennedy during oral arguments was really onto this. At the point of *Padilla*, there were, I think, twenty-three states which had plea admonishments done by the court. However, there is a difference between a Sixth Amendment right to counsel and a Fifth Amendment duty of the court. Florida has litigated it. They first said that, yes, admonishment by the court cured any defect by the attorney. It was later overruled. I do believe that across the country, again, when the court and prosecutors worry about finality of the plea, that's the tension that we see. We see in, I think it's Arizona, that the prosecutors are demanding that any potential future *Padilla* is waived. So even if you don't know you have a future *Padilla* claim, you've waived it. So it's interesting. We'll see how far that goes, if it ends up going up to the Supreme Court. But again, our duty as defense counsel is very different than the duty of the court.

And as we know, our clients usually don't say much once they're in that plea colloquy, even if what they're hearing is different or what they're hearing is something for the first time.

So these are some of the things that I think are coming as a result of *Padilla*. Again, I think in the lower courts, it is a hit or miss, but I think still our duty as defense counsel is to try to help to figure it out so that we don't have to worry. It's a lot cheaper if our clients don't have to appeal. It's a lot cheaper if our clients are deported. As you heard Jennifer state, it's costing billions of dollars for detention on — and deportation. And if we can just redirect those funds and to increase spending in the crippled defense world, it would be a wonderful thing, even though maybe not a popular thing.

But I think I'll close my remarks right now, and I look forward to discussing this further with you.

CHRISTOPHER LASCH: I also want to say thanks to the *Journal of Law and Policy* and also to the *Journal of Race, Gender, and Social Justice* for supporting today's symposium. When I was invited to speak on this important case, of course, I jumped at the chance. And to do so on a panel with Yolanda and Jennifer is a real treat. Thank you.

I would like to talk about and offer some encouragement for pushing beyond *Padilla*. *Padilla* certainly is a step forward in some ways. The recognition that the consequence of deportation cannot be described as collateral in the experience of the person facing it is a significant recognition. And I also would like to share Jennifer's optimism that this reflects a little bit of realism on the Court's behalf about what the world actually looks like in terms of the connection between criminal proceedings and immigration proceedings. So I think that *Padilla* is certainly a step forward and a cause for some celebration. But I also think that it has its shortcomings and that we need

to be thinking about how to go further in some different directions.

I will proceed in three parts. First, I will discuss briefly what I mean when I talk about *Padilla* — what it is I am claiming we need to go beyond. What are the substantive and procedural shortcomings with *Padilla* that I am talking about? Second, I will talk about, specifically with reference to substantive shortcomings, how we can push beyond the limited right that the *Padilla* decision recognizes — how we can pursue the logic of *Padilla* to further reasonable conclusions appropriate to the crimmigration world that we live in and that Jennifer Chacón described. And then third, I will spend a very short amount of time on *Padilla*'s procedural shortcomings and what we might do to overcome those and turn *Padilla* into some truly enforceable constitutional norms.

So what is *Padilla*, and what are the substantive and procedural limitations that I am claiming exist? What is it that I'm saying that we need to move beyond? Substantively, although a step forward, I think that *Padilla* represents a limited articulation of a constitutional right. I think that what the Court is saying the Constitution guarantees here is, in fact, somewhat an impoverished view of what the Constitution can provide. I say that because *Padilla* focuses solely on the ultimate consequence, on the end game of immigration proceedings, on what the Court refers to as deportation consequences. And I say what the Court refers to because the fact that such proceedings are no longer called deportation proceedings is a point worth noting. They are called "removal" proceedings, which is significant in thinking about the world we live in because for me, at least, "deport" is a verb that clearly applies to a person, whereas "remove" might be something that you do with any sort of *thing* that you don't want in its current place. I think the language of our current immigration system says a lot about where we are with respect to

immigration. I think it is significant that the *Padilla* court references it as "deportation consequences." We see a little more humane terminology in *Padilla.*

The Court discusses the severity of deportation as a consequence and the automatic connection between some criminal convictions and these severe deportation consequences. These factors, the Court finds, make it very difficult to cabin off deportation as a so-called collateral consequence. So I think the constitutional right recognized in *Padilla* is expressed very narrowly in terms of a deportation consequence that is thought to be extremely severe.

I also think that *Padilla* is not just substantively limited in its vision but is also procedurally limited. A lot of this is because of the posture that the case came to the Court in and the precise question that the Court was called on to decide. But the rule of decision that we are talking about in *Padilla* is the *Strickland* rule. Tim Arnold earlier lamented the deficiencies of *Strickland*, and he is certainly not alone. Scholars have raked the *Strickland* text over the coals for its inability to make good on *Gideon*'s promise of a lawyer, an effective lawyer for indigent defendants.

The *Strickland* test has two prongs. People this morning have discussed this a little bit. The first prong is the deficient performance prong. You have to prove that your lawyer operated outside a wide range of what competent counsel might provide. Stephen Bright referred to this as the mirror test. If you can hold a mirror up in front of counsel and it fogs up a little bit, we might have satisfactory, constitutionally sufficient performance.

The second prong is the prejudice prong. You have to prove that things might have been different but for your counsel's deficiencies. And then the cases that *Padilla* is mostly talking about are guilty plea cases. We are talking about a situation where somebody comes before the court and says, "Yes, I know I stood up and said that I did all

these things, but actually, I would like to take that back and go to trial. And I would like to get a jury in here, and I would like to have several days for a trial." You can imagine that courts might be somewhat loathe to let people pass this second prong of the *Strickland* test. Those are the two limitations that I see with *Padilla.* A substantive limitation in terms of what the right articulated is and a procedural limitation in terms of how you vindicate that right.

So, how do we go beyond the limited substantive right? How do we get beyond just the idea of the deportation consequences? Jennifer Chacón talked a little bit about the crimmigration world, and one way of thinking about that is that there are all sorts of crimes which carry over consequences into the immigration world. But there is another way in which crimmigration has occurred over the last twenty years. It is not just that the immigration world bleeds over into criminal proceedings in important ways that *Padilla* says we have to be aware of, but it is also that the immigration proceedings themselves have become criminalized. As a clinical fellow at Yale, I walked into immigration court for the first time to figure out how I was going to teach students how to practice in the immigration courts. And I had been a criminal defense attorney up to that point, and I was a little nervous about going to immigration court for the first time. But when I got there, I was completely put at ease by the familiarity of what I found. There were people in jumpsuits in detention that looked a lot like the criminal courts that I was used to. There were people appearing via closed circuit television. There were people without counsel. I was not prepared for the absolute lack of procedural protections that people in immigration proceedings were accustomed to. Since I was used to practicing in the criminal world, I was used to the idea of a constitutional right to counsel and other forms of due process. As my colleague at the time, Michael Wishnie,

told me, "We have not had the due process revolution in immigration court yet." So, immigration court does not look that different from criminal court, and it shares, in fact, one of the hallmark features of the criminal justice system, particularly since 1996, which is pre-adjudication detention. I would call it pretrial detention, except that you do not get a trial in immigration court. You just get a hearing.

Because immigration proceedings appear so criminalized, many scholars have called for the importation of criminal due process protections in immigration proceedings. Once you start to realize how criminalized the immigration proceedings look, it becomes easier to think about the role of criminal defense counsel on the front end of this. Think about two sets of proceedings: first, the criminal proceeding in which a crime is charged and then, a second proceeding, which is the immigration proceeding. Although the Supreme Court tells us that the immigration proceeding is civil, understanding it as highly criminalized may help understand what the role of the criminal defense lawyer on the front end might be. It seems quite logical that a criminal defense lawyer representing somebody who might be subject to a second *criminal* proceeding would take steps, such as: (1) trying to avoid those additional charges being placed at all, (2) improving the client's position with respect to whether the client will be held in detention during that second set of proceedings, and (3) improving the client's position with respect to the ultimate outcome of those proceedings. Once you realize that, you might say this carries over pretty easily into the immigration world, and the idea of what a criminal defense lawyer ought to be doing on the front end goes beyond just the criminal issues.

Padilla, of course, recognizes only the third of those: improving the client's position with respect to the ultimate outcome. But I think that we ought to recognize all three, and so here are some ways in which I think that we can push

beyond *Padilla* to think about how the world ought to be, and what the Constitution should guarantee, given the realities that I have discussed.

First, we can expand the types of cases in which criminal counsel actually must be appointed. For example, misdemeanors that do not carry jail time, for which you ordinarily would not get a lawyer under the Sixth Amendment, can have immigration consequences. And a lot of minor misdemeanor convictions result in people being shuttled over to the immigration system to endure the consequences of those convictions. There are a lot of cases where there is no lawyer in criminal court followed by serious consequences in immigration court. There are also many misdemeanor prosecutions in criminal court where you might not be afforded counsel because the prosecution has indicated it will not seek jail time. For example, there are many jurisdictions, such as Massachusetts, where the prosecution can waive jail time, and therefore the court does not need to appoint criminal counsel in those cases. But lots of those cases can have immigration consequences other than deportation. Specifically, one that is quite serious is mandatory immigration detention. Again, as a criminal defense person walking into immigration court, this struck me as something new. I am used to going into court and having my clients always have a chance for some sort of bail to be set. In immigration proceedings, if you have been convicted of certain offenses, there is mandatory no-bond detention, which means you will be in jail throughout the pendency of the immigration proceedings. Since the Sixth Amendment right to counsel in criminal cases is ordinarily guaranteed for those facing jail time, it seems like a logical extension, particularly after *Padilla*, to apply the Sixth Amendment right to misdemeanors that might not carry jail time in the criminal case but do qualify for mandatory no-bond detention in immigration proceedings. I think there are other instances where we could think about expanding the

Sixth Amendment right to criminal counsel — any case in which an immigration detainer is filed, for example. Alternatively, perhaps the appointment of counsel should persist through the handling of issues related to an immigration detainer.

So in addition to expanding the types of cases in which criminal counsel must be appointed, *Padilla* also suggests that we re-visit the idea of the types of services that criminal counsel must provide with respect to immigration consequences. And again, I am talking about a more expansive view of immigration consequences, not just the ultimate *deportation* consequences.

Those expanded services should include counseling. The client may need advice concerning not just deportation consequences but also about immigration detention issues. Is the client going to be subjected to mandatory no-bond detention? Is the client going to be subjected to a detainer? In appropriate cases, the client probably needs some advice from counsel about whether to discuss his or her place of birth or his or her citizenship status with any other persons other than counsel, like law enforcement or immigration officials who are visiting in the jail. In appropriate cases, the lawyer should avoid making any on-the-record references to immigration status. Courts often sort of seek this information out during a plea colloquy by asking, "Counsel, do I need to give a *Padilla* advisement?" That might not be a question you want to answer if your client is, in fact, going to be defending immigration proceedings in the future. Here again, my focus would be on improving outcomes for the criminal client in this second set of proceedings, i.e. immigration proceedings, not just with respect to the ultimate consequence but with respect to every step along the way.

Additionally, in addition to counseling issues, we could add some litigation to the criminal defense lawyer's responsibilities, especially in regards to immigration

detainers, which are incredibly important. An immigration detainer is a piece of paper that federal immigration authorities fax to a state jail or prison or a local jail saying that they want the prisoner currently in criminal proceedings for immigration proceedings. It tells the state or local authorities that, when they are done with the current criminal proceedings, they are to hold that person for a period of forty-eight hours, not including weekends or holidays, and then the federal authorities will come and get the prisoner. In 2009, around 10,000 to 15,000 immigration detainers were issued. Now it is a quarter of a million every year. Immigration detainers are the way that the pipeline has been set up to channel people from state and local criminal proceedings directly into immigration proceedings. And it happens that there are numerous legal issues surrounding immigration detainers. Can your local officials be obligated to hold someone pursuant to one of these detainers? And if they cannot be required to hold somebody, are they authorized to hold them? Does the Fourth Amendment have to be satisfied? After *Arizona v. United States*, we are told that state and local officials do not have unlimited power to arrest people for suspected immigration violations, but that is exactly what an immigration detainer amounts to. It is a warrantless arrest based on an alleged civil immigration violation. So there are lots of legal questions surrounding detainers. The criminal defense lawyer is authorized, and the Sixth Amendment makes sure that this happens, to fight tooth and nail to make sure that the client in a criminal case does not get a two-day jail sentence at the end of the case. So why would it be that a criminal defense lawyer would not be similarly authorized to fight an immigration detainer? Or why would the Constitution not *require* a criminal defense lawyer to fight a two-day detention waiting at the end of the criminal case just because it is pursuant to an immigration detainer? So I think that there are questions about

expanding the scope of defense counsel's obligation and representation in those ways.

In regards to the procedural narrowness of *Padilla*, of course we can continue to litigate these types of claims the way *Padilla* did. We can bring a post hoc, post-conviction petition and allege that counsel was ineffective and that the ineffectiveness caused prejudice to the client. But *Strickland* is a very hard test to meet. In fact, it is probably the worst test that could have been put in place to implement the rights that we are talking about. It really has no relationship to *Gideon*'s promise of having an effective lawyer. So I would suggest that we need to think about litigating *Padilla* on the front end as much as possible, instead of coming to these issues from a post hoc position where the courts are going to give strong consideration to the finality that the court wants the pleas to have. We need to litigate these issues up front. If public defenders are overburdened by case load, they probably do not have the time needed to meet the *Padilla* obligation. Overburdened public defenders are not being given the resources or the time to meet with their clients. For example, in New Orleans in 2009, the statistics indicated that the public defenders spent about nine minutes with their clients per misdemeanor case. If that is the situation, *Padilla* is probably best litigated on the front end by motions to the court, which can in many cases be made ex parte and under seal. Defense counsel should ask for funding to consult with an immigration attorney or to have an immigration attorney be appointed to this case or for more time to consult with their clients because this is an issue that they ordinarily do not have time for. So, my emphasis on the procedural side is we need to shift the litigation emphasis from the back end to the front end.

Thank you.

PAULA SCHAEFER: I want to thank all of you for being here. It's been a great panel so far, and I think it might be nice to start with asking you if anyone wants to follow up on a comment that one of the co-panelists made. Was there anything that someone else on the panel said that you want to respond to? No? I'm going to ask one question then, and then I'll open it to the audience and walk around with the mic and ask some questions.

Obviously, *Padilla* is about effective assistance of counsel. It's not about competence or best practices. I would be interested in all of your thoughts about what training law students and criminal defense lawyers should be seeking if they want to achieve competence in this area.

JENNIFER CHACÓN: I guess I would start for the law professors and for the law students who are kind of starting their law career, if you are interested in criminal work, be that prosecution or defense, take an immigration course. You should have some fundamental awareness of the basic collateral consequences that attach to criminal convictions. And it's a pretty complicated, thorny area, and it's worth having that overview.

I also would say — and I'll turn it over to you guys to kind of offer more details. When I was preparing for this panel and thinking about what I could talk about, I actually had a research assistant go out, I said, give me a binder full of kind of what the best practices are, what people are doing to implement *Padilla*, what are the requirements but also kind of how are people dealing with the requirements, how are they setting up their own practices. And my research assistant has done that. So I think, if it's possible, probably through the conference organizers, I'm happy to provide sort of my bibliography list of what these kind of resources are so that, if you haven't accessed them or would like to access them, you can find them. I found them — I could actually kind of limit the list now, but I've read through most of them

and identified the best practices based on what I've read. And I'm happy to provide a list of those things. But that might be some useful reading for people who are looking for something that's concise and clear about what the obligations are.

YOLANDA VÁZQUEZ: I think one of the things that's been great is when I went to UC — I actually teach crimmigration. So I teach a seminar on the intersection between immigration and criminal law, and those classes are popping up across the country, which I think is great because I think, for many students who want to be either criminal or defense attorneys or prosecutors, that's definitely a class that they should take, especially if there's — part of it is just practice, what's an aggravated felony, what's a crime of moral turpitude. I think there's places across the country that students — AILA, I think it's free for students, which is American Immigration Lawyers Association — becoming involved in that. I think setting up your own groups — There are resources, Norton Tooby has great practice guides that are really helpful. I think finding a public defender organization or prosecutor's office that deals with this issue and being able to intern, even working with an immigration attorney during school or in the summer, I think is probably really good. I do think it's something that, as Jennifer said, all people who want to go into criminal law should be a part of at this point. It is not going away.

CHRISTOPHER LASCH: And on top of that, I would suggest going to immigration court and observing proceedings for a lot of different reasons. The world that you learn about in law school is very different from the world that exists out there. And I think that is true across the board no matter what substantive area of law we are talking about. But as a criminal defense person, the practice in the courts does not match up to what you would expect it

will be after reading about it. And the same is true for immigration court but ten-fold. I think that you can also realize the impact that detention has on immigration proceedings by going and watching immigration proceedings. It is just like the criminal world, where pretrial detention is used as a mechanism to coerce "consented-to" outcomes. That is true in the immigration law as well. Going to court makes you appreciate the actual consequences that are at stake.

It is very easy for criminal defense attorneys to think in an abstract way that their job is to bring the criminal case to a successful conclusion and whatever happens in the immigration court happens in the immigration court. But going and seeing what actually happens there helps you to understand that things are not going to get better over in immigration court if you do not do your job on the front end.

YOLANDA VÁZQUEZ: As Jennifer said, and today others have said, if you get a conviction in criminal court, once you get transferred to immigration court, most of the time there's no relief. It's that criminal conviction that really boxes a client in, and so the only way you're going to save a client is to make sure that he pleads to something that doesn't make him deportable or at least you have some sort of relief. And again, in immigration courts, since it's a civil proceeding, you have a right to counsel but not at the government's expense. And since the majority of the people in immigration court are poor, just like in the criminal justice system, their not going pro se in immigration court against the government is pretty near impossible. And so we have to also think of that as criminal defense attorneys. And Chris talked about detention. Immigration detention overshadows the Federal Bureau of Prisons. The Federal Bureau of Prisons holds approximately 200,000 detainees. Immigration is approximately 400,000, twice as many. So again, this is something that's really, really important when

we're talking about a conviction and whether then your client is subject to mandatory detention. And again, as Chris said, if they're mandatorily detained, they just want to get out, regardless of whether they have relief or not.

JENNIFER CHACÓN: And the other thing I'll say is we have been pretty focused on, as *Padilla* is very focused on, the obligations of the criminal defense attorney in this context, but I think, obviously, if prosecutors are concerned about the finality of a plea, then they too need to be sort of aware that these discussions need to be happening. And they can be sensitive to whether they're happening and to the extent that there are genuine justice concerns about — often the prosecutor enters into negotiation and thinks that they are actually helping somebody who seems relatively sympathetic to getting a good deal. And it is not a good deal, and I think that's the kind of — it's not a good deal if it winds up in life-long banishment for somebody — the seriousness of standard applies here. So I think although this kind of — *Padilla* definitely frames the obligation in that way, and although much of our discussions really focused on that obligation, there is kind of a broader obligation that runs to judge and prosecutor as well, just in the terms of the administration of justice.

YOLANDA VÁZQUEZ: And one thing, I guess I want to add because I forgot, citizenship. As Jennifer said, citizenship is much more complicated than we think. But if you can prove your client is a U.S. citizen, they're not supposed to get deported. They have been deported, but that's what's not supposed to happen. And so again, citizenship isn't just where you were born, it's what status your parents have and where your parents were born. I think that one of the biggest things that I saw when I used to do outreach was that there was a new law that said, if your parent naturalized before you turned eighteen and you were

a lawful permanent resident, you were in the legal custody of the parent that naturalized, that you automatically became a U.S. citizen. And most people do not know that. We always found at least one or two children who were U.S. citizens and did not know it. And there's a case, *Juan Estatz*, out of New York. He was deported on an aggravated felony, he was then found again, people like to return. In New York City, he was sentenced to five years in jail. His deportation was supposed to come. Immigration came and said, "We were actually going to deport you, but we realized that you were a U.S. citizen and you were actually a U.S. citizen before we deported you the first time." And so then he had to litigate because he was subject to parole, and they wanted to keep him on parole. But the judge was like, "He's a U.S. citizen," "You got it wrong the first time," "You can't keep him on supervised parole." But again, it happens, so not only where he was born, what the status of his parents were and sometimes even his grandparents.

JENNIFER CHACÓN: The other thing I would add just in terms of kind of things that are important but may not superficially seem important, the criminal record generally. It's not just this crime and what are the consequences of this crime, but are there other crimes in the past that are going to give specific consequences to this crime, particularly if they were crimes involving moral turpitudes or multiple crimes, multiple criminal sentences, which takes something into the realm of a particularly serious crime. Those kinds of questions I think become important. To the extent possible, knowing the full criminal record, knowing the full immigration history, and then knowing any possible facts that pertain to citizenship.

PAULA SCHAEFER: I want to open it to the audience. I have a microphone that will help them pick it up on the recording.

UNIDENTIFIED SPEAKER: I wanted to ask a question to Chris, but anybody can answer it. What as a public defender practicing in state court do I do to fight tooth and nail to get rid of that detainer? Do I file a motion in state court, do I call the federal public defender's office and ask them to file my motion in federal court, as even a motion? And do you have one that I could have?

CHRISTOPHER LASCH: Sadly, I do not have a motion because that would be such a nice answer. But I am happy to talk with you at great length about fighting detainers tooth and nail. There have been three class action lawsuits brought that I know of that litigated detainers. One in Connecticut was settled pretty favorably with the Connecticut Department of Corrections changing its entire policy about what detainers it was going to honor. I think that that lawsuit really shook the Connecticut officials. The idea that they were legally allowed to hold people pursuant to detainers in all circumstances has sort of been the routine part of criminal law enforcement. Detainers are not a new thing for jails and prisons. So, when jails and prisons receive immigration detainers, their first response is that they should just handle this like a criminal detainer, which is all pretty routinized and straightforward. But there are real questions about immigration detainers and the legality of it. I can point you to some resources that will help identify the legal arguments that can be made and to some of those class action habeas petitions that have set forth the different grounds for relief.

PAULA SCHAEFER: I think we have one in the middle.

UNIDENTIFIED SPEAKER: Yes. Two things, first, Professor Chacón, you said something about providing a reference to somewhere where we could go to get forms or

what have you. I get my responsibilities as a lawyer, but in terms of the nuts and bolts —

JENNIFER CHACÓN: Yes.

UNIDENTIFIED SPEAKER: Anything you could provide, a list of questions, what do you ask somebody who you suspect might not be a U.S. citizen in order to fulfill these obligations. If you could provide that, that would be great. My second question is: If you are someone who practices doing appointed criminal defense work, either on the state or federal level, have you all had experience with problems getting compensated for immigration issues? Because, here in the Eastern District of Tennessee, on both the state and the federal level, we lawyers are hearing a lot about we're spending too much money for CJA lawyers and things like that and are looking at ways to cut back. If we are billing — and this is sort of a practical matter — if we're billing for things relating to, say, immigration issues, something that is not strictly or necessarily related to the criminal case that we're appointed on, do you have any thoughts about that, or have you seen problems in getting those things sort of kicked back at lawyers?

YOLANDA VÁZQUEZ: I was always the public defender, so I didn't have to worry — I was salaried. But I do know that there are people across the country that have been able to get money arguing the fact that if they don't, under *Padilla* — and now I think you probably could even under *Lafler* — if you don't, you're basically ineffective, and therefore, an appeal is going to come up, which is going to cost more money. And then judges have actually started to give money realizing that they can't — they want the finality of the plea. So if you can articulate an argument that "I can make this final, you just have to pay me up front, judges," at

least some judges have been saying, okay, this is what you're going to get.

UNIDENTIFIED SPEAKER: But it's like *Padilla* in your request for, you know —

YOLANDA VÁZQUEZ: Definitely. Right. And I probably would even start to push the envelope with *Lafler* with the plea negotiations as well, yes.

CHRISTOPHER LASCH: I certainly appreciate the bind that you could find yourself in if you are worried about getting denied on the back end of a case and you do not submit your billing usually until the case is concluded. So, one alternative approach would be to seek funding for an immigration attorney under the CJA.

UNIDENTIFIED SPEAKER: Is that available under the CJA?

CHRISTOPHER LASCH: Well, I have definitely seen that argument made that funding for an immigration attorney should be within the set of services that an attorney can seek funding for.

UNIDENTIFIED SPEAKER: That would be helpful. Thank you.

PAULA SCHAEFER: I've got a question here, and then we'll go over here.

UNIDENTIFIED SPEAKER: We maintain a website with another organization called DefendingImmigrants.org, and we have all the nuts and bolts materials that the previous questioner asked about in terms of what your obligations are

in the scope of *Padilla*. So I would strongly suggest that people go to DefendingImmigrants.org.

Another thing I was going to ask was a question — I heard a couple of people sort of talk about this second prong of the standard for ineffective assistance in a plea case as "I would have gone to trial." I understood that there would be a probability of a different outcome, which could include — a different plea would have been negotiated, which in the *Padilla* post-conviction world, sometimes can just mean instead of getting a theft conviction for 365 days, I would have gotten that conviction for 364 days. And given the probable willingness of most judges to have sentenced the person to 364, especially if it was suspended, that might be and I think some people have found that that kind of outcome is more easy to secure on post-conviction rulings. I'm pretty sure that that characterization is more accurate, especially in light of *Lafler* and *Frye*, that there really is a duty to negotiate an effective plea bargain; is that right?

YOLANDA VÁZQUEZ: I would argue yes. And just so — Dan, saying the difference, 364 through 365, that's the difference between an aggravated felony and not an aggravated felony. So that one day makes all the difference in the world.

CHRISTOPHER LASCH: I would add to that that the second prong of *Strickland* speaks about a reasonable probability of a different outcome. People tend to sort of cut to the chase and talk about whether there would have been a different outcome. But technically that is not the standard you need to meet. Whether that gets you anywhere in your particular forum may vary.

JENNIFER CHACÓN: I think some of the articulation gets muddled because I think *St. Cyr* formulates it slightly differently. I think you could ignore that and argue the way

that you're arguing. I think that's how *Strickland* articulates the test.

YOLANDA VÁZQUEZ: Although, there are still some jurisdictions that say he would have gone to trial.

UNIDENTIFIED SPEAKER: I have a question about what you guys think in terms of the way that the criminal and immigration system is set up, as all of you have articulated it, with folks having access to a lawyer in the criminal system but then often not having access to an immigration lawyer once they're in removal proceedings, in terms of how that plays into the actual enforcement of *Padilla*. So folks who were misadvised or not advised in the criminal system, let's say that happens, which I anticipate will, unfortunately, continue to happen, it happens every day, all day long after *Padilla* was decided. But still, a lot of criminal defense lawyers don't know and aren't able to provide the kinds of immigration advisements that they should under *Padilla*. But folks are then pleading badly without being advised and then being shuttled to immigration court, they don't get a lawyer, they get removed. What are the chances that they're going to bring ineffective claims? That is a real concern for me in terms of the court saying in *Padilla*, "Look at this great system we're setting up, oh, we're supposed to do X, Y, and Z." And every one being like, yea, yea, yea, *Padilla*. But then realistically, our non-citizens who have already been removed who were advised badly because they pled badly in the criminal system, so they didn't get a *Padilla* effective lawyer, are they really going to be able to bring ineffective claims? What are your thoughts on that?

CHRISTOPHER LASCH: Yes, there are huge barriers to that. That is another reason why I think litigating everything on the front end has become so important because the back end is so ineffective to address this problem. But think

about a case where you do not get a lawyer in criminal court because you are charged with a misdemeanor that does not carry any jail time. Then you go to immigration court, also without a lawyer. I think we need to attack both of those pieces. I think *Turner v. Rogers* offers some hope for reinvigorating arguments about a right to counsel, at least in some cases in immigration court, and it is the idea that there are uncounseled criminal convictions that may be deficient. This leads to another argument about why you need counsel in immigration proceedings. You need counsel to raise that kind of issue for immigration judges to take into account.

YOLANDA VÁZQUEZ: And I completely agree. If you're not getting enough to finance the back end, really even worse. I do think, like Chris said, *Turner v. Rogers*, I think, is a great case for there to be some policy litigation that you do have a right to counsel in immigration because you're against the government and the possibility of deportation, the Supreme Court has already said, it is a harsh penalty. So I think there has to be some kind of litigation. I know under Obama's comprehensive or immigration reform, he talks about the discretion of the judge being able to appoint counsel for unaccompanied minors, the mentally ill, and some detainees. And so we'll see if that stays. So the administration recognizes this problem, and hopefully we'll be able to get in at that end as well.

JENNIFER CHACÓN: But I think you're right. The bottom line is, for significant numbers of people, there's the practical effect. They will receive bad advice or mis-advice on the criminal end, and they'll serve a sentence. They will be put in deportation proceedings. There will be no one to reexamine what's happened, and then they will be in Thailand or El Salvador or Britain or wherever it may be. And that's the end of the matter, which I think goes to kind of the earlier point about as much as can be done on the

front end should be done on the back end. Really, it's not a cure-all remedy that's going to get at every situation of bad advice or no advice.

UNIDENTIFIED SPEAKER: One of the panelists talked about how advice applied to different areas of law outside of immigration, as far as collateral effects — Do you think that trend is likely to continue, and is the legal community, the legal marketplace going to be able to fill that void cost effectively? And is it likely that it wouldn't?

YOLANDA VÁZQUEZ: I love the cost effectively. We spend billions of dollars on detention. If we could just re — the money is there, it's just spent differently. There are, I think, what the Professor said — there's, approximately, what, seventy thousand collateral consequences across the country changing daily. And so do I think it's a trend that's growing? Yes, I think it is something that is being litigated because, again, it's the goal of the client, and if the client needs to stay in his housing, if he wants financial aid for school, those are all — I think the right to vote — they are all very important things. I think, again, there has to be a policy about doing something by curtailing the collateral consequences that are attached versus sort of saying, well, we're just — it's going to tie up our hands because we shouldn't have to do this because it's too complicated and just too much. So I do think one of the things about *Padilla* is it reinvigorated, I think, defense counsel to be able to really think that they could start litigating these things, and it's starting to break through across the country. And I do think that people will continue to do that, which I think is good.

JENNIFER CHACÓN: I think what's tricky about it is it's so patchwork. Depending on the jurisdiction you're in,

which collateral consequences you're required to advise someone about is going to be different, and I think that is revealed by your list. And the collateral consequences are perpetually shifting or changing in every jurisdiction. So I think there is an effort on the part of — there's a working group in the ABA that I think that Jack Chin is spearheading that and trying to kind of get a handle on whether can we create a database of what the collateral consequences are. Can we make something accessible to attorneys that are going to be in the position of having to give this advice? So there is some work being done on that, but it's not done. And it's not easy.

I think that to me kind of what I take out of this is that perhaps one of the biggest favors that you can do any client is try to figure out what their priorities are, what are their priorities as a general sense, and to think about this. And you're not going to be able to do that with regard to all of the collateral consequences, given how many there are and how varied they are. But I do think that to the extent that you can at least very briefly get a sense of is the deportation consequence more important than the criminal conviction — Is the losing of the gun more important than the length of the thing? To the extent that knowing you have some general sense of what the client's priority is, that might help to navigate, but it's not the answer.

CHRISTOPHER LASCH: In a way I think your question highlights a real drawback of *Padilla*, which is its focus on the lawyer instead of on the client. A whole different way of looking at this is not whether are lawyers allowed to give bad advice, but what do we do when a person receives bad advice? So, instead of bringing up the question in terms of obligation of counsel, which makes courts very motivated to curtail that, maybe bring up some collateral consequences that lawyers would agree are so far outside the realm of criminal services. The most important thing to the client

might actually be that the client got bad information from a lawyer or some other source.

JENNIFER CHACÓN: And avoiding removal, deportation is not always the goal of the client either. So I think that may be an automatic assumption that people make, and it's not always the right assumption. And there may be some clients that are happy to be deported sooner to avoid a lengthy criminal sentence and/or lengthy immigration detention, and it's worth assessing that out too. But it's complicated.

PAULA SCHAEFER: There's a question in the back.

UNIDENTIFIED SPEAKER: I don't know which one of you did this, but you quoted or recited a case a second ago, *I.N.S. v. Saint* something, and then you explained it. It sounds like an interesting case. I didn't get the last part of —

YOLANDA VÁZQUEZ: Oh, *I.N.S. v. St. Cyr*?

UNIDENTIFIED SPEAKER: Yes.

YOLANDA VÁZQUEZ: S-t. C-y-r. And it was 2001, I think.

UNIDENTIFIED SPEAKER: Thank you.

PAULA SCHAEFER: We have a question over here.

UNIDENTIFIED SPEAKER: I would just like to follow up on the first question in the back, which was, if you are appointed to a client who does have an immigration hold, the answer was a class action lawsuit. I'm not a class action lawyer, I'm a criminal defense lawyer. Is there anything,

any motion that can be filed to try to get that hold removed? Just as an example, if someone has got a hold from another state, well, that would fall under the Informed Extradition Act, and in Tennessee there's actually a motion and a procedure, a law to cite, to get that individual a bond. But my judges say, "Well, that's a federal hold, I don't have jurisdiction, and I don't know of anything even to file." So if there were any ideas on that.

And the other is, recently ICE has been putting people on probation. Maybe that is something that always existed in the law, but it has only been utilized in my experience here recently, meaning if they made their bond in state court or if they were granted an OR bond after a period of time where they were in custody only on the immigration hold, they are being released on, for lack of a better phrase, ICE probation, to see the disposition of that case. Do you have any advice how to encourage ICE or to petition for ICE probation?

CHRISTOPHER LASCH: I did not mean to suggest that you need to file a class action lawsuit because I agree that that would be really unhelpful advice. My point is that there have been lawsuits filed, so you can get the pleadings in those cases and maybe use those arguments as a starting point for drafting up a motion or a pleading in a case that you have. Whether state court judges are going to be the best forum or not because of the problems you identified, like this is federal law, is a question that will be answered jurisdiction by jurisdiction. State courts have jurisdiction to entertain a habeas petition, for example. You argue that the criminal charges were dismissed, your client is being held pursuant to this detainer, and there are the legal infirmities with it so the client needs to be released. All state courts are familiar with that kind of a habeas petition, somebody who is being held unconstitutionally. Some criminal judges might entertain a motion with respect to a detainer during

the pendency of the criminal case. The criminal judge might take the position that he/she has jurisdiction over the case, and that includes telling the jail what to do with the detainer or not. So, there are motions that you can think about filing, whether they are going to be successful or not, of course, is going to depend on your judges and their receptiveness to the argument.

The other thing that people should be aware of is that, in December of 2012, ICE completely revised its detainer form and its detainer guidelines so that in theory they are meeting a set of criteria before they issue these detainers. A good starting point would be to get a hold of a physical copy of the detainer that your client is being held pursuant to, and check it to make sure what ICE says is true. For example, maybe your client does not have three prior misdemeanor convictions, which is what ICE is saying is true. That might be an opportunity to negotiate with ICE directly about removing the detainer or considering lifting the detainer.

PAULA SCHAEFER: Do you want to follow up?

UNIDENTIFIED SPEAKER: I want to point out it's very easy for ICE to move whatever you file because all they have to do is go get them, and so that really complicates the efforts to try to do something about the detainer. File and serve everybody, you've gone through all this effort, and ICE just comes up and picks them up. So that's one of the big challenges with the detainer issue. And on a case-by-case basis, and I think that's why the class action is so much more helpful, although much more difficult, is because it is so hard to do these case by case. It's on the front end challenging them before they have been given a lot better chance to get the case to actual adjudication.

Also I want to comment on this afternoon, Christina Kleiser, who works in the public defender's office, that's going to be on the last panel, and she's been pushing for the

public defender's office to start — and you guys probably know this because you work with her — to find immigration persons and answer these kinds of questions for public defenders. So this afternoon when she comes, it's a great time to talk to her about how you can support that effort and help her in doing that.

And then one last point I wanted to make, and this is something that the first speaker spoke about at the very beginning, but it's real important from an immigration practice a lot of times you have a hard time convincing people whose relatives have been detained that they can be deported just because they're in the country illegally, regardless of whatever their crime is. But I think on the criminal defense side of this, it's easy to sometimes disregard a good defense on the criminal issues because you think, well, they're going to be deported anyway, they have no status. And *Padilla* was a permanent resident. So it's a different set of rules. In my experience here in Knoxville in this jurisdiction, most of the cases we see are not permanent residents, people with legal status falling into criminal proceedings. Most of the time, the vast majority of time, it's persons with undocumented status. However, if immigration reform happens, that is seriously going to turn all that on its head because there's suddenly a vast number of people who no longer previously had no options who suddenly have some options. And to a small degree, that's already happened because, over the past three or four years, immigration has been directed by the Obama administration to regain a little bit of the prosecutorial discretion that they had foregone in the past, oh, ten or fifteen years. So even in cases that someone is undocumented, there might still be options if they're able to navigate successfully, navigate at a criminal proceeding. So in a limited sense, even if they're undocumented, it still matters, and especially if there's immigration reform, it's really going to matter.

JENNIFER CHACÓN: Yes, I would want to hammer that home. I think, even if there's no immigration reform, you might have someone who is eligible for asylum but might not be eligible for asylum, say, if it's an aggravated felony. You might have someone who is eligible for cancellation of removal but might not be eligible for cancellation of removal if it's the aggravated felony. So someone who is unauthorized may well have serious status issues that are on the line here. And then if comprehensive immigration reform is enacted, things that people are pleading to now may be the kind of decisive factor as to whether they're eligible for that then. And so I think we need to be really thoughtful about what it is that they're pleading to and what the potential consequences are in the shadow of immigration reform. And it's really difficult to know what that means for particular people. And so you just have to kind of keep it in mind as a broad source of information about what you're doing.

PAULA SCHAEFER: I think we're out of time. I know there's still some questions. I would invite people to come up, and hopefully our panelists can talk for a couple of minutes after we wrap up.

But I want to thank all of you. I appreciate you all being here today. It's been a great panel.

LUNCH KEYNOTE ADDRESS: 287(G) AND SECURED COMMUNITIES: SOME OF THE DANGERS OF DELEGATING FEDERAL POWERS

Elliot Ozment

MR. HOWELL: Our next speaker is Elliott Ozment. Elliott Ozment is the founder and managing attorney at Ozment Law. He graduated from Vanderbilt Law School in 1975. He's put together a successful career, countless awards, panels, and boards, including the 2012 Tennessee Bar Association's Public Service Harris A. Gilbert Pro Bono Award, and I believe that was given to him for his work in the now fairly infamous *Villegas* case. Mr. Ozment is a frequent speaker and lecturer and is presently working on a book on motions to suppress legally obtained evidence in immigration court. Today he will be speaking on Section 287(g) of the Immigration Nationality Act. Without further ado, Mr. Elliott Ozment.

ELLIOT OZMENT: Well, good afternoon, folks. I'm glad to be here in Knoxville today, and I appreciate the presence of each and every one of you. I want to start out by recognizing a man who has helped me more than any other person since I started the practice of immigration law, and that's Dan Kesselbrenner. I love that man; he knows it, and I could not do — our entire office could not do half of what we do if we had not had Dan's assistance through the years. You're very lucky to have him here in Knoxville at this conference, and I'm glad you invited him. His presence alone is worth whatever you paid to get into this thing, so I'm glad he's here, I'm glad you're listening to him, and have the privilege of hearing him.

Well, my topic today is 287(g). There are lots of ways that we could approach that topic, but I think what I'm going to do, to make this as interesting and as personal

as I can, is to tell you my story on how I connected up with 287(g) and what happened after that.

My story begins on October 6, 2006. I had gotten a call from Sheriff Daron Hall, the sheriff of Nashville, Davidson County, Tennessee, and he wanted to have lunch with me. And so he and my wife and I joined him for lunch at the Palm Restaurant. I think it's on Church Street in Nashville. I think that's the first and only time I've ever been there. We had a very pleasant lunch, and as we had lunch, he told me about his plans to bring the 287(g) program to Nashville, Tennessee.

Now, for those of you that might not know what that is, let me just take a brief moment to describe it generally. The 287(g) program, at one time at least, existed in about eighty-two or eighty-five different jurisdictions across the United States, and what it is is a contractual arrangement that was provided by Congress that enables ICE, Immigration and Customs Enforcement, which is the enforcement arm of the Department of Homeland Security, to contract with local law enforcement authorities.

There are two different types of 287(g) programs. One is called the Task Force Model. That's where you contract with the sheriff's office or the police department in a particular location. The other one is called the Jail Model. And that was the model that Sheriff Hall wanted to bring to Nashville. And what that contract provided for the sheriff to do was that, when somebody was arrested, he had the authority to have his deputies in his jail become 287(g) deputies, and what they could do is interview that person that was arrested soon after they were arrested and, through a series of interview questions, determine whether that person was legally present in the United States, whether that person had committed a serious enough crime to warrant issuing a notice to appear and to issue a detainer.

Now, a detainer has become very controversial lately. A detainer is a piece of paper that is signed that says that you are put on an ICE hold, is what it's commonly referred to as, and what that means is that, after you're finished in the local court, after your case is disposed of, if you have a detainer on you, then you can be kept for up to forty-eight hours after you are eligible for release. So if you were sentenced to time served and you come back to court, the jail keeps you for another forty-eight hours, if there is a hold on you, even though you've served your sentence or even if the charge has been dismissed; it doesn't matter. When you are brought back to the jail, you are not booked out at that point. If you have an ICE detainer on you, then you are kept for forty-eight hours.

Now, at that point, ICE can either come and get you or let you go. Now, in Nashville's program, they were never released because ICE was right there, and so they just bring a truck in about two or three times a week, load them up, and take them down to Alabama. And then from Alabama, they would take them on to Oakdale, Louisiana, which is a hellhole of a place. That's where all the ICE detainees wind up.

So what happens is that that program is designed or was designed by congressional statute to enable a more efficient performance of capturing dangerous criminal aliens. That's what its purpose was.

And so at the lunch at the Palm Restaurant, I asked Sheriff Hall how he intended to design the program, "who are you intending to go after with this program?" And the reason I asked that question is because, just before our lunch, Williamson County had arrested a person, a lady, for having no driver's license, and then ICE in that case, ICE issued the detainer because Williamson County did not have a 287(g) program. And ICE came and picked up this lady and put her in immigration court, and whatever

happened to her after that was up to the federal authorities. And all she had done was to drive without a license.

Now, those of you that know the background of driver's licenses here in Tennessee know that, in February of 2006, the State of Tennessee stopped giving any driving certificates or driving licenses to people who were undocumented. Now, we can debate the pros and cons of that. Remember that these people had already learned how to drive, they had had a driver's license, they knew how to drive, they were not a threat to the streets of the community, and yet the legislature decides, in its wisdom, to stop issuing driver's licenses to those people. That was in February of '06.

Now, a few months later, in October of '06, is when I was meeting with Sheriff Hall, and so I wanted to know, "What are you going to do with the 287(g) program? Are you going to go after those people?" He said, "Absolutely not." And my wife was there, and she has a steel-trapped mind; she remembered that. Usually that works to my disadvantage that she has a steel-trapped mind but not this time. She remembered every word the sheriff said. And so he said, "I want you to be on my Advisory Committee. We're just going to go after dangerous criminal aliens. That's all we're going to do. And I want you to be on my Advisory Committee."

Well, I'm as much in favor of getting rid of dangerous criminals, whether they're aliens or not, as anybody, as the sheriff. I don't want those people in the United States. Get them out of here. They give immigrants a bad name. Drug dealers, murderers, wife beaters, we don't want those people up here. And so given the sheriff's assurance that this is how the program was going to work, I decided to agree to serve on the sheriff's Advisory Committee.

Now, I didn't know Sheriff Hall all that well. He seemed like a nice enough guy to me. He was soft- spoken, very gentlemanly. I had no reason to doubt that he would keep his word. And so he brought the 287(g) program to Nashville, and it started operations I think in April 2007. This was just a few months after our lunch. And it wasn't too long until we began to see lots and lots of people being arrested for no driver's license and then being put into immigration court.

Now, in the sheriff's Advisory Committee meetings — I attended every one of them, and I sat there. And at the second meeting, I said, "Sheriff, we need to make some changes to this program because you are putting a detainer on each and every person that is arrested no matter how minor the charge, and that was not the intent of this program when it was created by Congress. And that's not what you are entitled to do under the contract that you signed with ICE." And I said, "You should work with the Steering Committee to come up with some criteria to determine who is a dangerous criminal alien that should be detained and turned over to ICE. That's what you should do." And he didn't respond at all. He just ignored my suggestion. I made it at the next meeting and the next meeting and the next meeting. Soon it became obvious to me that he was not going to keep his word.

Here is what he later bragged about in a four-color brochure that he made up to polish his political image. Let me read it to you. He cited a statistic that is very important. He said, "The percentage of foreign-born arrestees nearly doubled" — now, this is him bragging — "nearly doubled from 2001 to the inception of 287(g) in April 2007, when the number reached an all-time high of twelve percent." Then he said in 2006 — this was the year before his 287(g) program started. Listen to how many were arrested and put in the immigration court. "In 2006, the federal government only identified 151 illegal aliens for removal."

Now, that's back when ICE had control of who they put into immigration court. That was before Hall took control of the process. They had 151, and in the first year that Hall operated the program, they had something like 3,000. It was pathetic.

Now, the reason the feds only had 151 is because they only put aggravated felons into immigration court. They only went after dangerous criminal aliens.

Hall said in a newspaper article, "It is too late to deport an individual only after a serious crime has been committed." Did you hear that? We can't wait until these no-good immigrants commit a serious crime, we've got to get rid of them now before they do it.

Now, do you understand the significance of that statement? What Daron Hall was trying to do was to rewrite U.S. Immigration Policy. That was not the policy of ICE. That was not the policy of the Immigration Enforcement. And yet he thought that was a bad thing.

Let me quote you something from the OIG's office, Office of Inspector General. They issued a big report in March of 2010, and here's what they said in that report. It's a big, thick report. You can google it and get it. But here's what they said in one place: "According to ICE's July 2009 MOA template, the purpose of collaborations between ICE and LEAs" — that's Local Enforcement Authorities — "in the 287(g) program is to identify and process for removal criminal aliens who pose a threat to public safety or a danger to the community." That's what the inspector general said. That's the policy that was supposed to be supporting the 287(g) program. But Daron Hall didn't agree with that. Daron Hall decided, on his own account, to change U.S. Federal Immigration Policy in Nashville, Tennessee.

So you can imagine how outraged I was. The events that topped the list for why people were

arrested in Davidson County's 287(g) program every year was no driver's license. Just exactly what I had feared.

"No driver's license arrests for Hispanics increased from 23.6 percent pre-287(g) to 49.4 percent post-287(g) in 2007."

Now, it was just not no driver's license. People were arrested and taken to jail for fishing without a license. The park patrol would arrest somebody, some poor Hispanic who was trying to catch a fish for dinner that night in a metro park to feed his children, and they threw him in jail. Hall put him into immigration court, and they would be deported. It happened over and over and over again. Trespassing, that was one of their favorites. That means they were not where they were supposed to be. They would be standing on a corner looking for work, and the police would come along and arrest them. They weren't hurting anybody. They were looking for work. It's been going on in Nashville for decades, but all of a sudden it became a deportable offense.

Well, let me tell you the case that took the cake, the thing that really enraged me. One day a woman came into the office, and she told me that her husband had been arrested and was in jail. Come to find out that what had happened was, early one morning he was sitting in a chair in a laundromat drinking a cup of hot chocolate. A metro cop came along and said, "What are you doing?" He said, "I'm sitting here drinking a cup of hot chocolate waiting for my boss to come and pick me up so I can go to work." And then the cop said, "Let me see some ID." And so this man took out his W-7 tax ID number card. He didn't have a social security card. He didn't have a driver's license. So he took out the only thing he had, which was a tax ID number so that he could file taxes on the money he was earning, and the cop took a look at it. This ignoramus cop didn't know what it was. He said, "I'm going to arrest you for criminal impersonation. This is a fake social security

card." And so there it went, he took him in. This was the father of a nine-year-old, autistic, U.S. citizen boy. That's who he had at home.

And so they took him to jail, and they put him up before the judge in general sessions court in Nashville. And when he went into the court, the translator — this was going on a lot back then — a translator would come in and tell him, "Hey, listen, you need to plead guilty so you can get out of jail quicker. The judge will let you go if you just plead guilty. If you don't plead guilty, you're going to have to stay in here no telling how long." Well, this man heard another man talk to him in Spanish and said, "He wouldn't lead me wrong." And so this poor man pled guilty to criminal impersonation. Can you believe that? And then Hall slapped a detainer on him.

Well, this woman didn't have a nickel, but she said, "Can you please help?" And I said, "I will help." So the first thing I did was to go into court and get his conviction set aside, and then I took his case. We ultimately got him a green card because he had been here ten years and he had an autistic, U.S. citizen son. And I got the immigration judge to give him a green card. It's called Cancellation of Removal. And he didn't have any criminal record other than this bogus criminal simulation charge. And I was so outraged by that that I wrote an op-ed in the *Tennessean*, and the *Tennesseean* printed it of all things. And let me read you what I said at the tail end of that editorial.

I said, "Almost half of the approximately 4,000 287(g) detainees have been arrested for such minor infractions as no driver's license, fishing without a license, staying in a park after ten o'clock p.m., or now possession of an IRS card while drinking hot chocolate." I told them the story earlier in the editorial. "Then held for civil immigration charges." And then here's where I really started preaching. I said, "Business Leaders, 287(g)'s assault on the foreign-born will

make recruitment of new international business more difficult." And the Nashville Chamber of Commerce was trying to get international companies to come to Nashville. "Religious Leaders, 287(g) is inflaming hatred and intolerance and destroying family values by splitting immigration families for as long as ten years."

What would have happened with that ten-year-old if that father had not gotten a green card? What would have happened? Do you think Daron Hall cared? Not one whit.

"Civic Leaders, 287(g) is bringing international infamy and shame to the city of Nashville, which has now come to be identified around the world as a city whose jail denies basic human rights and has engaged in terrorizing pregnant women by shackling them during labor." That was the *Juana Villegas* case that was still grabbing headlines on the front of the *New York Times*. This is what was happening. And then I said, "Nashville, we are better than this."

Well, it wasn't long after that that I was fired from the sheriff's Advisory Counsel. Imagine that. And so he wrote me a hot letter, a two-letter. I felt obliged to write him a two-letter back. And I'm not going to read you the whole letter. I've got it here if you want to read it after the presentation. But let me just read part of it.

I said, "Sheriff, you have transformed the Federal 287(g) Program, designed and intended by Congress to catch dangerous criminal aliens in partnership with local law enforcement, into a ruthlessly efficient, local, ethnic cleansing machine designed to persecute the foreign-born and purge Nashville of brown-skinned people unwanted by the xenophobes and racists among us. This program is causing entire sections of Nashville, especially along Oliver Road (phonetically), to atrophy, and it will take decades to rebuild them. No enforcement action is more responsible for separating immigrants from

their children and U.S. citizen spouses than your 287(g) program. How you and others of your ilk that attend church on Sunday and espouse family values can then operate through the week in a mindless campaign to tear up families in the Buckle of the Bible Belt is beyond me. It is your stubborn refusal to honor your word and build a rational set of criteria for identifying dangerous criminal aliens that has now led this community to the *Juana Villegas* case. By your actions, you have brought international infamy and shame to the city of Nashville, which has now come to be identified around the world as a city whose jail denies basic human rights and has engaged in terrorizing pregnant women." I hope he read the letter. I don't know whether he did or not.

Well, it was that night that I got down on my knees and I asked God's forgiveness for adding any credibility for enabling this sheriff to establish such a program, and I made a promise to him that I would try to destroy that program if I could. So I waited and I waited, and then in September of 2011, into my office walked a young man named Daniel Renteria. And Daniel was sitting out in my waiting room with a plastic bag, and so he came into my office. He paid the initial consult fee. I had never met the guy. He was a young man in his early 20s. No, he was 19. And I said, "Daniel, what have you got in your bag there?" And he pulled out this bloody shirt. I said, "What happened?" He said, "Well, I was in a little incident where persons in another car shot some bullets, and the police chased the car I was in and the other car. I got out of the car and ran, and they set some dogs loose, who mauled me." I said, "Well, what happened after that?" He said, "I ran home, and they arrested me Sunday night."

Now, let me read you the time line of what happened. Very interesting. He was booked into jail on 8/22/2010. This was shortly before he came to my office. It was 2010, not 2011. The ICE detainer

was placed on him at 5:57 p.m., about an hour after he was brought in. At 10:30 they conducted an interview. That's about five hours after he had been booked in. And they asked him, "Where were you born?" He said, "I was born in the United States." He couldn't speak English, but he said, "I was born in Portland, Oregon." They didn't believe him, and so they accused him of lying. Then they accused him of having a fake social security number. They said, "What is your social security number?" And he told them, and then they entered the correct social security number. Oh, that matches, okay. He also had a Tennessee ID card. Didn't have a driver's license, but he had an ID card.

Now, 9/3, September the 3rd — remember, he was arrested on August 22nd. He was kept in jail all this time on an ICE detainer, couldn't make bail. At that time they were denying bail to anybody that had a detainer on them. We have since changed that. We have gone to court and sued some sheriffs and now they know better, but back then you couldn't get bond in Sheriff Hall's jail. The charge was dismissed on 9/3/2010. I even forgot what they arrested him for, but it was dismissed. There was no criminal conviction. He had been arrested August 22nd, in jail all this time.

Now, that's when the court dismissed the charge, was one p.m. on that day. The ICE detainer was deactivated by Deputy Ford on 9/3 at 9:56 p.m., almost ten o'clock that night. They had kept him in jail all that time. They didn't believe he was a U.S. citizen. It took his sister to bring a U.S. passport to the jail and show them he's a U.S. citizen, and they still didn't turn him loose until ten o'clock that night. The ICE detainer was not deactivated until ten o'clock that night, and he still was not released for another three hours. It was 9/2/2010 at 12:48 a.m., forty-five minutes past midnight. And here he was sitting in my office, and he wanted to sue somebody. He

was mad. What he was mad about was getting mauled by those dogs, but I knew a dog-mauling case was going to be a thicket. I didn't want to get into that.

But I said, here's what we will do. You are a U.S. citizen. You see what had happened was, he was born in Portland, Oregon, and his Mexican parents decided that they didn't want to be in the U.S. anymore. And they went back to Mexico back when he was one year old. He grew up in Mexico, didn't know English, but he was a U.S. citizen. And so he came back about a year before he came to my office. And I said to him, "We're going to sue the sheriff." And so that's exactly what we did. *Renteria v. Metro Government.*

Now, here was our theory of the case: Our theory of the case was that Sheriff Hall did not have the authority to enter into that 287(g) agreement. He signed it, the feds signed it. But it was null and void because he didn't have the authority to sign that document because it gave him law enforcement authority that he did not have the right to have under the Metro Charter.

I had grown up in Nashville. I remember Judge Beverly Briley. He had more sense when he was drunk than most people do when they're sober. He was a brilliant man. And he set up Metro Government, and I remember when it was set up. All the law enforcement authority was given to the Metro Nashville Police Department, but they were stuck with the sheriff, what are we going to do with this sheriff because it was a constitutional office; they couldn't just eliminate it. And so they told the sheriff, "We're going to give you the authority to keep the jail." That's the only thing you can do, is keep the jail, but you cannot exercise law enforcement authority inside Davidson County. And Sheriff Hall had signed the 287(g) agreement that gave him all kinds of law enforcement authority, including signing the detainers to keep people in jail

beyond the time that they should have been released. So we took it to chancery court first. Metro insisted on naming the feds. After they came in as a defendant, they moved it to federal court. Fine with us. And then Judge Sharp referred it to the Tennessee Supreme Court, and there we were.

I had to make a choice, what was I going to do before the Tennessee Supreme Court. Well, I've argued before the supreme court before. Years back I was counsel in the case of *Clinton v. Cain-Sloan.* Those of you that are students here, go look it up when you leave here. That is the granddaddy of all retaliatory discharge common law in Tennessee. Some of you might have heard of the case. And the lawyer on the other side of that case was Bill Harbison, and at that time we were arguing in front of Bill Harbison's father, William Harbison, on the supreme court. I'll let you go and look up the outcome of the case. But that's when Bill Harbison and I began to know each other.

Now, this is the same Bill Harbison that was just elected as president of the Tennessee Bar Association just this year. And so we made the decision that we were going to ask Bill Harbison to argue this case before the Tennessee Supreme Court. We had Dan Kesselbrenner of the National Immigration Project helping us. And the reason we made that decision is because all the justices on the supreme court knew Bill Harbison, all of them. Some of them might have known me, but the difference is, Bill was famous and I was infamous. And so I thought they rather hear somebody famous than somebody infamous.

So we made the presentation. I think we were right on the law as it existed at that time. Bill Harbison did a wonderful job, a remarkable job. He's one of the greatest lawyers in this state. Then about two weeks before the supreme court came out with its decision, guess what happened? I opened up the *Tennessean*, and I fell back into

my chair in shock. Two things: Number one, Daron Hall announced, "I'm going to discontinue the 287(g) program." This was after we had already argued the case to the Tennessee Supreme Court. And then Saul Solomon, Metro legal director, came out and said, "We're going to amend the Metro Charter to make sure that there's no more confusion about who can do what. We're going to let the sheriff do a few law enforcement things, but he's going to have to do it in collaboration with the police department." And so they proposed the Metro Charter amendment that was adopted last November. Two weeks later, the Tennessee Supreme Court came out with its decision and ruled against us.

I still think we were right on the law, and the only way the supreme court was able to rule against us was, they rewrote the law that had been the law for fifty years in a case called *Metro v. Poe*, which said the sheriff cannot have any law enforcement authority interpreting the Metro Charter. Sheriff Robert Poe at the time. And that was their prerogative to do that.

And I sat there in my chair and reflected on it, and I said to myself, "Self, you lost the battle, but you won the war. There is no more 287(g) in Nashville." One of the proudest achievements of my life. So that's the story of 287(g) in Nashville, and that's why I don't recommend that any community bring 287(g) because you have some ambitious, local law enforcement officers that will use that program to demigod against immigrants and try to ride it to higher office.

Now, those of you that can, I want you to come to Nashville. When you drive by my office on Murfreesboro Road, in about three weeks you are going to see two big statues. Each one of them is fifteen-feet-high. One is going to be on the right side of the door, and the other one is going to be on the left side of the door. One of the statues is the Statue of Liberty holding up the torch, and the

other statue is Lady Justice holding out the scales. I had a person in my office one day ask me, "Why in the world are you doing this?" I said, I want to remind every person, whether they're an employee walking in our door or a client walking in our door, I want to remind every single person — or just driving by — that what is going on in this office is a fulfillment of our Pledge of Allegiance to the United States of America, Liberty. and Justice for All. So thank you. It's been a pleasure.

PANEL DISCUSSION II: ANALYZING THE IMMIGRATION PROCESS AND HOW CRIMINAL LAW FITS IN

Tricia Herzfeld
Jeremy Jennings
Karla McKanders

MR. BOCK: We will go ahead and get started with our Analyzing the Immigration Process panel. We will give each panelist twenty minutes to speak, and then we will have a forty-five minute Q- and A- period. Our first panelist is Jeremy Jennings. Jeremy is the principal attorney at Jennings Immigration Law Office here in Knoxville. He graduated from Sturm College of Law at the University of Denver in 1998. Since then he's accrued a wide array of immigration experience, appearing before immigration courts in Memphis, Atlanta, Miami, and Oakdale, Louisiana.

Our second panelist will be Tricia Herzfeld. Tricia is senior counsel at Ozment Law in Nashville. Ms. Herzfeld focuses her practice on the criminal defense of immigrants, counseling, and constitutional law.

Our third panelist will be Karla McKanders. Karla is an associate professor here at the University of Tennessee College of Law. I've had the privilege of working with her this semester, and she's really opened up my eyes to the power of immigration law and the process of law to help immigrants coming from some really difficult situations. So without further ado, I'll turn it over to Jeremy and we'll get started.

JEREMY JENNINGS: A couple of caveats before I start. Totally the other extreme after Elliott's presentation. Very inspirational. Thanks to Elliott for sharing that story. We are going to dig into a few nuts and bolts here. And if

you're an immigration practitioner, I apologize, you can go to sleep right now because this is before 101 in immigration. Along with our topic, Analyzing the Process, I wanted to give the criminal defense or the criminal law attorneys out there an idea of what you're doing impacts what we're doing. We've talked all about it today, but we haven't talked about where does it actually happen and when. So I wanted to give you a flavor of when that occurs and when we see this.

And I use *immigration* broadly because it encompasses the State Department, it encompasses Homeland Security, all the different facets of immigration, and so I just use *immigration* broadly.

Criminal convictions impact, in immigration, basically four terms that we use, but they really go to the heart and have everything to do with immigration. The first is admissibility. Admissibility is broadly who can come. Second, it impacts removability. And removability is basically who can stay, or to the corollary, who can we remove or deport. The third thing that convictions impact is good moral character. That's basically what it sounds like, who is essentially a good person. And finally, in a relatively new development, criminal convictions impact the ability to petition for someone, and that's the process by which you're trying to bring someone to the United States through the immigration system.

So what is admissibility? Who can come. And these are the grounds that the law is not to exclude an individual from obtaining a visa or gaining admission to the United States. So think about the very beginning scenario. You're from Spain, and you want to get an employment or a student or a visitor visa to come to the United States. Well, the job of the U.S. Embassy or the consulate in that country is to determine whether or not you are admissible, whether or not you meet the criteria to be

granted the visa to come to the United States. So that's what we call a consular visa application. The person is in the foreign country, and they are applying for the initial grant, the actual visa that goes in the passport, the permission to travel to the United States in a particular status.

Now, that person gets their visa. They've passed the admissibility determination from the U.S. Consulate, and they get on the airplane. And they fly to the United States, and if any of you travel, you know what happens: You get in line, citizens go here, everybody else goes over there. Well, what's happening, that's a port of entry — the airports, land crossings, sea crossings. If you have ever gone on a cruise, you've had to go back through immigration as well. These are ports of entry, and the officer at the port of entry makes the final determination about whether or not someone is allowed to enter the United States, not the state department who granted the visa to you in the first instance, although that's the first step you have to do. But at the port of entry, the officer there is making essentially the determination of admissibility to determine whether or not to allow you into the United States.

A third scenario about admissibility is what we call Adjustment of Status. An Adjustment of Status is the process of obtaining lawful permanent resident status from within the United States. So if someone is here typically in some other type of temporary legal status and they have become eligible to apply for lawful permanent resident status or a green card without having to leave the country, then that process is called Adjustment of Status.

This is where it gets a little bit confusing because, although it's not technically an admission, Adjustment of Status does require admissibility, and some of the language uses the language of admission. So it's resulted in some case law to clarify this, and that's really a lot more than I

need to go into for you today, other than to tell you that Adjustment of Status, the process of applying for a green card in the United States, also reviews a person's admissibility.

Now, I'm not going to go over this and you probably can't read that anyway. Section 212 of the Immigration and Nationality Act lays out the grounds of inadmissibility. Only one section of that are criminal grounds. There's many grounds of inadmissibility. But when reviewing inadmissibility, we go to Section 212. I think the next panel is probably going to go into more detail about the specifics of these things. I'm just going to throw out a few words that you've already heard today. Moral turpitude, aggravated felonies, controlled substances. Three big things that you are going to deal with commonly in admissibility.

Removability — who can stay, the grounds to remove or deport an individual who is already present in the United States. Now, these are not the same as the grounds of inadmissibility. They were located in two different parts of the statute, 212 versus 237, and they are not identical. So some things that make you removable are not something that would make you inadmissible. What are some common scenarios? Well, obviously we're talking about removability, so the person is already in the United States. Well, a lot of what we talked about today, booking, especially now with Secured Communities, and I don't know that we have talked about Secured Communities yet, but basically what it is — and I think it's nationwide now. I think it's nationwide that, every person who is booked into the jail, their fingerprints are automatically sent to the FBI, doesn't matter who it is, every single person. As I understand it, the FBI is now forwarding those fingerprints to the Immigration Service for them to do an immigration review. This program is called Secured Communities.

And it's the result of that Secured Communities booking that is resulting in the detainers these days that we see. I think Tim Arnold showed the huge jump, the expediential jump, and talked about the technology changes. A lot of that is as a result of Secured Communities because, every single person who is being booked, those prints are now going to the Immigration Service and giving them an opportunity to issue detainers.

It's not just booking. It's also convictions for criminal activity. Well, you think it's not necessarily the same thing. For an example, somebody came to me with a case recently. The guy was booked a long time ago, but his case is still coming up. And he did not go to jail at that particular time, but he's running the risk of a sexual abuse felony. Well, although they didn't catch him at booking, one of two things can happen: They might catch him if he's convicted at the time; they're going to get him when he goes to jail, or if not, he's probably going to go on a sex offender registry. And ICE commonly reviews and controls things like sex offender registries and things like this to determine who are people who are removable from the United States, so these database checks are resulting from criminal convictions.

Adjustment of Status we've already talked about, but as part of the Adjustment of Status process, you've got to go to what's called an Application Support Center and give them what they call biometrics, which is your fingerprints and your photograph and your signature. Well, one of the reasons they take those things is to perform the criminal background check to determine are you admissible, are you removable from the United States?

Adjustment of Status — getting the green card in the first instance. Then you've got to renew the green card. It may be two years later, it may be ten years later, but at some point you've got to renew that green card. So again, they are going to require biometrics.

They're going to review your criminal history, prior to renewing the green card, to determine whether you have done anything in the interim that makes you removable from the United States.

Naturalization — the process of becoming a U.S. citizen. Again, biometrics is required at the Application Support Center to determine the same kinds of things as we talked about. And basically any process, any immigration process that requires fingerprinting, is giving them the opportunity, and really the responsibility, to determine whether or not there's something in your background that makes you removable. It could be an asylum application. It could be TPS, which is Temporary Protected Status. More recently it might be deferred action or the DACA program that some of you might be familiar with. Brand new, provisional hardship waivers are requiring criminal background checks to determine whether or not you meet the discretionary requirements for that. Anytime that immigration is collecting — and they're increasing the scenarios in which they're doing so — collecting your biometrics, they're running those through the database to determine whether or not somebody is removable.

Removability, again, you can't see these, but's it's Section 237(a). And I'm going to trust the next panel to talk about those things in detail. But one of the big things is aggravated felonies. You have heard a lot about this today. Aggravated felony is a defined term. It's in Section 101 of the Immigration Nationality Act. And it lays out, it enumerates what the aggravated felonies are. And it's one of Congress's favorite things lately to expand and expand and expand what falls under the definition of aggravated felony, and not just that, the courts do it too. So, for example, what constitutes — sexual abuse of a minor is something that's commonly subject to case law. A

crime of violence. What is a crime of violence? That is subject to case law a lot. Good moral character. Essentially the question is, Are you a good person? Immigration law defines this in the negative. It doesn't say who a person of good moral character is. It says who a person of good moral character is not. And it does this also in Section 101, and it lays out the statutory ineligibility. So there's a whole list of things that, if you have done these, then statutorily you are not a person of good moral character.

And importantly, aggravated felony is permanent bar to good moral character. So talking about the permanence of the aggravated felony convictions, one of them is permanent bar to good moral character. Now, good moral character is not just statutory, it's also discretionary. So just because you don't meet one of the statutory ineligibilities there, they also have the discretionary ability to look beyond that to determine whether or not they think you meet good moral character. Historically I think immigration uses this discretionary power quite often, particularly in a naturalization application, where if you have hardly any criminal conviction at all within a five-year period with good moral character required for naturalization, that they will often times use that against you to deny your application, make you wait five years from the time of the incident, and then establish your five years from that point.

But the important thing is, good moral character is not limited to criminal convictions. So when do we see good moral character, are you a good person? The most common one is naturalization, when an individual is applying to become a U.S. citizen.

Second is Cancellation of Removal, which is what Elliott was able to obtain for — which one? I forget.

UNIDENTIFIED SPEAKER: The guy drinking the hot chocolate.

JEREMY JENNINGS: Yeah, the hot chocolate drinker with the ITIN card. Cancellation of Removal requires three things for non-lawful permanent immigrants: Ten years of continuous residence in the United States, good moral character, and then extreme and unusual hardship to a U.S. citizen or lawful permanent resident, spouse, parent, or child. So good moral character in a Cancellation of Removal scenario. Voluntary departure: Voluntary departure is an avenue of relief in the immigration court where essentially they're going to go home. There's just no way around it. They don't have any form of relief other than leaving the country. They can do it under an order of deportation, which carries an official deportation against them in a bar of the re-entry, or they can do it under voluntary departure in which they agree to leave the country on their own, at their own expense, and avoid deportation on their record and avoid penalty of deportation. But it requires a showing of good moral character, and the judge will listen to the factors to determine whether or not they have met that requirement.

Finally, probably the least common these days is registry, and registry is a commission that allows somebody who has been here, I think it's from 1972 — I think it's January 1st, 1972 — and if a person has continuously resided in the United States from that period of time up to the present, then they can apply for registry; essentially "we've been here so long, you can't kick us out" kind of thing. But part of that requirement is again showing of good moral character. That is Section 101, good moral character.

The ability to petition. Can I bring someone to the United States? Now, this is relatively new, and it's a twist.

Everything else that we have talked about so far is looking at the non-U.S. citizen and their ability to either come to the United States or remain in the United States or apply for some type of benefit in the United States. This one is different because it looks at the U.S. citizen and also the lawful permanent resident to determine whether their behavior restricts them from being involved in the immigration process. And the most common way that we see this is through what we call an Alien Relative Petition, which is a petition that someone files typically for their spouse or their parent or maybe their child. It could also be siblings, if you are a U.S. citizen. Their ability to file an Alien Relative Petition or also a fiance petition —

One thing I want say. You never know when a U.S. citizen is going to be interested in marrying someone from another country, so don't write that off, but be especially aware of a situation where you're advising a lawful permanent resident about what's called a specified offense against a minor because, just by nature of their coming from another country, the likelihood that they might be wanting to eventually marry someone from another country or that they have got relatives from another country that they're interested in bringing over is going to be impacted by the Adam Walsh Child Protection Act. So just don't write it off if your client is a U.S. citizen, but be particularly aware of it if your client is a lawful permanent resident.

Specified offense against a minor terminates the ability to petition on behalf of the Foreign National, and I will go into this one a little because it's something the other panel may not. It enumerates them: solicitation to engage in sexual conduct, child pornography, criminal sexual conduct involving a minor or any conduct that by its nature is a sex offense against a minor. So that's kind of the catchall. And there is an avenue of relief if you can demonstrate, at the sole discretion of the attorney general,

that the person will not be a risk, but it's a huge hassle to go through. So be especially careful when you're dealing with offenses like this and giving advice about immigration consequences there.

Two more notes before I pass on my turn. Outstanding warrants. If an individual with an outstanding warrant appears before DHS, including U.S. citizens, DHS may alert the appropriate law officials for arrest during an immigration appointment. Let's say your spouse and the two of you go to the immigration office in Memphis, the U.S. citizen and their alien spouse. The U.S. citizen has an outstanding warrant. Well, immigration is not performing biometrics yet, but they are checking the backgrounds by name, social security number, whatever other means are available to them, I guess, to determine whether or not the U.S. citizen has the ability to petition, and it's something you need to be aware of. Don't send your clients to immigration if there are unresolved criminal issues.

And finally something that is very hot off the press, immigration announced last week customer identity verification. And again, it's just giving immigration one more opportunity to collect your biometrics before they do something with your immigration status, and this is after you have submitted initially your biometrics to them for review. When you go to the appointment, they're going to take your biometrics again to confirm that you are the person that you say that you are. So the person who is appearing for the appointment is actually the person who gave the fingerprints at the prior time. And this is going to involve adjustment interviews, naturalization interviews anytime that you go for a benefit to the local immigration office for temporary travel or parole or lawful permanent resident stamp. That's it for me.

TRICIA HERZFELD: I'm Tricia Herzfeld. I practice with Elliott over in Nashville. How many public defenders or

criminal practitioners do we have in here? How many people think you might want to do that? I'm sorry I missed this morning's panel; I had a horrible cold, so there may be some overlap, and I'm terribly sorry if there is. I've been doing criminal immigration law with Elliott now for just a little bit under a year. I started out my career as a public defender in Miami, and I will tell you I violated *Padilla* probably a hundred thousand times in Miami. *Padilla* wasn't law then; we didn't know. As a public defender, you are busy, your case loads are extraordinary, you are trying to get the best deal you can for your client, minimize their time, and make sure that they are not pleading to something they're not guilty of or they're doing something in their best interest; however, I will tell you that over and over and over again I would say to my client, "It's okay," "You're Cuban," "They will just send you over to (inaudible)," "You'll spend six months there, and you'll go away," or "It's not a felony, so that's fine," "Immigration is not deporting people who are not convicted of felonies." Or in Florida we have a thing called a Withhold of Adjudication, so you plead guilty. There's technically a crime there, but they never enter the formal adjudication of guilt. We were all so brilliant. We just thought that meant you didn't have a conviction and nobody would ever bust you on it. We were wrong. All of us were wrong, and as a whole, as a bar, we continued to tell immigrants over and over and over again, "This won't affect you," "This won't affect you," "Immigration is not deporting on this," "You're fine," "You go ahead and take this plea," "Get your time and get out."

Times have changed substantially since then. And when I think about all that advice that I gave to all of my immigrant clients over and over again, a little bit of it makes me want to throw up because I'm just like, oh, my God, I was absolutely ineffective, I absolutely did this over

and over again, not because I had bad intent, not because I wanted to hurt these people but because the law was different and I didn't know.

Now, we are very fortunate that the bar in Miami, the bench, has agreed almost uniformly that when there's an immigration issue, they are just wiping the slate clean and letting people re-plea if they need to, which has been particularly helpful. But in places like Nashville or Tennessee, that's not quite so easy. Miami's population is primarily immigrant-based. You've got first- and second-born, first- and second-generation Americans, but generally the bar and the bench are very, very adept to dealing with immigration issues. Tennessee, our population is not so big, and the bar and the bench aren't quite as used to dealing with that. So kind of getting into the specifics of Tennessee law and how that affects things in immigration court has been a particularly challenging thing.

Name that plea. So one of the things that I've been working on since I've been with Elliott — and I should tell you, I don't know if you have my bio or not, I was at the American Civil Liberties Union of Tennessee before I came over to work with Elliott. And I think you can all see his passion and his just incredible dedication to the work with immigrants and this state, and that is the reason I left the ACLU. This man just absolutely bowled me over with his work and dedication and passion and got me to leave ACLU and come to work with him, and I just could not be happier. I really think that the immigrant population in Tennessee is probably the one population, although there are many, that really is under-represented and doesn't have a voice and isn't really heard about or from, and without his courageous work, I don't think half the people would even be here knowing this stuff today.

So some specifics about when you're advising Tennessee's immigrants in criminal court. How many immigration status categories do you need to

worry about? Like you're the public defender, you're appointed on a case, or you're retained in my case. What do you say? "Are you legal?" Is that your first question? I don't know. "Do you have any U.S. citizen relatives?" "What age were you when you got here?" There's a million. And again, I didn't realize the complications of this until many, many years later in my practice. And the answer is, you have to worry about all of them. There are a million and one different scenarios that each client could be facing. You don't know if they are a lawful permanent resident. Do they have derivative citizenship in some way? Do they have temporary protected status? Are they eligible for DREAM Act Light as we call it, DACA, DREAM relief? Are they eligible for a visa somewhere, Cancellation of Removal? All of those things — and there are a million more — should all factor into your decision of what plea you're allowing somebody to take or not take.

In my own personal practice, I pled a guy to a third very minor misdemeanor who had temporary protected status, and anybody who knows anything about that knows it's two or more and you're done. Actually I think I pled him to a second. That's what I did. I pled him to a second. I didn't know. I didn't know. It was something I hadn't researched sufficiently, and I will tell you, it's quite embarrassing to walk to a judge you don't know very well and say, "I'm sorry, I was just absolutely ineffective." And I did. I turned around, I went and got the answer. Something kind of said to me, I don't really know that I should be pleading this guy to this, but I did it because everybody in the courtroom said, yes, yes, yes. The public defender in the courtroom said, "No, no, it's fine," "He should be fine," "It's an Under Advisement Plea," which is something we have in Nashville. And we can talk about it in a minute. "It doesn't count. It doesn't count." I should have trusted my gut

because, truthfully, it does count. But my gut at the time told me I don't know. The public defender was like, "No, no, everybody does this, everybody does this," and I went along with it because we do this. It doesn't matter how many years you've been practicing, you get nervous, you think, "Okay, everybody else is doing it, I don't want to be the cog in the wheel."

But I went out, I called Elliott, who was fantastic in taking my call. And I said, "Hey, I think I might have done something wrong here." I found out absolutely I had done something wrong. And so for all the criminal practitioners or people who want to be criminal practitioners, your job is to claim yourself ineffective if you have been. I was absolutely ineffective in what I did that day. I did not properly advise my client. I am not embarrassed about that. I am not ashamed. That is something that is your job. If you mess up, you've got to go in and say it, and you've got to go in and fix it because your client doesn't know you messed up. He would probably have to find four or five different lawyers before somebody is going to realize the technicality of your mistake. I did, okay. I knew it, and I knew it immediately.

So I walked right back into court and said to the judge, "Guess what? I screwed up." It's called the practice of law for a reason, and every now and then we mess up. "I need to vacate this plea, please." Now, of course, the district attorney gave me a problem. Blah, blah, blah, and I said, "Look, you can do it one way or the other. I can find an attorney that is going to go ahead and post-convict me right now, we can go ahead and do that. And we can go through the process in doing all that, or we can go up to the judge while the file is still right and fresh right there. We can move it to another date so I have a little bit more time to research the immigration consequences." And guess what they did? Nobody wanted to deal with post-conviction petition. They knew I would, but I think they

might have been a little bit shocked that I was willing to post-convict myself.

And so I just want to make that point to all of you. Don't be afraid to say, "I don't know." Don't be afraid to ask questions, and don't be afraid to say, "I screwed up because we all screw up." That's how it goes. I think the important thing is to make sure that you identify it and you take responsibility for it. Anyway, that was kind of an aside.

So there's a million different immigration things that you need to worry about. The DREAM Act is one that is relatively new. They have to do with significant misdemeanors and insignificant misdemeanors, and they are not particularly well-defined. So those are things that you want to watch out for: How old your client was when they came, if they have derivative citizenship, if they have any type of immigration relief that you pleading them guilty to a particular crime could affect.

So here's where we are talking about diversion. Was there already a panel on diversion this morning? Ok, good. So let's talk specifically about diversion in Tennessee. Everybody thinks, if you get a diversion plea, that's great, it doesn't show up on your record, awesome, total freebie, your one get-out-of-jail-free card. Does diversion work for immigration court? Can you tell by my voice? No, it does not work for immigration court. And why is that? Tennessee has two technical types of diversions but probably four or five in actual practice. It took me quite a while to figure this out when I moved my practice from Miami. Judicial diversion, the first one — some counties, that's all they do. I practice in Nashville but then all the surrounding counties. And in Nashville, sometimes you can get judicial diversion.

In Cheatham County, for example, I asked for judicial diversion on a case, and they're like, "Yeah, we don't do that here." And I said, "But it's in the statute."

"Yeah, we just don't do that here. The judge — oh, no, that's pretrial, sorry, the judge only does judicial diversion." That's what they said. If you look at the statute here, judicial diversion requires you to plead guilty. So you actually stand up, and you stand in front of the judge. Yes, yes, I did it, and then the judge says, "Well, I will accept your plea of guilty, but I'm going to withhold entering it." Kind of the same thing I was talking to you about that we used to do in Florida. The person says, "I'm guilty," but then it's not actually put into the record as guilty. Everybody thinks that therefore it's not a guilty plea for immigration purposes, just like we thought in Florida, but the truth of the matter is, it is. Most people don't understand that. Most of the judges don't understand that. Certainly the district attorneys don't understand it, and I would say ninety-five percent of the criminal defense bar does not understand this point. So it's your job to educate them.

The good one: pretrial diversion. So pretrial diversion is the good one, and if you are ever going for diversion, that's the one you want to try to get. And that's the one that all sorts of counties will say, "We don't do that." Pretrial diversion stops the prosecution right where it's at. So you have gone in for your day, whether it's for arraignment or your first appearance or plea date, and you say, "I want pretrial diversion." It's like the iron curtain, bam, stops right there that day. No admission of guilt, no adjudication. Everything is just put on hold. You'll go do your pre-service hours, whatever it is they want you to do. You come back, the case is dismissed, and it's off your record, versus judicial diversion, the one that we had before where you actually have to go in, plead guilty, you go do your fifty community service hours, you come back, they wipe it off your record. See the difference? The deal is — and the reason that prosecutors and the bench tend to like judicial diversion better is

because, if you mess up, they already have a guilty plea that they can hang over your head, versus pretrial diversion, you've got to start that whole process again. But then there's this funny thing in Davidson County called Under Advisement Pleas. Go ahead and google it, you won't find it. It doesn't exist in any of the books. It's not a statute. It's not anywhere. It's just its own little animal that's been made up in Davidson County, and probably you have them in other counties. An Under Advisement Plea is very, very similar to judicial diversion, but the district attorneys in Nashville, whose heart is supposedly, some of them, in the right place, thinks that it's basically judicial diversion where you get up and you plead guilty and they withhold everything. But you can only get one of those generally throughout your life. You kind of get your one diversion plea. So they'll do them all the time and not do them under the statute because then they're not taking your one free one. So you go in, and as a new practitioner in Nashville, just like, "Okay, I know I want pretrial diversion, I won't want judicial." You know that. "I want pretrial, I don't want judicial. I want pretrial, I don't want judicial." You've got it all in your head, and the prosecutor says, like they did to me, "I'll give you Under Advisement." What is Under Advisement? I'm googling it, I'm looking. Does anyone know what Under Advisement is? And, oh, yeah, yeah, it means they don't enter anything, it's all good. It's really judicial. They're just not keeping a record of it. So for any of you who end up practicing in Nashville or any other counties, that's what that is.

CHRISTINA KLEISER: Do you know why they created that animal in Davidson County?

TRICIA HERZFELD: I think because they wanted people to get more than one. No, not really. That's the best

answer anybody has been able to give me. So a bunch of other lawyers will tell me, "Oh, it's all right," "I pled him to a misdemeanor," "It's totally fine," "Immigration is not going to get him," "It's not a felony," "I pled him to a misdemeanor, all good." No, not necessarily all good. So misdemeanor convictions can also be incredibly problematic for immigrants regardless. Domestic assault, for example, can be a killer for an immigrant. Domestic cases are really, really hard. Drug cases, any sort of DUI, child abuse — there's all sorts of things that can count. We have talked about crimes of moral turpitude. There's a million and one reasons that misdemeanors just generally aren't safe. A lot of practitioners think that they are, misdemeanors are safe. No, you need to be careful.

You should expunge eligible convictions. Everybody thinks yes. If you have got the opportunity to expunge a conviction, you absolutely want to do that because it's not on your record, goes away. The answer is no, it never, ever, ever, ever goes away for immigration purposes. And then what happens is, you have a practitioner like Mr. Ozment who is trying to prove that you didn't plead to this or you did your diversion or whatever, but if the stuff has been expunged, it means there's no court file left. So now you are stuck in a position where you have to take the word of the government because you don't have a court file to prove that it's not what they're saying it is or that it was dismissed under favorable terms. So everybody thinks just expunge it and get it off your record and that'll be so much safer, but in reality it's counter to your intuition here. You want to make sure you can hold that because the government will have those documents, and you want the benefit of having those too.

JEREMY JENNINGS: And another thing about this is, your client often thinks they don't have to tell immigration about it if it's been expunged, which means when they go to show up for their appointment, they get a misrepresentation charge against them because they have said, "Have you ever been arrested or convicted" and they say "no." They have to be disclosed to immigration even if they have been expunged.

TRICIA HERZFELD: And when you're talking to your client, ask about things that have been expunged, ask about things that were just dismissed because generally they don't understand that they were dismissed under one of these diversion pleas that you need to know about. And sometimes they'll say, "Have you ever been convicted of a crime" and they tell me "no." Fifteen times they'll tell me no. And then I'll say, well, have you ever gotten busted for weed? Oh, yeah. Have you ever gotten busted — oh, yeah, for driving, yeah, tons of times, and, oh, and there was that one DUI. Sometimes you need to go through very, very specifically with your clients the types of cases that we see our immigrant clients being arrested and convicted for all the time, like driver's license cases, because sometimes they just don't consider those to be crimes.

And my last point is, and this is probably a little bit more complicated, but are probation sentences treated as incarceration for immigration purposes? This is kind of complicated when you start getting into aggravated felonies and these types of things. And the answer is, it depends. So you want to watch this. In order to get a probation sentence in Tennessee, you have to be sentenced to a suspended amount of incarceration. So when you look at the plea agreement, the plea agreement will say, for example, two years suspended, special condition probation. Now, we all see that as they got a two-year

probation sentence, and isn't that fantastic? However, Tennessee law mandates that in order to be able to be given a probation sentence, it has to go along with a suspended sentence of incarceration. I have never seen that in any other state that I practiced. Dan may know if it's a more common thing. I personally haven't seen it before. But the reason that this is a problem is because when you start getting into calculating how much time somebody was sentenced to for various purposes, for aggravated felonies or whatever, suspended sentences count for incarceration. So if you've got a three-year suspended sentence and they're trying to determine if you're an aggravated felon, that's about the same so far as they're concerned. And in Tennessee even, if the judge is trying to give you straight probation and they're trying to indicate that "we don't think that what you did was that bad, so we're going to give you straight probation," it doesn't matter because, in order to have straight probation in Tennessee, it has to correlate with the suspended sentence of incarceration and suspended sentences count for immigration purposes in certain contexts. So you want to be very, very careful about that. We've had that come up with our clients quite often, and it's a difficult thing to try and get out of. So that's pretty much all I have. I could talk for hours, so you all should shut me up. And we'll let Karla go.

KARLA McKANDERS: Hello, everyone. I'm going to switch gears significantly now and go from an explanation of the criminal side and the implications on the immigration system to talk about the actual civil immigration process, how it works, and specifically how there are many due process violations that occur in the immigration civil context.

Before I get started, I definitely wanted to thank Katie and the *TJLP* for this putting together. On our long

drive over to Memphis, we talked about the conference in October and then came back this semester, and I found out it was all organized. So congratulations for putting together such a wonderful seminar.

Since President Obama began his second term, top priority for his administration has been of course immigration reform — we hear it all over the news — and wanting to fix the broken immigration system. One of the top priorities or special attention has been given to especially Latino voters who have been dissatisfied with the lack of progress on immigration reform and the failure to move forward on immigration reform during Obama's first term in office.

So in my presentation, I want to focus specifically on the constitutional due process violations that result from a civil immigration removal system that is based on Fundamental Fairness Standard under the Fifth Amendment. I propose that considering immigration reform, the lack of due process rights afforded to immigrants during their removal proceedings has to be a topic of primary concern when we think about immigration reform.

The due process crisis has been documented in circuit courts. The American Immigration Council recently issued a report, which I have placed in your materials, which is called *Two Systems of Justice, How the Immigration System Falls Short of the American Ideals of Justice*. The National Lawyers Guild also has issued a report, and senators have been testifying about how due process has to be brought back into the immigration removal proceedings.

The lack of due process rights in the immigration system range from lack of legal representation, as immigrants in the system aren't guaranteed any form of representation by an attorney; the lack or failure to provide bond determination for immigrants who are detained; and

also, in some instances, the lack of the procedural safeguards that come along with having protections of the Federal Rules of Evidence in immigration proceedings.

So what I want to cover briefly is to first give you an overview because I know a lot of you don't practice in the area of immigration law, to give you an idea of how a case progresses through the immigration system. Then I'll talk about the Fifth Amendment, due process standard, which, in my opinion, results in a watered-down protection for immigrants and specifically poor immigrants and immigrants of color. And then I will talk about how Congress, over the years, has eroded the due process standard, and specifically some of our co-presenters have talked about 1996 congressional changes. So I will talk about those. And then finally I'll talk about what reforms are necessary in order to bring back a due process standard to some civil immigration proceedings.

I want to start with an example first of how due process violations result in removal proceedings. I have a case that comes from the ACLU, which talks about an immigrant, a 52-year-old grandmother was imprisoned for seven months in New Jersey. She was a long-time Green Card holder or lawful permanent resident with three U.S. citizen children and two U.S. citizen grandchildren. Immigration officers came to her home and arrested her in the spring of 2011.

Under the mandatory custody provisions enacted in 1996, she could not be released from immigration prison because she had a nine-year-old minor drug possession offense. She had not been sentenced to any jail time for that offense, and it was her only conviction during the thirty years that she had been in the United States. The Federal Government didn't permit her to ask the judge to release her on bond because of this old conviction that she had. And she had posed no danger to anyone and was not a flight risk. So this is an example of how, mainly through

the 1996 provisions that I will talk about in a second, how immigrants may be detained for an old conviction and not given bond pending their immigration court proceedings.

Just to give you an idea of what happens after the case goes into an immigration court, the Department of Homeland Security will issue what's called a Notice to Appear, and the Notice to Appear is a complaint against the immigrant saying that they are inadmissible or removable from the United States. And it has the charges to which an immigrant is to, say, admit the allegations, admit that they're removable or inadmissible into the United States, and then assert that they have a defense to remain in the country or take what's called Voluntary Departure in some instances.

An immigrant, like I indicated before, does not have the right or access to counsel when they come into immigration court proceedings. If you went to immigration court in Memphis, you would be provided a list of attorneys that possibly can provide their services at a reduced rate or a list to the community legal center, which would refer you to attorneys that can help you with your case for no cost.

Once you are in the immigration system, you have what is called a Master Calendar Hearing. And at that Master Calendar Hearing, you have to go before the judge and admit or deny the allegations and assert that you have a defense to removal or no defense to be removed from the country.

If you have a defense to removal, you are then moved ahead and given a date for an individual hearing. And at this hearing you can present evidence to why "I can't be removed from the country." You can assert asylum, you can assert what is called Cancellation of Removal, which means I've been in the country for a certain period of time, I have a U.S. citizen child

or spouse that would be detrimentally affected by my removal from the system.

In immigration court, when you have that individual hearing, you don't necessarily have to — all immigration courts do not follow the Federal Rules of Evidence, but you are allowed to present evidence and present witnesses in support of your claim.

So when we look at the constitutional protections that are offered to immigrants in removal proceedings, there is the basic Fifth Amendment Due Process Right. We all know that due process derives from the Fifth and Fourteenth Amendment of the United States Constitution. There is substantive protection, and there is also procedural protection.

The procedural component imposes restraints on arbitrary action by the government guaranteeing fair procedures when the government seeks to deprive a person of life, liberty, or property.

The Supreme Court has stated that due process of law is the primary and indispensable foundation of individual freedom that defines the individual and delimits the power of the government. So it's important that, when looking at our system, our immigration system, and the hearings that's given to immigrants, that we provide due process protection to immigrants in removal proceedings. But immigrants are only entitled to the protection under the Fifth Amendment, and the due process protection under the Fifth Amendment says that immigrants are guaranteed to a Fundamental Fairness Standard. And what this means is that, if an immigrant wants to challenge their proceedings for a violation of their due process rights, they have to show that the proceeding was so fundamentally unfair that the immigrant was reasonably prevented from presenting their case, and secondly, they have to demonstrate prejudice, which means that the outcome of the

proceedings may have been affected by the alleged violation.

So what I argue is that the standard has, and other immigration scholars have argued, that this standard creates a deportation, a different standard, where we have a certain set of rules that apply to non-citizens when they are faced with the possible deprivation of liberty, interest, such as separation from family members, removal to a country where they have no significant contacts, or in some instances, the inability to ever return to the United States.

So by classifying deportation as a civil penalty, the Supreme Court has held that immigrants facing removal are not entitled to the same constitutional rights that are provided to the defendants in facing criminal punishment, and it is for this reason that immigrants facing deportation today are not read their rights after being arrested for an immigration violation, they're not provided an attorney if they can't afford one, and they were not allowed to do things, such as challenge an order of removal for being cruel and unusual punishment.

Congressional erosion of due process rights. I want to just talk a little bit about some of the 1996 changes that resulted in the rollback of due process rights. I think one of the panelists, Yolando Vázquez, spoke about this morning how there can be no statute of limitations on misconduct that can make you removable from the United States. For example, Katie actually had a case, a cancellation of removal case, where her client in the immigration clinic had committed check fraud numerous years ago and her client had been in the country for approximately thirty years and who was a lawful permanent resident and went to visit her mother in the United Kingdom, came back into the country, and placed into removal proceedings because of conduct she had committed probably about twenty years prior to being placed into removal proceedings.

So what the Antiterrorism and Effective Death Penalty Act of 1996, which is called AEDPA, and the Illegal Immigration Reform and Responsibility Act, which is called IIRIRA, both did was they expanded the categories of aggravated felonies. It also added certain crimes, such as gambling and passport fraud, to the crimes that can make you removable from the country. So what happens is — I think Yolando mentioned — that if you had committed a crime prior to 1996, that didn't make you removable from the country. If you left the country, like our client, come back in, and you can find out that your previous criminal acts or criminal conduct would make you inadmissible to the country. So this is one of the examples of how the government may seek to deport immigrants based on old criminal convictions that have been designated by the 1996 laws as aggravated felonies or crimes that make you removable from the country.

As I mentioned at the beginning, another due process violation that needs to be addressed by immigration reform are the mandatory detention provisions without an opportunity to have a bond hearing. Under IIRIRA and AEDPA, detention without a bond is mandatory for nearly all non-citizens with criminal convictions, including, in some instances, nonviolent misdemeanors.

The Supreme Court has upheld this pre-removal mandatory detention law based on the understanding that removal proceedings are generally completed within a short amount of time. In reality, though, many immigrants spend years in detention while they are waiting for their hearings to be resolved. So what AEDPA and IIRIRA have done is they have increased the amount of immigrants who are in detention, and in 1996, when the laws were passed, there were approximately 8,500 immigrants in detention. And in 1998, right after the law was passed, there were about

16,000 immigrants in detention, so that number doubled. And we know that the process of detaining immigrants kind of backfired against the U.S. Government when — at the end of March of this year, the U.S. Government ended up releasing approximately 2,000 detained immigrants because of funding cutbacks and the inability to detain immigrants without a bond hearing.

Another due process violation that occurs in immigration proceedings is, many immigrants who go before an immigration judge or aren't given the opportunity to go before an immigration judge and agree to be removed without appearing before the judge — this process is called expedited removal procedures, and it provides low-level DHS employees broad discretion to deny admission to immigrants summarily. And sometimes people that get caught in the system may be asylum seekers or people that may have access to some form of immigration relief.

So this process works by — if an immigrant comes into the country, arrives at the border, and doesn't have proper documentation to enter, under expedited removal, an immigrant can be removed from the country without having a hearing, without having a chance to present evidence or no assistance to legal counsel. It also impacts asylum seekers, who are people who are forced to flee their countries because they are afraid of being persecuted.

When they arrive at the border and they are questioned by a low-level immigration official, they will be granted an interview, and the person at the border has discretion to decide whether the immigrant will be forwarded on to have a credible fear interview, if they have asylum, or whether or not they can lawfully enter the country. So the lack of due process protections that are provided or not provided in the expedited removal proceedings are really as

problematic when we look at the way our immigration system is set up.

And finally, another issue that we have with — or I have with — the immigration system is the lack of right to a speedy trial. There is a large backlog in immigration courts. When my clinic was in Memphis this past March, the judge went through a long speech about how many cases she has and that she has to hear cases not only in her jurisdiction but also in Kentucky, and this results in a backlog of approximately a year to a year and a half from that time that you have your first Master Calendar Hearing to having your individual hearing before a judge. It can take a long time to proceed through the immigration system.

So in conclusion, there have been many suggestions for how to reform the immigration system to guarantee due process rights to immigrants. One proposal has been to create Article III courts for immigration courts, and the American Bar Association has wrote a large report and recommendation on creating a separate immigration court system that would be akin to the federal courts that decides tax cases.

We know that in immigration court we have approximately 231 immigration judges across the country and they hear over 300,000 cases, and that's approximately 1,200 cases for each judge. And that is about three times the amount of cases that a federal district judge hears. Taking and creating Article III courts is an idea that has been criticized because Congress has the ability to create immigration courts and there's a concern that taking this responsibility and making an Article III court would take away some of Congress's power and their ability to create a uniform rule of naturalization.

Other solutions to the due process violations that occur in immigration court have been access to counsel for

those cases that specifically involve minor children or people with mental disabilities to give them the ability to have somebody to advocate on behalf of them and to also effectively present their cases before immigration judges.

Also, another solution would be to provide bond hearings and revoke the mandatory detention for nonviolent criminal offenses. So the case I described at the beginning, we would offer the immigrant, who has an old conviction, to be able to argue that she is not a flight risk, that she should be released on bond pending her deportation hearing.

Also, another proposed solution would be limiting the ability for lawful permanent residents to be deported under the 1996 laws where the Department of Homeland Security can go back and institute removal proceedings for old conduct or placing a statute of limitations on the conduct that you can be placed into removal proceedings. Of course, I think Jennifer Chacón mentioned that, when we look at immigration reform, that it's probably not possible to achieve all of these goals in one fell swoop, but I think that, if we look at our system and we say that we want to provide a system that guarantees just basic rights for people that come before an immigration judge and have to defend and know the INA in order to remain in the country, that it's imperative that we assure just basic due process rights for immigrants that become before the court system. Thank you.

MR. BOCK: It looks like we have about forty minutes for question and answers. Really quick before we jump in, I would like the panelists to briefly restate their name for the court reporter so they can attach a name to a transcript. And then secondly, if you guys, the panelists, have any questions for each other, anything jumps out at you before we open it up to the floor, I would like to give you guys the opportunity to respond or perhaps ask a question. Do you

guys have anything that stood out? Well, are there any questions? Yes, sir, gentleman over here.

UNIDENTIFIED SPEAKER: Tricia, good to see you again.

TRICIA HERZFELD: Good to see you.

UNIDENTIFIED SPEAKER: I know we had done some work once upon a time here. You were talking about I guess the things that you look at before you have a client enter into a plea agreement. Again, I'm looking at it from the perspective of a practitioner. Checklists are great, little things I can look at. What do you have or what is available to you that you would recommend to a practitioner so that, when you meet with a client before pleading, you have some sort of idea of what to actually ask them about so you can sort of determine if they are going to have immigration consequences?

TRICIA HERZFELD: I have a practical answer to that, and then I have a totally impractical answer because sometimes I think you just have to reach for the stars, or you are never going to get them. The practical answer is, I'm trying to put something together just based on my experience and stuff that I've gathered from the Nashville public defender's office. Mike Holley, I don't know if he ended up being a speaker or not, has put together a fantastic kind of list from 2008 that we are trying to update of what Tennessee crimes tend to be considered, crimes of moral turpitude or aggravated felonies to —

UNIDENTIFIED SPEAKER: I think that's part of the materials here.

TRICIA HERZFELD: It's really, really fantastic. I rely on it all the time. It needs a little bit of updating. I personally, just from a practitioner's standpoint dealing — my client base is entirely immigrant-based, so all of my criminal cases are only on behalf of immigrants or those people who could have immigration status issues. So I see certain things come up all the time, so you have the criminal simulation, forgeries, kind of the fake ID stuff. As a practitioner, I always try to get the second-degree misdemeanor out of that, which is criminal impersonation, and generally the second-degree misdemeanor puts your client in much better shape.

The other thing I can say is — I don't know if anybody talked about the crimes of moral turpitude before. If I have to plead my client to something that I think could be considered a crime of moral turpitude — which, again, it's difficult because your client wants to stay out of jail, they want to try and maintain their immigration status, they want to try to get out of jail, so you have a lot of competing interests. There's a thing called the Petty Offense Exception, and I don't know if that was discussed at all. But there's a way to lessen the impact of a crime of moral turpitude, so if you have to plead my client to something that I think might be, I try to get that plea to where it's under a year. So it's 11/29, with a sentence that is actually less than six months. And this I've learned a ton from NIP, and there's a gentleman by the name of Norton Tooby. So if there's any criminal practitioners in here, you need to join NIP, and you need to buy all of the Norton Tooby books because I now have them all dog-eared and highlighted like a million times. There's a lot of charts and stuff that are in there.

My bigger world solution, like how to change the system from an ACLU case, I think the criminal bar needs to be reformed somewhat. My true belief is that, if you have a client who is an immigrant, you cannot really, truly

provide effective assistance of counsel if you do not also have an immigration practice that's going alongside of it or somebody that you can call. My personal belief is that every public defender's office should have an immigration specialist on staff, and for those people who are taking appointed work or taking criminal cases, I think just like you can get money for a mental health evaluation or competency evaluation from the AOC, the Administrative Office of the Courts, I truly believe if you have a client who may have immigration issues, you should also be given money like that to go consult an immigration specialist because it is so incredibly complicated that, even when I think I've got a handle on it, I'll come back — I'm fortunate enough to have an office full of immigration lawyers, and I come back and "oh, no, but you forget about this, or there's also this issue." So those are my kind of long-winded, real-term answers in the interim, but really I think — and it's going to be kind of one of my goals — to try and really reform the way Tennessee is doing that to make sure that immigrants are getting adequate representation.

UNIDENTIFIED SPEAKER: Let me ask a follow-up question then. In terms of your practice, how much of it is in state court criminal proceedings, how much of it is in federal court criminal proceedings, and what sort of differences have you noticed there in Nashville, the middle district?

TRICIA HERZFELD: I would say most of it is state court proceedings, and I would say that the majority of it is Nashville, though I'm getting very busy in the donut counties. Kind of once you get out as the person who is doing this and — by the way, my Spanish is only marginal. It only passes just barely. But once I've kind of gotten out there — and I'm kind of bragging just a tiny bit, and I don't

mean to do that. But the judges and district attorneys and even the other lawyers in the courtrooms are so grateful to have somebody say, "Hey, I realize you are taking these pleas every day, you're actually screwing all these immigrants. You think you're helping them, but you're not." I've had judges say, "Oh, my gosh, we had absolutely no idea, we thought we were helping them." So it's been a lot of state court stuff, and I find that, the more people that are out there and the more they ask questions, the more they're learning. The federal court stuff we do less of, and that's all of our civil rights practice. We also do civil rights cases, so I'm in federal court on federal civil rights cases. But the federal criminal stuff, they generally are the clients that either can't afford us or the charges are so rock solid because they have gotten busted on biometrics or whatever it is that they end up opting for the public defender, which, in the middle district, we have fantastic federal public defenders.

UNIDENTIFIED SPEAKER: In federal court, I was wondering, a lot of times there are cooperation agreements where the people end up cooperating, and I had one a couple years ago where they got a U visa out of that cooperation. And actually it was an identity card situation. They got to stay, and they'll eventually probably become citizens. And I just didn't know if you had anything about U visas that you would like to add.

JEREMY JENNINGS: It's out there. If you've got a client who has been participating in the prosecution of an investigation, a criminal investigation, and the law enforcement agencies are willing to certify their participation, then you can apply to the immigration service on their behalf or participate in

assisting the government in the same and move them into a legal status, eventually a permanent resolution.

TRICIA HERZFELD: We do a lot of U visa work, so that's one of the screening questions we have kind of added. The way kind of my practice works, just so you know, is, generally an immigrant will come into the office and say, "My brother or my father, whoever, is in jail" — we're getting less of that because ICE has gotten a little bit more flexible with the detainers, but for the vast majority of time, it was "so and so is in jail," "they've got an ICE hold," "I can't post a bond," "oh, my God, oh, my God, oh, my God, what do I do?" So you go in, you interview the client, you figure out their immigration relief, if they have any, and then you figure out where they are in their criminal case as well. And we generally come back to my office, we synthesize both of those things. So do they have immigration relief, what is it that we think they have? And then, okay, based on that, what can we do to creatively plea bargain in order to maintain that?

One of the questions we've added to our screening list is have you ever participated in assisting in the prosecution of a crime, or have you ever been the victim of a crime? And there's a whole list of things that if you are a victim of a crime and you try to prosecute that person, you can get a U visa. Mr. Ozment was also successful — I think it's the only case in the country — of obtaining a judicially-signed U visa certification from a federal judge in the *Juana Villegas* case, and that was a really, really huge deal because that was based on the civil rights case of Herby Chuckle Sabed (phonetically) and the judge went ahead and signed the Supplement B for the U visa certification.

The other thing that I should mention, and I'm probably talking too much, so just stop me if I am, but what I do sometimes with my clients is we do

what's called charge bargaining or time bargaining. And I will bargain time, and a lot of the district attorneys look at me like I have lost my mind. Some of the older criminal defense lawyers who have been around for a long time are like, "That woman is crazy," "She looks like she's 12," "We have never seen her before," "Clearly she just graduated from law school and is committing malpractice all over the courthouse."

Like if I had a client who was eligible for DREAM Act relief, which has happened, and he got busted for DUI, and bad facts, they blow — you can beat them sometimes, but mostly you can't. He blew at point one two. Crap case, awful, but I managed to go to the district attorney and say, "Look, this kid is eligible for what everybody knows as the DREAM Act, and if he pleads to this DUI, he's done." He's toast. That's it, game over. If you would be considerate enough to allow me to get him a reckless driving conviction, for example, which is not certain it won't count but is much better than where we were, I agreed with the district attorney to let him spend more time in jail. I've pled guys to more time in jail to get it as a simple assault as opposed to a domestic assault because a simple assault is going to be easier for them to work through in immigration court than a domestic assault, which can kill them. So sometimes I'll say, "Yeah, you know what, we will give you eighty-nine days in jail," and they're like, "This woman is nuts, pleading all of her clients to eighty-nine," "What is wrong with her?" Well, no because, in that case, my client's goal was really to remain in this country and still be eligible for whatever immigration relief it was, so the eighty-nine days, which he'll probably only do half of, he was going to do that time if we bound the case over anyway.

So I think a lot of it is just client counseling and trying to figure out what it is that their end goal is, where their priorities are, and then sitting down with one of the

million Tooby books or all these practice advisories that NIP has done and trying to figure out how to fit all these square pegs in a round hole. It's like chess.

JEREMY JENNINGS: Just to draw the connection, the eighty-nine-days Petty Offense Exception — that's what they're shooting for there. Has the misdemeanor been less than six months of imprisonment? Also, think about it. Sometimes you might have a client that doesn't really want to plea or is not interested in doing a plea, and you can use the immigration consequences to help convince them that "this is really something you should reconsider because we have some control over a plea situation." If we do it right, versus if we go to trial, then, as everybody knows, anything can happen.

TRICIA HERZFELD: Which brings me to one other point. Some of the other things that I have learned from attending CLEs and practicing and reading all this stuff is, what you say in a plea agreement also makes a huge difference. So depending on a county, a lot of times they will want to recite the facts that were alleged in the indictment or the affidavit or whatever, and if I pled something much lower, sometimes I'll just go in. And I'll be very, very specific about my language and say we will stipulate that there is sufficient facts to support simple assault, but we will not stipulate to any facts outside of that. Now, whether that works at the end of the day, I don't know, but what you want to try to do is keep the record of conviction and kind of all the documents that out are there as tight and clean as you can.

I have a gentleman right now who is charged with sexual assault of a child, and one of our goals is going to be to try to keep out anything having to do with a child in order to be able to maintain a plea that maybe might help

him immigration-wise later. But it's never a hundred percent.

UNIDENTIFIED SPEAKER: The wording made me think of a question. You said the wording of how you enter the plea is very helpful. Would it be helpful to convince the DAs to let you enter best interest pleas because, in my little experience, DAs tend to not really care if you enter a best interest plea or not?

TRICIA HERZFELD: So far as I understand, immigration doesn't really care if it's a best interest plea or not. You can maybe get a little bit of wiggle room out of that, but you probably have more experience in it than I do. I think they consider them to be the same.

UNIDENTIFIED SPEAKER: Well, dang.

TRICIA HERZFELD: You try, you try.

UNIDENTIFIED SPEAKER: I guess my question will be for Tricia too. Have you represented any clients on post-convictions with *Padilla* yet, and if so, how are you going to satisfy the prejudice call? We talked a little bit today about deficiency, but how do you show prejudice, other than your client just flat-out saying, "But for counsel not telling me or giving me misadvice, I wouldn't have pled guilty?"

TRICIA HERZFELD: The cases we've had have been kind of stark, which has been good, where somebody has pled to something that is literally one day more than what they needed. They pled to a year, and they needed less than a year. Or they pled a day over what would have been the Petty Offense Exception or whatever. So the cases we've had have been pretty clear that, had the lawyer known

the immigration consequences, they could have easily gotten that from the district attorney, and that's kind of the argument that we have made. But it is a little bit complicated in having to show affirmative misadvice versus nonadvice, which is — when I was in Miami, like I said, I misadvised everybody, but I don't know that that was always affirmative misadvice. Sometimes it just could have been nonadvice. So I think that's a little bit complicated.

And I think knowing exactly what the issue is — whether the person can apply for affirmative relief or is removable, does affirmative relief count, does it count that your person is now not eligible for the DREAM Act because of advice they received from their lawyer a year before the DREAM Act was even a sparkle in anybody's eye? I think those questions, a lot of those are still unresolved, but we continue to make them.

It's extra-complicated how I advise my criminal clients because they say, "Is this going to hurt me in immigration court?" And I say, "Well, based on the law as it is today, this is what we know. Things could change tomorrow, things could change the day after, things could change a million times after, and I can't promise that it never will. I can say, based on what we know today, that this is where we are at." It makes you very nervous in advising a client, and I have to say, a lot of my criminal defense lawyers now say, "Gosh, Tricia, I represented immigrants all the time and thought I was doing just fine, and now that I've talked to you, I realize, 'Oh, my gosh, I don't want to touch that in a million years, I'm going to send them over to your office,'" which has been great for my business but also terrifying as a criminal practitioner that there's so much out there. And it's so incredibly specified and difficult that it can take a really long time to get a handle on it, and I don't even profess to have a handle

on all of it. I'm again lucky that I have immigration practitioners in my office.

UNIDENTIFIED SPEAKER: Karla, you mentioned that the Federal Rules of Evidence don't govern immigration proceedings. Is there something else, any other kind of rules of evidence that regulate what can and cannot be done in regulation proceedings?

KARLA McKANDERS: So basically you go back to Fundamental Fairness Standard when you are litigating cases in immigration court, and so you can make arguments based upon the Federal Rules of Evidence that something is not admissible. And the immigration judge will hear your arguments. That's what I advise my students to do in the immigration clinic. But ultimately, if evidence is let in that you feel should not be let in, then you can go back to making an argument that it was fundamentally unfair for that evidence to come in and that you were prejudiced by letting that evidence in.

There have been a whole line of cases — I believe the Yale clinic has challenged different criminal evidence that comes in, that's allowed to come in that violate people's Fourth Amendment rights because different standard applies in immigration court than it does in criminal proceedings in terms of the types of evidence that is let in, and courts have evaluated, whether or not if somebody's rights are violated in terms of the way a search was conducted, whether or not that evidence should be let in. But again, it goes back to whether or not the admission of that evidence was fundamentally fair and how it prejudiced the immigrant in letting in the particular evidence.

UNIDENTIFIED SPEAKER: Kind of a follow-up to that sort of. In criminal proceedings when they are talking

about pleading and having dispositions and all that kind of stuff, is there anything in particular that should be either excluded from the record that cannot be brought into court or specifically included in the record to make sure that those facts are brought up in the immigration proceedings?

KARLA McKANDERS: You can probably answer that in terms of when you are pleading your clients.

TRICIA HERZFELD: It's very, very fact specific, and a lot of times I kind of say that there's kind of the gold standard for what you want, like I really want my client not to be charged with sexual assault of a minor. It would really be better immigration-wise if he wasn't. Truthfully we're not going to be able to plead anything that's really going to make just that entire thing go away. Your goal is to just kind of do the best you can with what you have. There's some old saying about — I don't know — making something out of mud. Anyway, I don't know it. But my point is, you can sit there, and it's easy to second guess anybody and say, "Well, you should have gotten this," "You should have gotten that." I think you just have to really look at the strength of the prosecution's case, if your person is appropriately charged, the facts that are in the indictment. There are certain things you can do in Tennessee where — most people, at least in Nashville, are charged by indictment, if you get that far, to criminal court. Sometimes your clients can have more of a benefit in staying in general sessions where there's not as clear of a record. If the facts are going to be included in the indictment, maybe you would rather see if you can work this out in general sessions so you can control your record a little bit.

You can also negotiate a plea from time to time with your district attorney that may allow you to avoid an indictment by the grand jury and instead plead to

a count that's been brought by information. And if you can negotiate with your district attorney — again, it depends on the district attorney that you're dealing with, but if you are pleading to something by information, you can a lot of times control the information that's in there and then, therefore, control what's in the record. But I try to be very specific. There's been a million books written on it, and I don't profess to be an expert by any stretch of the imagination. But there are things you can do to try to lessen the impact in immigration court. The way it works in our office is, we go to the jail, we figure all this out, they retain me to be their criminal lawyer, I go, I do all the criminal stuff, and then I literally come back and take the file. And I hand it to one of the immigration lawyers in our office and say, "Okay, I did the best I can," "Here you go," and then they kind of take it off on the next process.

JEREMY JENNINGS: Really we have the national expert in this sitting right back there — Mr. Kesselbrenner — and hopefully they'll spend some time talking about categorical approach and modifying categorical approach and the record of conviction and how you can control some of that. As Elliott said, we are really pleased to have Mr. Kesselbrenner here to talk to us about that this afternoon. And just another plug, I don't know about Tricia, I know Elliott — are you doing the TVA CLE?

TRICIA HERZFELD: I am.

JEREMY JENNINGS: Tricia and Elliott are doing the CLE with the TVA in Nashville in a couple weeks, and I think, as I understand it — correct me if I'm wrong — but if you're really inspired about the civil rights kind of things that Elliott was talking about today, then that's what they're going to be doing at that CLE.

TRICIA HERZFELD: Seven and a half hours of civil rights, detainers, criminal immigration, kind of the whole kit and caboodle, so if you just can't get enough, seven and a half hours. It will be available online too. They've got the webinar.

MR. BOCK: Do we have other questions? Well, I have a question perhaps possibly for Jeremy or Tricia. I know the new immigration policy espoused by President Obama encourages the use of prosecutorial discretion, and I wondered if you guys had any experience with that and, if so, what effect criminal convictions had on those, if that was just like an outright bar to them granting it or how they have dealt with that.

JEREMY JENNINGS: I have had some experience with prosecutorial discretion cases. Obviously, it's much better to have a clean record than any record. The worst record you have, the worst case you're going to have for prosecutorial discretion. It doesn't have to be a hundred percent clean, but it's got to be pretty clean for them to — they're stingy with prosecutorial discretion. So if there is anything there on the record, you really need to outweigh it on the other side with all the pros, all the positive factors about the individual, to outweigh the effect of whatever criminal conviction they've got.

TRICIA HERZFELD: Our experience in that has been absolutely the same. The only time that we've gotten maybe a little bit more leniency is when we file a civil rights lawsuit on behalf of the client because the reasons that they got into the system were so bad to begin with. But other than that, yeah, they've been pretty stingy.

JEREMY JENNINGS: They've gone from no discretion at all to just a little bit of discretion, but it has not been a huge, transformative change in the way that Immigration Enforcement acts.

UNIDENTIFIED SPEAKER: Kind of along those lines, when you're dealing with a DA and you're trying to work out a plea and you have an immigrant client, how more likely is the assistant DA or DA to be when you've got the immigration issue coming into play? Are they more sympathetic and more likely to work with you, or it just depends on the crime and —

TRICIA HERZFELD: I think it actually depends on the prosecutor. I've had people who have been incredibly sympathetic, and they'll say things like, "Oh, my gosh, you mean he can get status, and he's here on something so awful. Let me help you." I also had a prosecutor in a donut county say — as I was trying to get my client pretrial diversion, which is not something they did there, so I was coming up with different ways they could do it — well, just continue it for a year; well, she does all this community service. You have to be very, very creative in these. So in that plea negotiation, he said to me, "Well, where does she work?" Which is always kind of a complicated question when they start asking you questions. You don't want to answer them. You don't want to say, "Oh, my client, who is here undocumented, is working, and I don't know if she's paying taxes." You don't really want to get into it, but it's a judgment call with your DA at that moment. So I told him that she works at a local Mexican restaurant, and he said to me, "Well, gosh, I wish I would have known that, I sure love their tacos." And I said, "I'm sorry?" And he said, "Well, I didn't really want to work with you, but I sure love their tacos. And if I deport her, who is going to make my tacos if she gets deported? I need somebody to make

my tacos." Now, to me, that was just one of the most horrible things somebody could have said. I was just ready to fall over. I cannot believe I actually may get this plea deal because you think somebody needs to make your tacos. But it worked, and I got the plea deal. Now, Client doesn't need to know why. I don't think it probably benefits her to know why. But sometimes you have to play those games.

I've also had some prosecutors who have just said straight-out, "Now, I treat them just the same as I treat everybody else, and so it's the same for them, two days in jail for whatever this offense is. And that's what I give to every non-immigrant, every immigrant. It's the same for everybody." Then you try to explain to them, yes, but the consequences for the immigrant are very different. If I were to go to jail for two days, I'm not going to lose my family and be sent to a country I haven't lived in in twenty years, that's not going to happen. But for my client, I am telling you those are the consequences of this plea. And sometimes they are just like, "Well, they shouldn't be here anyway, so I don't really care. We're trying to get them out of this county." It just depends. I try to get a lot more flies with honey, and then when that doesn't work, if I've got a basis to file a civil rights lawsuit, I do.

KARLA McKANDERS: I have a question. Can you tell us about some of the civil rights lawsuits that you have filed?

TRICIA HERZFELD: Sure. How long have we got? I think one of our favorite — what does that mean? One of the bigger lawsuits we filed was in coalition with the ACLU. Elliott was the cooperating attorney in the ACLU's Immigrants' Rights Project in New York. We had a massive immigration raid outside of Nashville where twenty people were picked up by — and I'm not speaking

out of term because the case is still going, but you can find all this in the complaint — where the allegations are that local law enforcement works with ICE to come and do a coordinated raid where twenty people were picked up and put into removal proceedings. There were no criminal warrants. There were no administrative warrants. There were no warrants at all. Our allegations are that people busted in doors, drug people out by a gun to their head, called them all sorts of really nasty, horrible things in front of their children, and then put them into removal proceedings. The good news is, the case is still going. We have been litigating it for about two years. We just got past the first motion to dismiss and are in the middle of discovery that is probably going to last forever, but that's probably one of the bigger cases we've done.

Mr. Ozment, of course, has talked to you about the *Renteria* case, which is 287(g). There was also the pregnant, shackled woman, *Juana Villegas*, and there's been a series of much smaller lawsuits where, instead of twenty people in an apartment complex, it's been two, where people have come in without a warrant and violated the Fourth Amendment. The Fourth Amendment is kind of really key when you've got some of these immigration agents that kind of maybe are a little bit full of their authority or lack of it and decided they're going to go in and they're going to get these guys. It seems to have calmed down a little bit, which is good. I think there's probably been some policy changes from D.C. that have changed things, and we felt that. But we've had quite a few, and they are always very interesting. Horrible for our clients but good to be able to vindicate that and to be able to say to law enforcement, yeah, the Fourth Amendment actually applies to everybody. Not just whether you are a citizen or not, it absolutely applies to everybody. And being able to vindicate those rights for our clients, who feel really mistreated — one of them said to

me, "I came here because I needed to and I was told that this is such a great country and they would treat me and my family so well. I don't understand what's happening." And when I feel like I'm in a position that I have to apologize to my clients — "I'm sorry," "This isn't really who we are," "This isn't a country that we're meant to be, and we are doing the best we can to vindicate those rights for you" — puts you in an awful position. You don't want to feel badly about the way other people have treated them when they're just trying to come here for a new life.

So anyway, that's my soapbox. But it's very rewarding work. Anybody who is considering doing it, I can tell you, it's incredibly complicated. The landmines of 1983 make it very, very difficult to get past even your initial pleadings. So if anybody has any more questions about that, just give us a call at the office; we're happy to talk to anybody at any time.

JEREMY JENNINGS: Have those cases settled, gone to court? What is the typical resolution of the smaller cases that you're talking about?

TRICIA HERZFELD: I think we've settled most of the smaller ones. The bigger ones are probably going to be litigated forever. The *Juana Villegas* case, if anybody is following it, was just remanded from the 6th Circuit, so we will be re-trying that case is how it appears, which is interesting because it was a trial just on damages the first time around. But now it will be liability and damages, at least part of it. So that case is going to go on for a while. The *Renteria* case went to the Tennessee Supreme Court and back and forth. And the immigration race case that we have right now, it looks like it's just going to keep going. Probably be litigating it for ten years or so.

MR. BOCK: I have another question. What happens when a non-citizen is convicted of an offense that falls under the statutory grounds for deportation? Are they entitled to the same appeals process that citizens are, or are they put on a plane and flown out of the country?

TRICIA HERZFELD: Criminal appeal or immigration appeal?

MR. BOCK: Either or both.

TRICIA HERZFELD: From the criminal perspective, if you can get the appeal and everything filed early enough — there's a lot of landmines with times and time bars, conviction time bars, and there is some exceptions for fundamental due process issues. But you've got to get that stuff in. We have a couple clients right now that I'm appealing their criminal convictions, and in the meantime, they've been charged with aggravated felonies. They're being mandatorily detained, so they're sitting in for a long time while we're trying to get their criminal appeal through the system.

UNIDENTIFIED SPEAKER: Kind of following up to that, if your client is convicted to crimes that count, are they immediately — ICE immediately might come in, detain them, deport them, or do they have to go through the whole immigration proceeding? What immediately happens to them, or does ICE have the discretion to do that or not? What immediately happens to them?

KARLA McKANDERS: Most of the time, especially in Knox County, depending on the crime, there will be an ICE detainer that is placed on the immigrant while they are in criminal proceedings, if it's a certain type of offense, so you have the ICE hold placed on them. A

lot from Knoxville, depending on the crime, they will be placed in detention in Oakdale, Louisiana, which poses problems from a representation counsel standpoint because you might have an immigrant that is in Knoxville, can retain counsel here, immigration counsel here, but then is shipped off to Oakdale or another detention facility and has to find representation there, and some people get lost in the system. I've had many phone calls where someone will say they do not know where their family member is. They were in criminal proceedings, and ICE hold was placed on them. They couldn't find them. So that can be an issue. And then once you have an ICE hold placed on you, depending on the crime, you're placed in proceedings, and then you have a scheduling hearing and then an individual hearing before the immigration judge.

TRICIA HERZFELD: The ICE hold perspective of it is actually what makes things really challenging, and from a criminal perspective, a lot of your clients can be charged with something relatively minor. But the ability to post bond is significantly affected by the ICE hold. So I think Elliott was alluding to this earlier. It used to be that you couldn't even get a bondsman to write a bond on somebody with an ICE hold. It just couldn't happen. Functionally it depends. And I've learned this through working with Elliott that it is possible to pay your criminal bond and then go all the way down to Oakdale, get an immigration bond, and then have your client out, which is always a much, much better scenario to have your client fighting the criminal and immigration charges from being out of custody versus in. But sometimes your client will be charged with something that you know is not really going to be an easy sale for an immigration bond, something relatively serious, and you will have a little bit of a conflict with your client because they're like, "Well,

I want to get out," "I have a bond," "I want to get out," "I have a bond." And as a federal judge said to my client the other day, she said, "Look, in reality you're not going to get out. Based on the charges that you are charged with, even I were to give you a bond in criminal court, ICE is not going to give you a bond for these types of charges, so you are not going to get out. And the question is, Do you want to be here in Nashville where you can see your lawyer all the time, or do you want to be in Oakdale, Louisiana, where it's going to be much more difficult for you to see your client and, quite frankly, he may not be accruing any time towards any plea that he might get? So explaining that to your client, why they can't get out or the difficulties in that happening, is generally your number one thing for a client in custody.

UNIDENTIFIED SPEAKER: This is kind of related. When they are transferred from Louisiana, then are they subject to (inaudible) —

JEREMY JENNINGS: Absolutely. And the issue with the bond is pretty tricky. As criminal attorneys, if the bond — let's say it's a minor crime, and there's a $500 bond. And they could pay it tomorrow, but if the court date — the payment of the bond ends the state custody and that starts the immigration forty-eight-hour period under the detainer to come and pick up the individual. It's not the end of the criminal process anymore, it's the payment of the bond. So a lot of times what will happen is, immigration will pay the criminal bond, immigration will come and take the person and send him to Oakdale, Louisiana, and he will not be here for what would have been a dismissal of charges or time served or something, and now he's got a missed court date and complicated issues because immigration has whisked him away — by the way, they don't stay in Knoxville. The day that

immigration gets them, by that night, they are going to be in Alabama on their way to Oakdale, Louisiana. So once immigration gets them, they're going to be gone. So as a practical matter — that's why I was curious about fighting the issue about being able to pay the bond, which is absolutely their right legally, functionally it's not often, in my opinion, a very smart thing to do because your client is going whisked away to Louisiana and then you've got to deal with working with your client from this area. And they have missed their court hearing, and then it snowballs. And it's very difficult to manage.

TRICIA HERZFELD: I agree with that a hundred percent. Our clients always want to pay the criminal bond, and we're always like, no, no, no, wait. And the only time that we do is under very, very specific circumstances where we know what the person is charged with, we know when the net court dates are going to be in court, we know that the person has been whisked away to ICE, but I know I'm going to have an immigration bond for them. Or at least I'm strongly suspecting it. So if we could just set this court date off for two, three weeks or whatever — it's only under very controlled circumstances that we ever advise anybody to post the criminal bond. We have been fortunate enough that we found some bondsmen that are willing to work with us on that, and it took a lot of sweet-talking, a lot of "come on in" to get those criminal bondsmen to understand that they're not going to lose everything because the person has been brought into immigration custody. It's really an education thing.

MR. BOCK: I believe we have reached our time. I would like to thank the panelists for coming today and speaking and sharing with us. We will now take a ten-minute break before the next session.

PANEL DISCUSSION III: RECOGNIZING AND ADDRESSING IMMIGRATION CONCERNS IN THE CRIMINAL PROCESS

Violeta Chapin
Dan Kesselbrenner
Christina Kleiser

MR. ELKINS: Welcome. Before I send it over to them, I would like to introduce each one of them. In the middle here, we have Dan Kesselbrenner. Mr. Kesselbrenner is the executive director of the National Immigration Project of the National Lawyers Guild and has been in that position since 1986. Mr. Kesselbrenner is an expert on the immigration consequences of criminal convictions and contesting deportability in immigration proceedings. He's the co-author of *Immigration Law and Crimes*, which was cited in *Padilla v. Kentucky*. As a former member of the Clinton-Gore Department of Justice Immigrant Transition Team, Mr. Kesselbrenner's work defending immigrants has earned him numerous awards, including the American Immigration Lawyers Association Jack Wasserman Litigation Award.

Second to my right here, we have Violeta Chapin. Violeta Chapin is a 2002 graduate of New York University Law School, and Professor Chapin now teaches at the University of Colorado Law School in Boulder in the Criminal Defense Clinic. She's been recently published in the *Michigan Journal of Race and Law* in 2011 about the plight of undocumented immigrant witnesses in criminal trials. Before joining Colorado University's faculty, Professor Chapin was a trial attorney at the Public Defender's Service in Washington, D.C., for seven years where she represented indigent defendants charged with serious felonies at all stages of trial.

Last and to my far right, we have Christina Kleiser. Ms. Kleiser is a 1997 graduate of DePaul University College of Law, who has worked for various public interests and organizations in Florida and Ohio, specializing in child advocacy, criminal and immigrant defense. She joined Knox County Public Defender's Community Law Office in March of 2006, and she's been representing the public defender's clients in juvenile court since June of 2006 and counsels the Community Law Office's non-citizen clients about immigration consequences of their criminal charges pursuant to *Padilla*. Christina also teaches immigration law as an adjunct faculty member at the University of Tennessee School of Law. Thank you very much, and we will turn it over to you all.

VIOLETA CHAPIN: Hi, everyone. My part of the talk today is to talk to criminal defense lawyers who are representing non-citizen clients in state court and to give you an idea about the kinds of questions that you need to be asking them so that you can effectively represent them and advise them when it's fairly certain that they're going to be transferred to immigration court after their criminal case is disposed of.

So I'll give you a little bit more background in terms of where I'm coming from on this. I joined the University of Colorado's faculty in 2009 to teach the Criminal Defense Clinic, and what was happening was that we represent poor people charged with misdemeanors in Boulder County. That was a lot different from doing homicides in Washington, D.C., I'll tell that you. What we were seeing was a ton of people coming through with what were called ICE holds. And when I first saw one, I was like, What on earth is that? I had actually seen them when I was a felony trial attorney in D.C., but they weren't executing them necessarily when I left there, which I left the public

defender in 2009. And so in Boulder, we were seeing all these non-citizen clients coming through on really low-level misdemeanors, mostly traffic offenses, coming through with ICE holds, and we didn't really know what that meant. The judges had no idea what that meant. The DAs had less of an idea what that meant. And so we were all sort of floundering around trying to ask some immigration lawyers that we knew what it meant, and then we were probably giving them misadvice like Tricia was about how to resolve their criminal case and then try to sort of muddle their way through the immigration courts. We got a little bit better at it, thankfully, as we went along, and then in 2011 I added an immigration piece.

So now what we do in the clinic is we represent non-citizen clients charged with crimes, and students in the clinic learn how to interview these clients so that they don't screw them over in immigration court later on. What we've learned, what I've learned, students have all learned, and what we have been trying to teach the public defenders and the private criminal defense bar in Colorado is that non-citizen clients are different in very real, tangible ways — and advise and educate the defense bar about how to effectively represent them. That's essentially what I'm going to talk about.

We're talking about figuring out what your client wants to do, determining specific criminal defense goals based on the client's immigration status, and then Chris and Dan are going to talk about those last ones, talking more specifically about what's going on in Tennessee.

So like I said, we learned very quickly that non-citizen clients are different and that they're going to have to be negotiating both systems at once really right from the start. By the time we meet our clients in Boulder, it's the day after they have been arrested on criminal misdemeanor charges. We already know if they have an ICE hold. Is that true here in Tennessee by the time you meet your client

in misdemeanor court? Yeah. So you already know that they have got an ICE hold, and that tends to be the case in sort of smaller jurisdictions, where the jails quickly put people on a list to ICE and say to these people, "Check them out for us." And then ICE calls back and says whether or not you're going to stamp it with the ICE hold.

So by the time we meet our clients, which is literally less than twenty-four hours after they've been arrested, we already know that they have an ICE hold, so does the judge, so does the prosecutor. Big, red stamp on their intake jacket. The students have a little handy worksheet. The first place that I'll send you to — and I know Dan mentioned this earlier — www.defendingimmigrants.org. There is a *Padilla* intake worksheet. Print it out, take it with you to the jail, keep it anywhere you want, but those are all essentially the questions you need to ask the non-citizen clients. And we'll go through those.

As you've heard several times today, what happens in a criminal case is often fairly crucial to what happens later in the immigration case. So the first stuff, like I said, is the *Padilla* worksheet. There it is. Keep copies everywhere you can. My students have to keep it in their glove compartment, they have to keep it anywhere they're going to have to find it and access it quickly, and you are going to have to fill it out when meeting with your client who is a non-citizen who has been charged with a crime.

So how do you know that your client might be a non-citizen? So the first question I found is to ask where your client was born. Don't be like the jail, which is what the Boulder jail sort of slightly shame-facedly told me when I said, "Well, how do you decide who to put on the list and call up ICE and ask them to check?" They're like, "Well, if they're Mexican." I'm like, "What do you mean if they're Mexican? How do you tell if they're Mexican? Do you ask them if they're Mexican?" "Well, they look

Mexican, and they don't speak English." I said, "That is a huge problem. You're racially profiling people all day long." They were like, "Why are you asking all these questions again, Ms. Chapin?" So they are racially profiling clients. Try to be careful not to be racially profiling your clients. You would be surprised at who might be a non-citizen and who might actually be a citizen, but you want to be getting to that question sort of right away by asking — one of the ways to do that is ask if your client was foreign-born. What they do also in Boulder is, if you report that you were foreign-born, they put you on a list to ICE.

That was also made complicated by the fact that I was foreign-born. I was born in Costa Rica, but I'm a U.S. citizen. I've always been a U.S. citizen because my parents were U.S. citizens and they took me right over to the consulate and got me a passport. But if I were to get arrested in Boulder County, they would put me on a list to ICE, and one problem with that is that ICE doesn't have any record of me because I've never naturalized. My mom naturalized when I was twelve. My mom is from El Salvador, she married my dad. But she became a U.S. citizen when I was twelve, so she has an A number, an alien registration number. I don't have an alien registration number because I've never naturalized ever. I've always been a U.S. citizen, even from when I was in Costa Rica.

But that's one of the many ways that you get citizens into sort of the immigration pipeline because ICE doesn't have a record of them; they assume that I'm somebody who just recently entered and they just haven't found me yet, and so they might put a detainer on me. And there you are, a citizen with an immigration detainer. So you want to be figuring out what your client's situation is by asking questions about where they were born and then following up with that, or

ask about immigration status. Sometimes they don't know, and you're going to have to do a little bit more research. But you certainly want to be asking your client right from the beginning.

The existence of an immigration detainer can be one wink to the fact that your client might not be a non-citizen. So there's a couple myths floating out and around, certainly here in Tennessee and I'm sure in Colorado as well, which is that clients who have been issued an immigration detainer by ICE is undocumented. As you've heard, it's not necessarily true. People who have visas, people who are lawful permanent residents, sometimes even people who are citizens can be issued immigration detainers. We have a lot of judges in Colorado who have said the following to us, which is: Well, your client has an ICE hold, they're just going to be deported. Who cares? Also not true at all, and we will talk about that in a little bit about why that's not true.

So step one, and you will see this in the *Padilla* intake worksheet, is ask your client's immigration status, and they have a number of different potential statuses that they have. Just ask the status, and write it down. Hopefully, once you filled out this entire worksheet, if you have someone in-house like they do here in Knox County with Chris or if you have an immigration lawyer that you can call up, then you'll be able to go through this entire worksheet with them. So that's step one.

The last one is undocumented but potential future status. I'll tell you that in the clinic when we started in 2011 — this was before Obama issued the Deferred Action for Childhood Arrival — we had a few clients who I thought were completely screwed. They were totally undocumented. They didn't appear to have any avenue of relief. All of them — there were three clients right in a row — were seniors at Boulder High School. They were these young kids who had been brought over here by their

parents. They were all undocumented, their parents were all undocumented, so they didn't seem to have any obvious avenues for relief. Sometimes you can be undocumented but have some potential for future status, and now with immigration reform pending, that's also true.

Why are you asking about immigration status? Because then you will know whether they are subject to particular grounds of inadmissibility or deportability. Certain criminal dispositions will have adverse immigration consequences for your clients, just depending on their status, so you have to figure out sort of where they are in that realm.

Step two: What is your client's criminal history? These are a lot of the same questions that we just ask our regular citizen clients as well too, but you will see that the checklist gets a little bit longer. I like what Jennifer Chacón said earlier, which is that this is not rocket science. It's really not. It is quite complicated once you really get into the weave, but a lot of cases you can sort of figure it out on the front end. And that's what I'm trying to get the public defenders to realize. A lot of the public defenders are like, "It's so hard," "We don't know anything about immigration law," "It's so complicated." It's not super complicated. There's just a few extra questions that you need to make sure that you ask, and this worksheet gets you literally ninety percent of the way there.

So what's your client's criminal history, and get all of it. Again, traffic offenses, petty offenses, misdemeanors. You would not believe how many clients — "Do you have any convictions," and they're like, no, no, no. They're like, except that weed thing before or all the traffic offenses. So I tend to ask a variety of questions, like have the police ever stopped you, have you ever spoken to a police officer before, since you have been in the United states, have you actually gotten

handcuffed, did they ever make you sit on the side of the road? Sort of a wide variety of questions to really get to the answer that I need, which is everything. Yes?

UNIDENTIFIED SPEAKER: Do you have issues with clients who are afraid to talk to you because they don't understand the meaning of an adversarial process and that it may not exist in the country where they come from?

VIOLETA CHAPIN: Yes. So one of the things that we have a lot of conversation with in the clinic is how do you get the client to have a little bit of trust right at the beginning, and it's especially difficult, I think, with non-citizen clients when you come in there and you start asking them about their status. That is something that they have been taught to essentially hide from people. They know that that's not something that's good for them, if they are here undocumented. So certainly I talk to my students — and, obviously, this is something that all defense lawyers need to do — especially in time-constrained environments about explaining fairly quickly that "I'm here for you," "I don't work with the judge," "I don't work with the prosecutor," "I don't work with immigration at all," "I need to ask you these questions," and "I promise you that nothing you tell me will come out of my mouth unless you give me permission to do so" and try to explain why it is that you're asking them that question.

One fairly problematic question that we have is when we say, So were you born here in the United States? A lot of clients want to know why you're asking them that question, and it's important to answer that question, is that because, "If you are not a citizen, then there can be some problems in the criminal case, and by the way, they've issued a detainer." So we have the students explain to the client what a detainer is and the fact that

there's something holding them here and that, even if they pay their bond or their criminal case gets resolved, they're not going to get relief, they're going to get transferred. So we do do a fair bit of explanation, and that is sort of part and parcel of why non-citizen clients are different from citizen clients and how I think that really what needs to happen is that public defenders need to learn the language of speaking to non-citizen clients as opposed to speaking to citizen clients in answering questions like that.

You also want to know what sentence was received for each and every conviction, so add that into your little worksheet. So how much time exactly did you get? Now, lots of people have absolutely no idea. They don't know. They did it. I know that every single client who's in front of a judge and they're talking to them about pleas, they get sentenced, and they don't hear any of it because I think all they are hearing is jail, jail, jail. That's in their head, and so they're not listening. The judge is telling them all this information, and they're like, jail, jail, jail. So they don't hear it, and I have to then explain to them once again everything that happened once we leave. So a lot of clients don't know. To the extent that you can ask them, get that information, but you can also go back through your state and county records and figure out what the sentence was.

And why are we asking? Because this is what sort of determines clients' bond in immigration court. I had no idea about any of this at first. I didn't realize. My thought was that, if someone was undocumented, they were going to go to immigration court and definitely not get a bond because why would they get a bond if they didn't have any papers? That's not true at all. So asking about criminal history is important because that helps you figure out in your head and starts the wheels turning about whether or not the person is going to get a bond in immigration court and then how high that bond is. That's another reason, so you will know if the person has a certain prior — like if the

person is like, "I just got arrested." We had a client who got arrested on a DV — no, it wasn't even a DV, it was a stupid bar fight in Colorado. But he had a homicide conviction from New Mexico, and I was like, "That's a problem for you, sir." So there are some problems that you know that you have that prior, and the assault is the least of your problems here. The fact that you have a homicide conviction out of Mexico is going to be problematic for you in immigration court. And so there we were. And then I could talk to them sort of more about whether or not to post a bond in the criminal court.

So if your client has lawful status, these are some of your defender goals: So your primary concern wants to be avoiding a conviction that will trigger certain grounds of deportation, including the aggravated felony that I mentioned. We've heard about that because that will leave your client with no avenue for relief. It literally is the death star in immigration, aggravated felonies, just avoid at all costs to the extent you can. Then your secondary concern is to see if your client can get back in the United States sort of while proceedings are pending or afterwards.

Your client has no lawful immigration status. That tends to be the vast majority of the clients that we get in Boulder, is clients who are completely and a hundred percent undocumented and are now in the United States.

Very quickly, in case this wasn't said before, there are clients that are called EWIs. This was another term that I had no idea when I was in criminal court. Entry without inspection is what that means. EWI. Those are your undocumented guys. Those are the people who entered the United States without stopping through a port of inspection essentially. They are going to be subject to the grounds of inadmissibility because they're going to be treated as if they never came in, so they're going to do this whole legal — even though your guy has been there for thirty years, fifteen years, a long time undocumented, they're going to

be subject to the grounds of inadmissibility. They're going to treat them like they never entered and as if they're still physically outside the United States even though they're here. So that's who they're going to be. There it is. If they never had any status, they'll be charged with inadmissibility even though they're here.

If a non-citizen had a temporary status that expired, the government will charge them with grounds of deportability, don't they have to charge them with both?

DAN KESSELBRENNER: If you have been admitted, it's deportability.

VIOLETA CHAPIN: Okay. All right. I'll go back to that. Temporary status that expired.

DAN KESSELBRENNER: A temporary status that involved being inspected.

VIOLETA CHAPIN: Okay, they'll charge them only with deportability. So for these undocumented guys, these are your goals of the criminal defense lawyer: You know that you're focusing on the grounds of inadmissibility, and avoid sort of the crime-related grounds that prevent possible future avenues of relief, again, aggravated felony convictions, things that are going to prevent them from hopping over the good moral character bar.

Maintain eligibility for Deferred Action for Childhood Arrivals. This was a huge thing for us. Deferred Action for Childhood Arrivals is what's called DREAM Act Light. DACA is what we have here. It's relatively new. What I would encourage all criminal defense lawyers do is just literally google Deferred Action for Childhood Arrivals. It will take you to the USCIS web site, and they will tell you sort of the prongs that your clients need to meet in order to be eligible

for that. There's age requirements, there's time of entry requirements, and then there's certain criminal convictions that make you ineligible for that, so you want to be very careful to try to avoid those as much as possible because those are going to be your young people that you're getting that are either in school, in high school, or college, that have been here in the United States almost their whole life, probably only speak English, lots of them do. And so you want to be careful about those.

Step three: interviewing your client, what is your client's immigration history. So asking sort of these sorts of questions so that you figure out where your client might be over in the immigration realm. We have had some clients who have been deported before, unfortunately, and have re-entered, and so by the time you meet them, they've gotten re-arrested. If the person has been deported before, sometimes what's going to happen is called expedited removal, which we heard before, where they're not even going to get a hearing in immigration court. The immigration authorities are just going to reinstate this prior order of removal, which is still valid. It says you have been deported and you can't come back. They'll just reinstate it and send them right out, and then you have to have a really hard and difficult conversation about what your client wants to do. It can sometimes be attacked, but lots of times they just reinstate it. So does your client — that's how you figure out sort of what your client's goals are, and that's where we are going with this.

Again, what are your client's family ties and equities? These are sort of the same kinds of questions you would ask of your citizen clients anyway because these are the arguments that you typically make for bond. My client has family here, he has a lot of community support, he has kids, he works full time, he's worked at these different places, and you can talk

to them about these sorts of things. These specific questions are helpful for immigrants who are non-citizen clients in order to determine whether or not they have any immigration relief, and they can matter later on for an immigration lawyer who is either going to be helping you dispose of the criminal case in a way that's not problematic with the immigration case. Or they can be helpful if the client is able to retain an immigration lawyer and can get this information fairly soon.

Then figure out what your client's goals are. Does the client want to stay in the United States? We typically get a lot of clients who do want to stay in the United States. They have kids here. People do what people do; they move somewhere and put down roots. That's what human beings do. They get married, they have children, they have jobs, they do have a very real interest in remaining in the United States. That has resulted sometimes in our clinic just going to trial more often because we can't get immigration-safe pleas, and so we end up taking the case to trial in the criminal case. But then we have to have hard conversations with our client about whether or not "you can remain in detention pending trial" because, if the client has an ICE hold, then it doesn't make sense to post their bond in the criminal case because then they're going to be whisked off to immigration court and then we can't get them back to criminal court. So we've had clients stay in criminal court for four or five months waiting for their misdemeanor trial. They get their misdemeanor trial, and once it's done, then they get sent over to immigration court. And then those proceedings start going as well, but it's going to require you to have conversations with your client.

If the client's goal is to stay again, sometimes we negotiate for longer jail time; it happens all the time, or we negotiate for a plea that usually for a citizen client would

be terrible. We get a lot of cases because we live in Boulder, where people are driving and they've got weed in the car. So people have weed in the car all the time. So what happens is, the client gets arrested for reckless driving and for possession of drug paraphernalia typically because there's a pipe laying in the passenger seat. For a citizen client, the typical plea is to plea to the PDP, to the possession of drug paraphernalia, but it's a petty offense. And it doesn't carry any jail time, and if you plea to reckless driving, it gets you points on your driver's license. Most citizens don't want points on their driver's license if they can just get a stupid PDP petty offense charge. Non-citizen clients don't want that at all. They don't want anything drug-related. So we're in the position of going back to the DA and saying, "Okay, so we don't want the PDP charge," "We want to plea to the reckless driving," "We don't care about points on our license," "We just want to avoid it." And the prosecutors, because I'm with students, they're like, "Oh, you stupid student," "You don't know anything," "Let me tell you what the right plea is for this," and then we have to go back and tell the prosecutor, "Actually we do know exactly what we're doing, and we don't want the PDP charge."

So that's why, once again, sort of this brain shift when you've got a non-citizen client, drugs bad, bad drugs, don't go anywhere down that road. And so be negotiating for a plea offer that is going to be a little dissonant for the prosecutors or be asking for jail time in a way that is a little bit dissonant for the judge and for the prosecutors. And sometimes the client wants to be deported as quickly as possible, to get out of there, "I'm done." So figure out what those are sort of fairly early on and that will inform how it is how you advise your client later on as well.

Immigration detainers. So there was some questions earlier about how to go in and really sort of fight these immigration detainers and what it is that you

can say and do in immigration courts. It's the form I-247. I couldn't figure out how to get it in — I'm not the most computer-savvy — a picture of an immigration detainer because you can google it and you can see it, and you can see the language has changed. And it is a request from Immigration and Customs Enforcement asking them to advise them when a particular inmate who is in custody is due to be released in the criminal matter. It's a request.

So my first thing that I do now in the clinic with the students is, when we have a client with an ICE hold, we go and get a copy of the detainer, and the jail has been super nice and very willing to give that to us. And I don't see why they wouldn't give it to you; it's part of your client's file. Ask for a copy of the detainer, and then make a copy for the prosecutor and for the judge. And take it with you into court, and say, judge, this is just a request. All they're doing is requesting — we don't necessarily have to honor these at all. Now, the answer that we've gotten in criminal court from the judge is, "Ms. Chapin or Mr. Student, that's not my issue, talk to the jail about whether or not they're going to do it." So we did, and we went and talked to the jail. And we talked to the sheriff, and there has been some movement on this. There have been some jurisdictions that are now refusing to honor detainers in misdemeanor cases, in large part because it's very expensive for the jail; you have to pay the extra money for the forty-eight hours, so we've done that specifically. So they asked for the forty-eight hours.

And immigration detainers will say — usually the box checked is if ICE has — "We're issuing a detainer because we are initiating an investigation into whether or not your client is removable from the country." What does that mean? We are initiating an investigation into whether or not your client is removable from the country. What is ICE conceding that they don't know? They don't know whether your client is removable. They haven't met any

standard of proof to issue a detainer. ICE doesn't have to meet any burden of proof to show that your client is actually removable from the country before they issue a detainer. So I've had some students walk in there and say, they clearly don't know. They haven't met any burden of proof, and I think now this is an unlawful seizure. And we're going to make a Fourth Amendment argument about this. Some judges are delighted to have this conversation in the midst of a very otherwise humdrum day. Other judges are like, move on, they don't want hear to it.

But there are arguments that you can make, and Chris Lasch has pointed to some of the — Mike Wishney filed this out in Connecticut, and he made the Fourth Amendment Search and Seizure Violation. I would highly recommend you go and read the brief and make these arguments in court. The students are doing it. They're scared []less, but they're making the arguments in court. And the judges sometimes are engaging us on these things and really wanting to see what's going on with the detainer.

We also see that in some cases where judges are either refusing to issue the client a bond because of the detainer or they are not giving them a personal recognizance bond only because of the existence of a detainer — otherwise they would have given it to them because no prior and they have been here for twenty years and they work and do all these things, so but for the existence of a detainer, the person would have gotten a personal recognizance bond. We have made these arguments as well. There's actually no proof that the person is actually going to be removed, so it shouldn't make a difference at all.

The existence of a detainer means your client will not be released once they've either pled guilty or paid bond. They will be transferred to immigration detention, and once in immigration detention, they may or may not

get a bond. One thing that our attorney worksheet helps you figure out is whether or not your client is going to get a bond based on their prior convictions and about how high that bond is going to be, so you can have a discussion with your client about whether or not they can also pay the immigration bond. And in certain cases we've talked to the judge in the criminal court about the fact that this client should get a PR bond because a) they're almost definitely going to get a bond in immigration court and they're going to be able to pay it.

DAN KESSELBRENNER: There are also a certain number of cases in which, especially where it was done for investigation purposes only where — and it's a permanent resident — where until there's a conviction, they're not going to be able to pick up the person. So that's why you need to look at the particulars of each situation to see is this going to be the kind of bond — Tricia talked about in the last session that sometimes it doesn't make sense to pay the state bond and get whisked away somewhere else to another jurisdiction, but you also need to check, if it is an investigation-only-type situation, your client won't be — and is a permanent resident and they are expecting the charge to result in a conviction, until that charge becomes a conviction, they can't do anything. So they'll basically on their own either pick the person up and then release the person and not issue charges and not pick the person up once they realize it's investigation-only. So it's just a nuance, but it's like for every rule, there is this sort of exception. That's one that really applies here I would say.

VIOLETA CHAPIN: And in Colorado we're a little bit different from Tennessee in that we have an immigration court in Denver, so they just go take it to Denver, which is just thirty minutes away. So I don't care.

We frequently tell clients that maybe in this case, it makes sense to pay your criminal bond and not plead to anything at all, don't go over to immigration court with a conviction. We're fairly certain that you're going to get an immigration bond. If you can afford to pay the immigration bond, then you're out, and then we're golden. We're much better if you can get out. But we are just logistically different from Tennessee in that our client stays right there. Chris?

UNIDENTIFIED SPEAKER: The current version of the detainer form also has a box that can be checked that says, consider this detainer active only upon conviction. I have no anecdotal evidence whatsoever about how often that bond would (inaudible) because that would also be a situation where you want to go ahead and pay the bond because that's not an active detainer yet in theory.

VIOLETA CHAPIN: Right. Another reason why the first thing to do is get the copy of the detainer and look at it so that you know exactly what it is that ICE is alleging, where you are, and you can show it to the judge in the criminal court and show it to prosecutors, and I think it's a good idea for everybody to just start getting used to them. You're going to see a lot of them, and so it's good that people are used to them and you can talk about them in a way that gives you something else to say. I always like saying more.

So again, getting an immigration bond depends largely on your client's criminal history, not his immigration status, and the existence of a detainer only means if he's going to be transferred. Chris Lasch gave a lecture in my class where he just said, the ICE detainer — it's just a piece of paper. He said it earlier, I love it. It's just a piece of paper, judge. That's all it is. It's just a piece of paper.

Again, no standard of proof, and that means that your client could potentially get a bond. As I said, judges are largely unused to it, and it shouldn't make a difference in the court's bond determination or in the granting of alternatives to jail as a sentence. Request a copy of the I-247 detainer from the jail is sort of the first starting point, and then fill out your worksheet from there. And then if you need to, go talk to an immigration lawyer about who your client is, what's going on with him, and what you should do next. I'm a huge fan of the Defending Immigrants Partnership website. I use the *Padilla* intake sheet. There's also some awesome things like this. That's awesome. Thank you, Dan Kesselbrenner.

Practice advisory — lots of practice advisory for criminal defense lawyers who are representing non-citizen clients, so there's tons of really good stuff.

UNIDENTIFIED SPEAKER: So if we've got a judge to say, no, this detainer is unlawful, what do we do? Get the judge to sign the order and take it over to the jail? Is that how you get the person actually out of jail?

VIOLETA CHAPIN: Well, we have been wholly unsuccessful in it. I wish I could get the ball rolling, and we should be doing something in criminal court to fight these detainers. What we have told the judge to do is that "you have the jurisdiction, judge, to tell this jail to release my client."

UNIDENTIFIED SPEAKER: But even though they're excited about that argument, they still say no?

VIOLETA CHAPIN: Yeah. They are willing to engage us, and we talk about it. And the students have drafted certain pleadings about why they think it's a problem, and they'll read it and be like, what an

interesting exercise. But I think that it's something that really could have some teeth. It has some teeth. It certainly scared the bejesus out of the folks in Connecticut in terms of this Fourth Amendment argument that it's an unlawful search and seizure, especially since there has been no — do you see how it's different from a regular warrant that a judge signed, for example, in New Mexico for your client and they want you to transfer? There was no judicial proceeding in the ICE detainer world. It's literally Department of Homeland Security initiating an investigation, and that's why it's an unlawful search and seizure because there's no reasonable suspicion. They haven't met any standard to say that your client should be held, and "Now you are participating in the violation of my client's rights, and I want you to release him, judge, and tell the jail to release him as well." But I think what's also possible is to go and talk to the jail specifically, the guys with the keys, and say, "You guys shouldn't be honoring them for these reasons."

UNIDENTIFIED SPEAKER: That's the only way I've been ever successful in getting somebody released, is to explain to them that financially you hold them for forty-eight hours and the feds pay you. After forty-eight hours, the county has to pay for that, and on very rare occasions, I've had the jail agree to release somebody just for financial reasons. But I would speak with the attorney for the local sheriff's department and explain to them, send them a copy of the statute, and on two or three occasions, I've been able to convince them — this is only when ICE did not pick them up within the forty-eight hours. Forty-eight hours will run, somebody has already paid bond, and on occasion, just for financial reasons, they will release them.

VIOLETA CHAPIN: They got scared in Colorado. They had to pay an immigrant a whole lot of money for

holding them, I think it was, twenty-seven days over. They were like forty-eight hours, twenty-seven days. So the ACLU came in — I love the ACLU. They do all sorts of things like this. And they came in, and they sued the county, I think it was Jefferson County in Colorado, for holding him over the forty-eight hours. So you can scare them with the money thing because they'll have to pay up if they do it, otherwise they're having to pay as well, and they shouldn't, especially on low-level misdemeanors.

DAN KESSELBRENNER: Chris and I are going to share — we're going to be like a tag-team-back-and-forth kind of thing so we — that's why she's up there with the slides and I'm down here with the microphone for now. I wanted to start off by just talking about what Tim Arnold started up this morning, the slide showing the change of the war or the collision of worlds. There are some things that criminal defense practitioners and immigration practitioners can do to help make peace with each other.

I was once at a session of the Defending Immigrants Partnership, and we asked people who were the criminal defense practitioners in the room, "What are the three most annoying things that immigration practitioners do that make it hard for you to work with immigration practitioners?" And they said, people talk in jargon, they talk about I-130 this, I-589 that, EWI, people don't cite to readily available materials, so people cite the Immigration Nationality Act, which is a parallel citation system, instead of the more generally available and understandable 8 U.S. code. Now, this was a while ago, and maybe now they're equally available but still maybe part of the same jargon idea.

And the third thing complaint was, they asked for the moon. You have a client who is found charged with first-degree murder, and they say, "Do you think you can plead this down to disorderly? That would be great."

There's only one thing I remember that the immigration lawyers complained about at the criminal defense bar, and that was this sort of call from the courthouse bathroom during a break. It's like, "Oh, I've got five minutes between the sessions here," "I've got this client who did this, this, and this," "Would a plea to Tennessee 51-12-36 make him deportable?" Basically how long do you have for me to answer the question? Although I still take those calls, there are some people who said they wouldn't take those calls at all because it was really an affront, and that's why we try to get — but those kinds of mutual give-and-take, again, we can make things a little bit more peaceful between the two groups.

Having said that — what does our first slide say?

CHRISTINA KLEISER: Some of this is repetitive. We've had a couple of panels where we certainly have said some similar things over and over again, but I think some of these — and the three of us have been revising our slide show all day, so we have been trying to eliminate some of the more repetitive stuff. But some things are really worth repeating, and this is one of those. And that's that, in our office, there is a real misconception that if I have my — and the majority of the clients who come through our office who are non-citizens appear to be undocumented, and that is the category that is very often the lowest priority on my caseload of maybe consulting or researching whether this person has something worthy of trying to find a safe plea for or trying to help. And I'm so happy you told your personal story because there are so many ways that that can happen, where you go visit your client and they actually don't know that they're a citizen but it turns out they are or you go visit your client — and one of our misdemeanor clients referred a — and this is not somebody who's currently in our office, so I don't want you to think it's you up there in the back row — referred a no driver's

license case because he wanted to talk to me about the case, and it turned out he had a very, very strong claim to be a citizen. So, even the cases where you feel like there's probably nothing you can do, you need to do that research, your clients need to have that individual assessment. So they have significant interest in avoiding consequences if they have potential future relief.

And like Tricia said at the prior panel, you've just got to go with what we know today. We were talking a little bit about, Well, is there anything in the legislation that might be passed as the comprehensive immigration reform that we can at least be thinking about? And as defenders in trying to give the best advice, you have to just advise your clients that you have really no idea what, if anything, is going to get passed.

DAN KESSELBRENNER: The other thing that I don't think has been said today, but it's been implied when people talk about the civil/criminal distinction, is that the prohibition against ex post facto laws doesn't apply in immigration proceedings, so that you could give state-of-the-art advice today. And if Congress will happen to pass a law tomorrow that says that littering is an aggravated felony and "we want this statute to apply to convictions on or before or after the effective date of this amendment," that would probably pass constitutional muster, at least insofar as if the question was, Would it be barred by the prohibition against ex post facto laws because the Supreme Court decided that several times?

The upshot of this is not that immigration advice — we can't get the right answer anyway, why try? But it is important to let your client know, because your client is giving up significant rights, the right to a jury trial, jury trial charge, right to go to trial, and other things in exchange for your adequate representation.

Now, obviously, none of us can see into the future, so it wouldn't be a breach of your ethical obligation and certainly wouldn't violate *Padilla*. But it does seem to me the best practice is to sort of at least incorporate into your advice with your client that "this is the best advice I can give at the moment."

There was another thing in *Padilla* that I also didn't hear — although I wasn't in the room all day and that's the sort of — part of this decision talks about clear versus unclear, and it says, you have to advise when the consequences are clear. But if the consequences are not clear — and people did allude to — you just have to give this sort of generalized warning that this may create a problem. You can't know whether the consequence is clear unless you investigate the facts, find out what the law is, and try to apply the law to the facts.

Now, after doing that, you can give advice that's specific, but in the specificity, you're saying no one can tell — there's a chance this argument would work, something like that, but I guess the clear versus unclear doesn't — like distinction in the opinion doesn't eliminate your obligation to do an investigation because, until you do the investigation as a citizenship status, as to prior criminal history, as to the charge, investigate whether alternate charges are available, you won't be able to make an assessment as to whether it's clear or not. So there's work that has to happen in every case.

One of the things that was discussed in the prior session about negotiating with district attorneys who will say something like, "I like to treat everyone in this court equally — I don't care if it's non-citizen, citizen, everyone gets treated the same." Well, if that were true — and in the *Padilla* decision, one of the things the Court talked about was that sometimes prosecutors would want to consider immigration consequences in the interest of both sides to negotiate these pleas, and moreover, that creative

charge bargaining was part of what was alluded to in a list of things that an adequate counsel might do. It was dicta, it wasn't the holding of the case, since it didn't happen. But you could certainly point to things in the opinion itself, which if the Supreme Court thought that fashioning specific dispositions for non-citizen defendants was something that was a failure to do, it would be a Sixth Amendment violation. Then it's hard to see how there could be an equal protection problem with offering a different plea to a citizen or a non-citizen.

In other words, the notion that the Court reached its decision about the special importance of advising about immigration consequences is at odds with this notion that oh, I have to give the same disposition to everybody. Now, that might not work with every district attorney because some of the district attorneys may actually be doing it out of etiological reasons, they're being xenophobic or racist, rather than believing that argument, but there may be some people who, in good faith, believe that argument and haven't put the connection between the inconsistency with holding that view and the reasoning of *Padilla* itself. So it might be something you can do for those prosecutors. Just wanted to get that point out.

I know it's basically four or five months since the election, but at this point, I just want to take one or two more polls and get people involved just so we can get some participation going a little bit. And my first poll question: So we've heard about crimes involving moral turpitude, but I don't think we really heard an attempt to define it. So I'm going to throw out the name of a crime, and then there's three possible responses. It's a little bit of a rigid poll, but indulge me. One choice is that the offense always involves moral turpitude, the second choice is the offense never involves moral turpitude, and the third choice is, it sometimes involves moral turpitude. So the first crime is murder, which is the intentional taking of a life with malice

aforethought. So who thinks that a conviction for murder always involves moral turpitude? Who thinks a conviction for murder never involves moral turpitude? Who thinks a conviction for intentional taking of a life with malice aforethought sometimes defines moral turptitude? Okay. Will a person who thought it always involves moral turpitude volunteer, just explain their reasoning briefly for a second?

UNIDENTIFIED SPEAKER: How about by its own definition, with malice aforethought, a violent act.

DAN KESSELBRENNER: So violent act with malice aforethought, that that definition itself creates the —

CHRISTINA KLEISER: Turpitude misconduct.

DAN KESSELBRENNER: Turpitude misconduct. Okay. I didn't see any hands for never. Will someone who said sometimes choose to explain why they thought sometimes?

UNIDENTIFIED SPEAKER: I can't think of every possible circumstance, so I don't want to rule anything out.

DAN KESSELBRENNER: Okay. So the next crime is incest. Who thinks incest always involves moral turpitude? Who thinks incest never involves moral turpitude? Who thinks incest sometimes involves moral turpitude? Chris, do you want to volunteer why you said it always involves moral turpitude?

UNIDENTIFIED SPEAKER: Just so clearly depraved and degrading of the human spirit.

DAN KESSELBRENNER: He says, incest involves degradation of the human spirit, and that is

necessarily turpitudinous. It's not an unreasonable answer. Will someone who said sometimes care to give their — yes.

UNIDENTIFIED SPEAKER: Well, I think a lot of times it's probably defined, and sometimes people may not even know that they're having sex with a second cousin or something.

UNIDENTIFIED SPEAKER: And then there are different laws in different states for incest, so you have a moral turpitude attitude or you don't. And from one state to the next, you can't change that attitude.

DAN KESSELBRENNER: But did you notice — and this is sort of the presenter's trick — I explained to you the elements of murder, but I didn't explain to you the elements of incest? So I think the lesson, the takeaway from this is that, if you don't know the elements of the offense, you can't possibly know whether it's morally turpitudinous or not because that's really what the inquiry is about at bottom, is what the person is convicted for. So the people who said, marrying a second cousin or different states define it differently, in fact, if — and now I'll get into what the definition is, murky as it may be, and that is that moral turpitude is defined as an offense that has some degree of scienter, at least reckless — so reckless, intentional, and involves reprehensible conduct.

So right away there are certain rules that sort of — through that analysis, murder would always involve moral turpitude, and so for that one, I would say murder defined as the way I defined it, intentional taking of a life with malice aforethought, would be always a crime involving moral turpitude under the test I gave you, for the reason that the person in the third row back there mentioned, that

basically elements itself make it — you have to be bad to do that.

Now, obviously we could have philosophical discussions about what's bad and what's reprehensible, but they at least think that there's a certain degree of settledness in what's considered bad. And in fact, if you look at the thing about thou shalt not steal, thou shalt not kill, there is some either literary or historical reference for those particular crimes, although those weren't defined in the Ten Commandments either. That would be an answer you could give back. Now, that said, do you want to turn to the Tennessee statute on —

CHRISTINA KLEISER: Which one?

DAN KESSELBRENNER: Do we have one on joyriding and theft?

CHRISTINA KLEISER: Yes.

DAN KESSELBRENNER: One of the case laws, just to give some practical approaches, how to help give you not the answer but sort of a start to an answer, is that there are certain rules that have been defined based on the elements, that certain elements make something reprehensible or non-reprehensible.

The differentiating factor between when a conviction involving a taking is a crime involving moral turpitude and when it's not is whether the taking is permanent or transitory. So if you have a crime that has only a transitory requirement to deprive the rightful owner of their property, that's not really going to be stealing, regardless of what the state calls it, involving moral turpitude. If the state can call it stealing, it will be stealing for purposes of the state law, but in terms of moral turpitude inquiry, talking about the Ten Commandments,

thou shalt not steal, what the Board of Immigration Appeals cases suggest is, when it says steal, it really means take with intent to deprive the rightful owner of the property. So you have a statute like — joyriding I think was the next line.

CHRISTINA KLEISER: It is. Actually, though, Dan, if you don't mind, I think it would be another poll. I would like to know if folks think that our Tennessee Theft Statute meets the definition you're talking about. This is our Tennessee Theft Statute in Tennessee, and part of this is what Dan was saying earlier, is don't judge the crime by the title. You have to look at the elements to decide whether or not something could be arguably moral turpitude. So our Tennessee Theft Statute is a person commits theft of property, it was intent to deprive the owner of the property, the person knowingly obtains or exercises control over the property without effective consent.

You're the immigration adjudicator and/or the defense counsel or ICE counsel. Who wants to argue for this not being a crime of moral turpitude, if anyone out there thinks that?

UNIDENTIFIED SPEAKER: To the extent you think that it requires an intent to permanently deprive and that permanent depravation is (inaudible) immigration offense, then Tennessee statute is broader than that, the circumstances where there is no intent (inaudible).

CHRISTINA KLEISER: Does anybody want to counter that argument? So theft, if you just heard the word theft, would your gut say that it's a crime of moral turpitude? Mostly yes. But it's extremely important that you look at the elements. Yes, sir?

UNIDENTIFIED SPEAKER: The word *exercising control* would imply that that could be less than a permanent taking; therefore, not a crime of moral turpitude.

CHRISTINA KLEISER: I think our theft statute has a lot of good arguments in it, frankly. Now, when I'm counseling defenders in our office, I don't say that theft is a safe plea, by any stretch, because we certainly have adjudicators and judges out there who can get that wrong or maybe they go pro se and don't have counsel to sit in, and I think it's awesome that these offices have both immigration and criminal defense counsel in their same offices. We certainly don't have that in our office. So once we enter the plea, they're going out to their immigration lawyer, whoever they decide to hire, but they certainly have a good argument. If it's the best plea in the hierarchy of things that you can get from the prosecutor, you need to certainly think that it's not exactly the most unsafe thing you can find, although that's not our first task.

DAN KESSELBRENNER: Although I think we don't have enough information at this point, if I were to answer Professor Chacón — I got a call from Jenny Roberts, whose name I only mentioned so I could refer people to her terrific article on proving prejudice post-*Padilla*, which really lays out what prejudice means in this era, but anyway, Jenny works at a law school clinic, professor there. And she said, "Well, my client is charged with this Maryland Theft Statute," and it was remarkably similar to the Tennessee statute. And so I said, well, you get to look at the statute, but if the highest court in the state has put a gloss on the elements, then it would be a problem. And one thing that they would look at is jury instructions, so she pulled up the Maryland jury instructions for the Maryland theft. And even though the language in the statute said *deprive* — although, I don't know whether

it had *exercise control* over because that would be helpful if it ever went to an immigration court. But the jury instructions said deprive means permanently deprive, and it could be that those jury instructions weren't backed by a Maryland Court of Appeals, who is the highest court in Maryland, case to support it. But at a minimum, I said, stay away from that because a DHS prosecutor can make — often times they might not have worked hard on the defense side, but it isn't that hard to find the jury instructions. And the jury instructions pretty much resolve that question. The point of this is only that you need to also look at the case law interpreting the statute to see if there is a judicial gloss on the elements. Yes, sir, over here.

UNIDENTIFIED SPEAKER: Would it make any difference what was stolen or why, if I'm stealing formula to feed my starving baby?

DAN KESSELBRENNER: No. It should make a difference. If I were the one with the moral — but I'm not, and that's why — the person who said, "I don't know every circumstance that murder could be convicted," in this case, that's true, but it doesn't — you know that if a person got a conviction, they don't re-litigate whether there was a conviction or not. And so they don't re-litigate, whether in fact it was malice aforethought. Presumably if there was some mitigating factor, the person would have gotten second-degree. If it was self-defense, then it was an affirmative defense, and they would have gotten acquitted. And they proved it up. So it's really the fact of the conviction.

Now, it could make a difference in terms of — some states have theft over 500 is a felony, theft under 500 is a misdemeanor, or theft under 500 may be punished by only six months. And so you think you have to look at the

grounds of deportability. So we're not going to this sort of micro-level. But at the micro-level, you would find out. If you look at the grounds of deportability for moral turpitude, it says a single conviction for a crime involving moral turpitude within five years of admission where the crime is punishable by a year, at least a year, so, basically all of those things need to be there for the person to be deportable for that offense. So it turns out it was theft. It was moral turpitude. It wasn't permanent deprivation. It wasn't in five years, but it's only a six-month max. Then for that ground, they wouldn't be deportable. Why? You look on the one side of the ledger of what do they need — this is one good way to do this. This is sort of borrowing this from Mary Holt or Roger Williams. One side of the piece of paper, you put the elements of the grounds of deportability. Another side, you put the elements of the criminal offense or the client situation. So if each of the things match up — and someone said — I think Jennifer said this — that there's no way that you could be — the statute of conviction is broader than the definition. Then in a situation where it's the government's burden — where there's a burden, they won't able to meet the burden. Should we do the drugs, do the marijuana possession?

CHRISTINA KLEISER: Yes. We need to go back and talk about exactly what the record is that the immigration fact finder can look at, but another way that you can make a big difference for your client, under our Misdemeanor Marijuana Statute, is — our Misdemeanor Marijuana Statute, 39-17-418, an offense where a person knowingly possess or casually exchange a controlled substance. And under the immigration laws, you can be deportable, any alien could, any time after admission, have been convicted of a violation of any law relating to a controlled substance other than a single

offense involving possession for one's own use of thirty grams or less of marijuana.

In trying to keep folks awake during the last panel, let's hear from defense counsel as to the safest plea if your client is charged with misdemeanor marijuana, forty-eight grams of marijuana. What might you be able to negotiate with your prosecutor to help your client?

UNIDENTIFIED SPEAKER: Below thirty grams, right?

CHRISTINA KLEISER: And specifically state in your agreement a less-than-thirty-gram possession. Even though they may be possessing forty-eight, they still are possessing less than thirty also. So it's not false that they were possessing less than thirty. You can get a prosecutor to agree to that. They're still going to get their conviction, but you are safely pleading them to that.

VIOLETA CHAPIN: I'll say real briefly, with a couple of these things — and I think you're about to talk about it now — in terms of what it is that the immigration adjudicator can look at — the record of convictions is I guess what you're going to talk about?

CHRISTINA KLEISER: Yes.

VIOLETA CHAPIN: So one thing that we do now in Colorado is, for certain misdemeanors, such as weed charges that we can't get out from under, we have a trespass statute, which has a number of different things that qualifies as trespass, we prefer the trespass on agricultural land. It doesn't usually make a difference to the prosecutors, but we actually have it written out onto the Rules of 35, under the plea form, which is something that they normally don't do for citizen clients. It's odd and unusual for them to do, but again, on the whole non-citizen

clients are different type. We now write it out very clearly as to what specific part of the statute we are pleading to and exactly what the client is admitting guilt to so that it's very clear in immigration court so that they don't get to go look behind ugly things, like the police report, which is never helpful for your client. So that's another thing that we do, typically with those sort of broader statutes, is write it out very specifically on the top of the Rule 35 plea form.

DAN KESSELBRENNER: Basically you can make a difference because the prosecutor shouldn't care because the prosecutor is getting the conviction in the identical statute whether it's twenty-eight grams or whatever was on the original ticket. That statute also referenced that it has to be a federally-controlled substance. So there's a statute 21 U.S.C. 802 and schedules that are promulgated by the Federal Government that lists what are federally-controlled substances. If there is one offense more under the Tennessee schedules than under the federal schedules — it's better living through creative chemistry. There are all sorts of steroids being developed, and until they get basically put on the list, they and other kinds of substances are not federally-controlled substances.

It may be that Tennessee has particular interest in getting one of those on its list earlier. If you can plead to a violation of the Tennessee statute without naming the substance, so how does this work? I don't know that this is where Chris will fill in the gaps. I don't know what you can actually do in a Tennessee criminal court, but the idea would be something like, "We admit to a facie violation of the statute." So you're not admitting to all the allegations — let's say the charging document mentions marijuana, and marijuana is on the federal list, or cocaine. If you just plead to the charging documents, the records indicate that the conviction was for cocaine, cocaine is on the list, it's a deportable offense. And I've

seen these over the years; sometimes the charging documents don't mention the *to wit*. It says possession of controlled substance, to wit: cocaine. Sometimes they leave off the *to wit* in some jurisdictions. If they do that, you don't want to fill in the blank.

Assuming your client is charged with the right schedule, that is, that they are charged with something that they are not getting more time or that their client doesn't want that additional time, the absence of anything on the record as to the identity of the drug actually would inure to your client's benefit in immigration proceedings.

This is sort of consistent with my view, when I started off talking about not asking for the world, in terms of going down from murder to disorderly conduct. It's the hierarchy of outcomes. You really want to get the best possible outcome you can based on the facts and what your client wants to do. So obviously the best choice is no conviction at all. A slightly less good choice would be a conviction for something that is not deportable. Then going up the hierarchy, it will be a conviction for something that is deportable but preserves your client's eligibility for relief. And lastly would be something that — unless this is what your client wants — makes your client deportable and bars her or him from getting any relief. Specifying a facie violation of the statute but not admitting to the indictment, to the charging document, or pleading to — without asking for a statement of particulars — Now, in most cases, if you wanted to get the person — because it didn't mention a drug, it's not a violation, you can move to dismiss. If it was a jury case, once a jury was impaneled, you might be able to beat the charge. But doing that, they might realize their mistake and add the drug long before that, and then your client is both guilty and deportable.

Again, you have to sort of be creative. You don't have to memorize, and no one will, these grounds of deportability, but you want to look to, like I said, what will the government have to prove in immigration reform, what elements necessarily in here, in this offense, by virtue of any conviction. And if there's a match, then the person is in trouble. That is sort of a tool you can use to sort of begin your analysis.

CHRISTINA KLEISER: Do you want to talk about the categorical approach?

DAN KESSELBRENNER: Yes. I have been sort of doing it in a way that I think is actually easier to understand than sort of talking about it, is the categorical approach. That is, the immigration fact finder is not going to look at what you did. This was that what-if-you-stole-milk-to-feed-your-starving-child-instead-of-for-greed-or-gain. At least in the moral turpitude inquiry, the general rule is that you want to keep the record as you — you want to affirmatively get the most benign version of the crime possible. In an example where it's intentional or temporary taking of property, you don't want — unless the charging document just says intentional or temporary, and often times that's what happens — the prosecutor just tracks the statute. The person just pleads guilty to the charging document. You can't tell whether it was temporary or permanent. In the old days, you would win. Now there's a little bit of creed looking at what the person did. And if there's continuing ambiguity in some context, then they can sneak in the stuff that you let them mention that we want to keep out, like the police report. The way to avoid that is to allocate affirmatively to the most benign way to violate the statute possible. So pick your crime.

We've talked about temporary and permanent taking; plead to the temporary taking. Another place this

comes up is — if you remember when I said the definition of moral turpitude — and the same analysis applies in other grounds of deportability — I said, it has to be a scienter of at least recklessness or be for reprehensible conduct. That's what it has to be. If it's less than negligence, it's not reckless. It's not moral turpitude. Negligence is less than reckless. If you have any statute that has — I shouldn't say any because I mentioned when I talked to the public defenders yesterday, generally speaking, statutory rape is a strict liability crime, but that's like a thing unto itself almost because, under this analysis, stat rape shouldn't be a crime involving moral turpitude. I think the 9th Circuit has held that it isn't, but that's the result-oriented decision. And that's just sort of a specific warning.

But if you've got something that is like negligent assault, go for it. If it's even something like negligent homicide where a tragedy causes an accident and someone's life gets lost — if a person was just sort of an inattentive driver, which we've all probably had those moments where we're daydreaming and then quickly realize where we were and avoided an accident — I think the person who hasn't avoided that accident, it doesn't make them a bad person. And so under that kind of analysis, they have been recognized; negligent wouldn't be a crime involving moral turpitude.

In statutes that list elements or define different crimes, temporary, permanent takings, negligent, reckless, intentional, or there are things like possession of various amounts, you want to look to what the disqualifying element would be, and see if you can come away to get out from under it. If you affirmatively plead to the temporary taking, they don't get to look at the police report. The case law has eroded now so that if there's ambiguity after they look at the — first they look at the crime itself — this is the categorical approach — they look at the crime itself. They say, Does this always or never trigger the consequence?

The next step is, they look at the record of conviction, which is the plea, the charging document, the judgment, and the sentence. So then if that doesn't tell you whether it's, in this case, temporary or permanent taking, they then get to look to the things that are outside the record of conviction, like the police report.

VIOLETA CHAPIN: Which is never good for your client.

DAN KESSELBRENNER: You can preclude them getting from that step by pleading to the temporary taking. There are great victories in this. Florida has a thing, taking or conversion. This went to the 11th Circuit. Unfortunately, the people who are deported previously under the conversion — 11th Circuit said, hey, Florida legislature put two different words there: conversion, taking. This conversion isn't the taking because, if it were, they wouldn't need two words for it.

Now, that's the kind of argument that you've got good lawyers from the place Chris used to work arguing at the 11th Circuit, and you have got someone who has the both wherewithal and is out of custody to be able to present that claim. You then make good law for everybody else in the 11th Circuit then to just know, hey, it's theft, conversion. We converted this property. It's like, Who knows what that means? And there probably wasn't even a case in Florida because no one was ever — basically they probably did just mean for it to mean that they were just trying to cover their bases. But the rules of statutory construction can be weapons for people who do appellate litigation and, as a result of their efforts, can create rules which you then can reasonably infer will apply, again, with that caveat I mentioned before about the ex post facto law doesn't apply. Congress could pass a law that would be — Marco Rubio could say, "I'll go for comprehensive immigration reform if you just make sure that you define

theft to include conversion," and Congress goes along because they want comprehensive immigration reform. And this applies on, before, or after. Well, then all those people who pled would be now deportable. I don't think that's going to happen, but I just use it as an illustration to try to pull together the points about what you can really draw from the lessons.

VIOLETA CHAPIN: I'll jump in real quick just to say that one of the ways that this really came out for us in the clinic on the criminal defense side was to go and watch proceedings in immigration court, as Chris Lasch said before. If you have the opportunity — and we went to the detention center, and I know it's far here. But if you get the opportunity to go to a detention center and see how this works sort of on a daily basis, it's pretty shocking. We took some bond hearings for people who were in detention that were either trying to convince the judge — because the first person who makes the bond determination in immigration court is the Department of Homeland Security, which is bizarre; it's the cops who are setting bond first, not a judge. But then everybody has the right to request what is called a Custody Redetermination Hearing in front of an immigration judge and then hear arguments about why the person actually does qualify for a bond or that the bond that was initially set by DHS should be lowered. And one of our first cases was a guy who was from Nigeria, and he had come on a tourist visa with his parents when he was underage. And his parents had then just stayed past the time that they were allowed on the visa, so the kids obviously stayed with the parents. He had been arrested in Colorado several years before on a possession of cocaine charge. His public defender pled it possession of marijuana, straight possession of marijuana, but it didn't say an amount. It just said possession of marijuana. So we are going in, DHS says this guy is

ineligible for bond, can't get a bond because he pled guilty to possession of marijuana. They didn't yet know that he had been arrested initially for possession of cocaine, which would have been really bad, because they hadn't gone and looked, and they just knew that the conviction was for possession of marijuana. We couldn't get him a bond to get out of immigration court because it simply just didn't say on the plea form that it was possession of marijuana less than thirty grams. That's all we needed it to say, and it didn't say.

So then the judge said, well, it's your burden — it gets complicated from here, but the judge says, it's your burden to show it was less than thirty grams. The student very diligently goes out and gets the police report and sees that he was initially arrested for possession of cocaine. So we don't want to tell the judge that. But at this point it's our burden, and we just didn't have any way to prove it. We couldn't show it. So that really brought home for us the necessity, in criminal court, how easy it is to help your client. Really, if you had just gotten the less-than-thirty-grams language written on there, it would have made a huge difference in this person's life. And the criminal defense lawyer probably had all the best intentions but just didn't know. There we were with a vague record, Rule 11 — I said Rule 35 earlier — Rule 11 plea that said just possession of marijuana, didn't help us, and we couldn't get him out of detention. And it was a disaster. Picking the least problematic plea but also being very specific about it and writing it out was really important on the criminal defense side.

CHRISTINA KLEISER: We just wanted to throw up an example of the misdemeanor statute where you have potential for affirmatively helping your client in Tennessee. Now, I get a lot of calls from Felony Sessions saying, "The charge is aggravated assault,

I have an Offer 2 misdemeanor assault. Is that safe?" And my personal opinion on that is that there's a whole bunch of other stuff I need to know, and so we try not to answer those phone calls, even though I will take them. We try to get them to set that off so we can analyze it. But here's a misdemeanor assault statute in Tennessee where we have three separate sections with very different potential immigration consequences.

Dan, is the Tennessee Assault Statute — would that make someone be — if you just pled them to A1, intentionally, knowingly, or recklessly causing bodily injury to another, if I pled my person to potentially a crime of moral turpitude —

DAN KESSELBRENNER: Does it include *de minimis injury*, slight touching?

CHRISTINA KLEISER: It's intentionally, knowingly, or recklessly causing bodily injury to another.

DAN KESSELBRENNER: DHS would think so.

CHRISTINA KLEISER: Why?

DAN KESSELBRENNER: Because it's intentionally causing injury — anyone who has knowingly or recklessly — they would say that the scienters all are higher than reckless, and causing injury is reprehensible. So the two factors in the test of scienter, plus reprehensibility, are both met. The reason I hesitated, there is some dispute as to whether that language is sufficiently reprehensible to be a conviction for a crime involving moral turpitude, is why I said DHS would probably think so.

CHRISTINA KLEISER: DHS might argue yes. What might be a safer plea if you can get it — now, obviously, again the big "if," from going from an aggravated assault to an offense of touching might be a big "if" for the criminal defender. But if you are able to get three, intentionally or knowingly causing physical contact with another person is offensive, so no injury but still have intentional scienter. Now, in Tennessee, the first two are a Class A misdemeanor, and the third is a B misdemeanor. So for a prosecutor, sometimes that's a significant drop. But you are just being much safer for your defendant if you are able to get it lower. And then arguably they will have problems in the state of Tennessee even if you just have a misdemeanor assault for crimes of moral turpitude, if that is part of your analysis.

Our panel only has about twenty minutes, and I wondered if we wanted to leave the rest of the time for questions.

DAN KESSELBRENNER: Could you put the Venn diagram up?

CHRISTINA KLEISER: Sure.

DAN KESSELBRENNER: We have been focusing on moral turpitude just because we wanted to give some practical examples of how you can avoid a certain consequence, but avoiding one consequence isn't enough because I gave you the definition — we had some discussion about moral turpitude, but there's also grounds of deportability for guns. Unlawful possession of a firearm might be a strict liability offense. Certainly no one would say it's morally reprehensible. Someone might, but it's not the conventional view. So it wouldn't involve moral turpitude. But you need to go through the list of possible grounds of deportability, and you'd have

your grounds for deportability for a firearm that would say carrying, possessing, using a fireman as defined in 18 U.S.C. 921(a) or something like. Then you would look at it and say, "I avoided moral turpitude, but possession of a fireman wouldn't be good for my client because it fits under this other ground of deportability."

So the takeaway from this is, you need to not just focus on one of the grounds listed in 8 U.S.C. 1227(a)(2) of criminal grounds of deportability, but look at all of them. And then from that you can get your — do the hierarchy we talked about. I just didn't want people to think they had scored a victory by pleading to something which avoided one consequence but then fell under one of the other grounds.

MR. ELKINS: We have about fifteen minutes left that we will open up for questions, and if you do have a question, please let us use the microphone so we can get it on the record.

UNIDENTIFIED SPEAKER: It sounds to me like lawyers are confused about what crimes are going to trigger immigration consequences. They're calling you, and they're calling you. And they're calling Tricia. Why can't there be a database where you can go and click on your state and someone has figured out which crimes trigger immigration consequences, whether they definitely do or they may, and if so, what you should strive to plead for your client?

DAN KESSELBRENNER: The answer is yes, and I think in your materials, there's a thing that Michael Holley did from the Federal Defender of the Middle District of Tennessee. So the short answer is it's been done, but the ones I've done, I don't always have time to update every time there's a new decision. There's a nuance, and

something would have to move. And it really doesn't give your client an individualized assessment that we think you really need to do. So the answer to your question is, it's not a database, it's not — well, it's online, but you can't plug — it's not interactive. That's a resource to begin your research, and if it says always, there's a good chance that that will always — the category, like you said, always, never, maybe. If it says always, chances are it's not good.

But I did want to answer — I think it was your question from an earlier session about proving the prejudice, mentioned Jenny Roberts's terrific article. Now, it isn't just that I would have gone to trial, but the prejudice would have been — there's a reasonable possibility with a different outcome, and the different outcome could have been I could have gotten a lower sentence. One of the things we didn't show here is that there's a theft aggravated felony, that if it's a theft and you get a year sentence, it's in that killer category of aggravated felonies.

Let's say your client has been a long-term resident. They would have gotten this thing called Cancellation of Removal for Permanent Resident but for this conviction. Where there's a reason for the outcome that it mattered to the person and it was something like, it would have been foreseeable that someone could have gotten a 364-day-suspended-sentence-probation kind of thing instead of a 365-day and that one day would have meant the difference between automatic deportability and the chance to go in front of an immigration judge to qualify for relief, many post-conviction fact finders in many jurisdictions are going along with that. So I just wanted to — for those people who do post-convictions, I don't want the takeaway to be *Strickland* and it's too hard to meet when it's progeny because now — and this was what the Supreme Court decided last term, I think it was in *LaFleur* and in *Frye,* that part of the right to counsel includes the right to

an effective plea bargain. Just to be clear, you don't have a right to say, "I had a right to 364 days," but you had a right to have someone negotiate an effective plea bargain.

Also, historically, there's been a duty to mitigate, and the duty to mitigate includes seeking this sentence that would be lower. And it would also avoid immigration consequences. So there are resources out there. It's not the magic formula. Kevin talked about when *Padilla* was announced. I worked for part of the National Lawyers Guild, which is a very, very, very, very progressive organization, and I heard — we had that march in Nashville that Elliott mentioned, the *Renteria* hearing. There was a march to the courthouse, and the community in Nashville came. And there were Lawyers Guild members with their characteristic green hats being legal observers. So it's the kind of thing in the organization that represents people in struggle or movements in struggle. And then I see this was cited by Justice Alito in its concurrence of *Padilla*. Oh, oh. All these years I've tried to live the good life and be respectful, and then what could I have said that Justice Alito was citing basically a National Lawyers Guild book, being one of the most conservative members of the Justices of the Supreme Court.

As it turned out, it was the things that I had written about how complicated immigration law is which dovetailed with his analysis that it was too complicated for lawyers to do. Fortunately, it wasn't too complicated because I have faith in you out there — and I did want to give a shout out, since we are reaching the end of our time, to people who are doing this work. It isn't very difficult. It's very, very hard to have a limited amount of time, to have someone pressuring you to do more cases than you can reasonably do in the amount of time that exists in the day, and still have a life and still go in front of the judge and say, "Sorry, I need that continuance." So I really applaud — because a lot of what I do is sit in my

office and spit out ideas and write stuff and read stuff that other people do and talk to people on the phone. I have an easy job compared to the jobs you have who actually go into court and represent people on a day-to-day basis, having the stress and pressure of an individual whose life is really going to be affected dramatically by the amount of work you put into it. So I just wanted to not let this session end without sort of at least saluting the people who do that difficult work every day because I certainly would not want to do it.

MR. ELKINS: In reference to the list that he was saying is in your materials on the Tennessee statutes and how they're interpreted, Mr. Holley did, some of the students have tried to update that as best we could, but if you are going to rely on it, obviously check on your own. Any more questions?

UNIDENTIFIED SPEAKER: I just have a real short, quick question. Is there a website we could go to find out if someone has been deported?

DAN KESSELBRENNER: Does the 800 number list —

JEREMY JENNINGS: If you've been ordered deported.

CHRISTINA KLEISER: Yeah, if you've been ordered deported by immigration.

UNIDENTIFIED SPEAKER: Ordered deported, snatched up, gone, whatever.

JEREMY JENNINGS: That doesn't mean physically deported. That just means the court has ordered you to be deported.

DAN KESSELBRENNER: I don't know of one.

CHRISTINA KLEISER: Not a website. Very minutia right now, but if you have the alien registration number, which is a number issued to them when they are issued their first immigration documents basically, the Executive Office for Immigration Review has a 1-800 number. It's 1-800-898-7180, and if you call it, it's an automated system, you put in the A number, and it will tell you if the judge has ordered a prior deportation. Yes. Always helpful to get an A number. I don't care what your client tells you.

DAN KESSELBRENNER: It's not reliable. It will give you information to check further because, the last time I called, it happened to be someone whose case was reversed twice by the 9th Circuit, and he was actually pending somewhere in the administrative proceedings. I believe this person was pro se, got reversed twice by the 9th Circuit, and the thing listed him as having a deportation order, and that was the last entry. So, it can help be a starting place to further research. There is no way to avoid doing the work. These things can save, like the charts and the 800 number, can save time and give you a heads-up to do further factual and legal investigation, but the information isn't sufficiently — even the stuff I do — isn't sufficiently reliable, especially the things I do, sufficiently reliable for your client to decide without an individualized, particularized assessment of how this law applies to her in the case.

UNIDENTIFIED SPEAKER: Thank you.

MR. ELKINS: We have about five minutes left. Does anyone else have anything else? I've got one here that I would like to ask you. If you are advising a client on pleading and they could either plead to a crime that they may not have committed that has no immigration

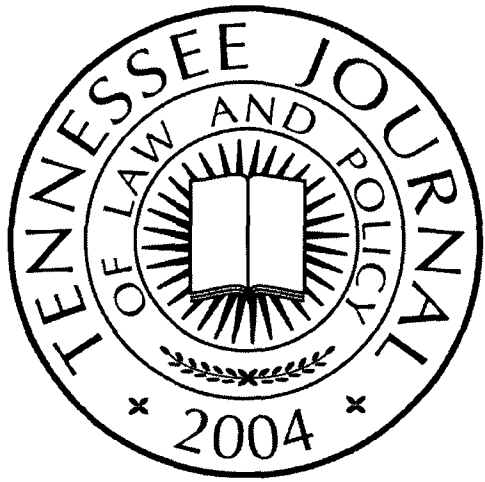
consequences or go to trial and face conviction to a crime that does have immigration consequences, how would you advise them?

DAN KESSELBRENNER: Well, the ethical issues that I see are, there is some — you have to be honest — you can't perpetrate a fraud on the court, but you have an obligation to represent your client zealously. It's possible I think to fulfill both. If you ask the prosecutor to write up the safe charge and then enter something like an *Alford* plea or no contest, you are not saying that you did it. You are just saying you have — *Alford* is a case where your plea is something like, "I have reasons to plead guilty other than my actual guilt." Alford takes a death penalty in North Carolina. He pled to something else because he didn't want to die because he didn't think he could get a fair trial in the North Carolina system that existed at the time, especially segregated juries. An *Alford* plea I think is a way that you can both maintain your honesty and integrity and your bar license and still help your client.

VIOLETA CHAPIN: It happens in other circumstances too. So with regular citizen clients, sometimes this prosecutor will give you a charge which has nothing to do with what you actually did in order to avoid points on your license, for example, and the judge will ask them ask a question, "Are you pleading to this in order to take the benefit of the plea, and that's the reason why you're doing this?" Yes. And that's perfectly fine to do that. We've had certainly cases where the client's alleged conduct, according to the police report, isn't what he's pleading to, but we're doing it in order to take advantage of an immigration-safe plea. The judge can say it if he wants to say it, but it doesn't matter to us. We're more concerned for the immigration-safe plea if we can get out from under something that's problematic.

MR. ELKINS: If there are no other questions, we will have our closing from our editor in chief of the *Tennessee Journal of Law and Policy*. Is there anything else in closing? All right. Amy.

AMY WILLIAMS: First of all, I just want to thank Katie for putting all this together. Of course, Professor White is conveniently not in here because she probably knew we got her something. Mickey wants me to remind you all to please turn in your CLE forms, which I'm sure you are already aware of, to be sure you get your credits. Thank you.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