

June 2013

Panel Discussion II: Analyzing the Immigration Process and How Criminal Law Fits In

Tricia Herzfeld

Jeremy Jennings

Karla McKanders

Follow this and additional works at: <https://ir.law.utk.edu/tjlp>



Part of the [Law Commons](#)

Recommended Citation

Herzfeld, Tricia; Jennings, Jeremy; and McKanders, Karla (2013) "Panel Discussion II: Analyzing the Immigration Process and How Criminal Law Fits In," *Tennessee Journal of Law and Policy*. Vol. 9: Iss. 4, Article 8.

Available at: <https://ir.law.utk.edu/tjlp/vol9/iss4/8>

This Symposium Material is brought to you for free and open access by Volunteer, Open Access, Library Journals (VOL Journals), published in partnership with The University of Tennessee (UT) University Libraries. This article has been accepted for inclusion in Tennessee Journal of Law and Policy by an authorized editor. For more information, please visit <https://ir.law.utk.edu/tjlp>.

**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 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 detainees, 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.