

EMBRACING MERCY: REHABILITATION AS A MEANS TO FAIRLY AND EFFICIENTLY ADDRESS IMMIGRATION VIOLATIONS

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Introduction

Efforts by the U.S. Congress and the Obama Administration to provide millions of undocumented immigrants a path to legal status will fail unless deserving immigrants are allowed to overcome prior immigration or minor criminal violations. Indeed, a pathway to legal status is a hollow gesture if the path is either too narrow or too steep. As one means of evaluating which immigrants should benefit from comprehensive immigration reform, rehabilitation allows immigrants to demonstrate that they deserve a second chance and provides policymakers with a buffer against critics of immigration reform who allege it is nothing more than an amnesty for persons who violated immigration and criminal laws. This article explores the current limited use of rehabilitation in the immigration context, examines its historic use in the criminal justice system, contrasts the U.S. approach with that employed by Canada, and outlines practical measures which could be taken to ensure that rehabilitation is an effective tool to decide who deserves to walk the path to legal status.

A central premise of this article is that, by significant margins, most Americans recognize that the value of welcoming immigrants with somewhat checkered immigration histories and perhaps even low-level criminal records outweighs the moral, social and economic costs of banishment. Current U.S. immigration laws

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are severe, unyielding and lead to the separation of families and the loss of productive workers for U.S. employers. Families, employers and educational institutions operate in a shadowland in which various members are a blend of U.S. citizens, Lawful Permanent Residents and undocumented immigrants.¹ Comprehensive immigration reform offers the hope that millions of immigrants who have lived and worked in the U.S. will be able to gain legal status.² A touchstone of comprehensive immigration reform is that U.S. immigration laws should focus on justice and fairness and, in particular, persons who entered the U.S. illegally or who overstayed visas should not be treated as criminals but, instead, offered a pathway to legal status and eventual citizenship.³ As a legal, moral and ethical construct, comprehensive immigration reform makes sense: if enacted, families will no longer live in fear of the deportation of one or more of its members, employers will be able to hire needed workers without fear of violating federal and state laws, and American society can become more cohesive and less rent by legal status and ethnic divisions.⁴

¹ Rick Fang-Chi Yeh, *Today's Immigration Legal System: Flaws and Possible Reforms*, 10 RUTGERS RACE & L. REV. 441, 444-47 (2009) (providing four alternatives to the current problem in immigration reform, stating that the best option is to "change the structure of the immigration legal system to a structure similar to the system of the National Labor Relations Board"). While there are a myriad of proposals calling for comprehensive immigration reform, this article refers to the proposal advanced by the Obama Administration, which was designed to encourage bipartisan support by focusing on border and interior enforcement, increased ability of U.S. employers to attract and hire foreign talent, and allowing undocumented immigrants to enter a pathway to legal status.

² See generally *Blueprint for Building a 21st Century Immigration System*, Infonet Doc. No. 11051175, AILA (May 11, 2011), <http://www.aila.org/content/default.aspx?bc=1016%7C9600%7C9601%7C39855%7C35361>.

³ *Id.* at 16; see also Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L. J. 102, 129 (2010), available at <http://ssrn.com/abstract=1713244>. Even the concept of a person being illegally present in the U.S. is imprecise and attempts to define it are often inherently value-laden. See José Antonio Vargas, *Immigration Debate: The Problem with the Word Illegal* (Sept. 21, 2012), <http://ideas.time.com/2012/09/21/immigration-debate-the-problem-with-the-word-illegal/>.

⁴ Cardinal Roger Mahony, *Immigration Reform: A Moral Imperative*, THE-TIDINGS (May 7, 2010), <http://www2.the-tidings.com/2010/050710/fordtext.htm>.

*I. The Need to Embrace Rehabilitation**A. The Practical Reality of Immigration Reform*

For all the benefits of comprehensive immigration reform, its success or failure depends largely on how it is crafted and implemented with respect to its treatment of immigrants who have violated U.S. immigration laws or committed certain low-level criminal offenses. The awkward reality is that nearly all immigrants who stand to benefit from comprehensive immigration reform have violated U.S. immigration laws, given the length of time many have been present in the U.S. and the fact that many are or were in a demographic group – young men – who are statistically more likely to have committed or been convicted of various crimes, albeit, in most cases, of fairly low-level offenses.⁵ Applications for status filed by immigrants with checkered immigration or criminal pasts will require individual attention and screening. If verifiable and efficient procedures are not created to vet such applications, the backlog of immigrants seeking status and resulting adjudication delays will detract from any possible benefits of gaining legal status. Justice delayed would truly be justice denied.

One other point often lost in the polemical debates over immigration reform is that comprehensive immigration reform poses the most significant logistical challenge for the federal government in a generation: up to seven million persons will be eligible to apply for a government-sanctioned benefit.⁶ In other less-inclusive efforts to adjudicate applications for relief, such as the Deferred Action for Childhood Arrivals (DACA) program implemented in August 2012, potential beneficiaries completed paper applications and submitted

⁵ Ruben G. Rumbaut, *Undocumented Immigration and Rates of Crime and Imprisonment: Popular Myths and Empirical Realities* 8, 11, 17 (Aug. 21-22, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1877365.

⁶ Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEWHISPANIC.ORG (Feb. 1, 2011), available at www.pewresearch.org/pubs/1876/unauthorized-immigrant-population-united-states-national-state-trends-2010.pdf.

them with filing fees to U.S. Citizen and Immigration Services (USCIS).⁷ An estimated 1.8 million persons are eligible to apply for relief under DACA.⁸ Certain applicants were selected for interviews with USCIS officers and, in all cases, applicants were screened for past criminal activities to determine if those activities posed an obstacle to relief.⁹ In the context of comprehensive immigration reform, USCIS and, potentially, the already overburdened Immigration Courts will face a tidal wave of applications and the need to make individual determinations of relief if an applicant has a negative criminal or immigration history. Greater acceptance of rehabilitation than under existing law and the creation of equitable standards to evaluate rehabilitation will allow USCIS and Immigration Judges to quickly adjudicate applications for relief. If a fair and workable solution is not found to address whether such persons qualify for comprehensive immigration reform, then the entire effort will be an exercise in futility and more emblematic of a broken promise than a hope for a more perfect union.

B. Models for the Evaluation of Rehabilitation

Given the close relationship between criminal law and immigration law, adjudicators of claims of rehabilitation in the immigration context could look to criminal law for guidance regarding when rehabilitation is warranted and when it is not. Apart from relying on factors used in criminal law to evaluate rehabilitation, there is a foreign model the U.S. may wish to consider, both in terms of crafting laws and regulations, which

⁷ *I am a Young Person Who Arrived in the United States as a Child (Childhood Arrival)*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <http://www.uscis.gov/USCIS/Resources/daca.pdf> (last visited Feb. 19, 2013); see also *Deferred Action for Childhood Arrivals*, HOMELAND SECURITY, available at <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited July 19, 2013); see generally U.S. CITIZEN AND IMMIGRATION SERVICES, <http://www.uscis.gov> (last visited July 19, 2013).

⁸ *Practice Advisory*, AMERICAN IMMIGR. COUNCIL, <http://www.legalactioncenter.org/sites> (last visited Feb. 19, 2013).

⁹ *Id.*

clearly spells out who qualifies and who does not, and also allows adjudicators to more carefully analyze which immigrants qualify for rehabilitation. Canada embraces the concept of rehabilitation in its consideration of which offenses will render persons inadmissible to or deportable from Canada.¹⁰ In its determinations regarding the equivalent of waivers for immigration and criminal violations, Canada applies traditional criminal law rehabilitation factors.¹¹ Canada also applies two different standards for rehabilitation – deemed and adjudicated – depending on the immigration status of the person, how long ago the sentence was completed, and the severity of the crime.¹² The Canadian approach to rehabilitation is straightforward in that it eliminates the guesswork by considering certain immigrants with criminal convictions to be “deemed rehabilitated” based on the satisfaction of specified criteria, while other immigrants may qualify for Canadian immigration officials to assess their degree of rehabilitation and the factors adjudicators use to verify rehabilitation are finite.¹³ Grafting the Canadian approach to waivers and rehabilitation on to comprehensive immigration reform in the U.S. would allow USCIS to take a more nuanced

¹⁰ Immigration and Refugee Protection Act, § 36(1)-(2) (Can.) [hereinafter IRPA].

¹¹ *Id.*; see *Rehabilitation For Persons Who Are Inadmissible to Canada Because of Past Criminal Activity*, CITIZENSHIP AND IMMIGR. CANADA, www.cic.gc.ca/english/information/applications/guides/5312ETOC.asp (last updated March 20, 2013); ENF1 14 /OP 19 Criminal Rehabilitation (listing attendance in drug rehabilitation program, employment history, and community service as positive factors attesting to rehabilitation, and indicating that “[r]ehabilitation may be demonstrated by the passage of time and through an examination of the person’s activities and lifestyle, both before and after the offence . . .”); Canadian Bar Association, *Criminal Rehabilitation* (April 21, 2008), available at [www.cba.org/cba/cle/PDF/IMM11_Sedai_ENF14%20\(2008-04-21\).pdf](http://www.cba.org/cba/cle/PDF/IMM11_Sedai_ENF14%20(2008-04-21).pdf).

¹² IRPA, *supra* note 10, at §36(2)(b)(including a formula for determining if a person is deemed rehabilitated, based on whether the offenses committed were either summary or indictable offenses, whether subsequent offenses were committed, and how much time has passed since the conviction. Deemed rehabilitation eliminates the guesswork regarding whether a person will be admitted to Canada while adjudicated rehabilitation is prone to the vagaries of individualized determinations by an officer).

¹³ *Id.*

approach to deny relief to immigrants with serious immigration or criminal records, such as multiple illegal reentries, immigration fraud, violent crimes, or crimes involving the manufacture or sale of illegal drugs, while allowing immigrants with lesser records to demonstrate recompense for their transgressions. The Canadian model would also allow USCIS to make streamlined decisions and obviate the need, in most instances, for protracted and adversarial legal proceedings to determine eligibility for relief under comprehensive immigration reform.

C. Rehabilitation is Good for the Soul

The need for enhanced waivers of immigration and criminal violations is contentious. As noted above, one of the inherent difficulties in comprehensive immigration reform is addressing how persons with immigration and criminal violations are to be treated. Pushback to waivers of illegal presence and entry as well as criminal records comes from two opposed camps. On the one hand, certain pro-immigrant advocates argue that the immigration laws themselves are wrong because family sponsorship from certain countries, such as Mexico, is attenuated and work visas are nearly impossible to obtain for lesser-skilled immigrants, so any violation of laws perceived as unjust should be excused.¹⁴ On the other hand, advocates for greater restrictions on immigrants argue that the immigration laws need to be enforced and that, while severe, the consequences of violating such laws, including banishment or long-term separation of immediate family members, ensure that violators do not openly flout the laws.¹⁵ Somewhat paradoxically, the expanded use of rehabilitation may help bridge this divide by affording persons who violated immigration laws or who committed lesser crimes a means to demonstrate their worth and regret for the circumstances that caused

¹⁴ Stuart Anderson, *Answering the Critics of Comprehensive Immigration Reform*, CATO INSTITUTE (May 9, 2011).

¹⁵ *Illegal Immigration is a Crime*, Federation for American Immigration Reform, <http://www.fairus.org/issue/illegal-immigration-is-a-crime.pdf> (last visited Feb. 19, 2013).

them to transgress while, at the same time, freeing more restrictionist-minded policymakers the opportunity to act with grace and decency.

To be clear, rehabilitation is strong medicine for immigrants who wish to qualify for legal status. Rehabilitation depends, in traditional and religious contexts, on acceptance of responsibility, a showing of contrition, penance and extension of mercy.¹⁶ The point of rehabilitation is not just to satisfy an adjudicator that an immigrant qualifies for a benefit; no different than its effect on a criminal, rehabilitation allows an immigrant to reflect upon choices made and future aspirations, while also allowing the society which embraces rehabilitation to extend mercy.¹⁷ Both actions are critical to the success of rehabilitation as a means to ensure that not only deserving immigrants benefit from comprehensive immigration reform but also that, as a society, the U.S. does not later regard such reforms as too bitter a pill to swallow. In addition to advocating for a streamlined adjudicative process to determine which immigrants should gain from comprehensive immigration reform, this article proposes that any legislation to reform the U.S. immigration laws should demonstrate greater respect than existing U.S. laws for the human capacity to change, make amends, express regret and, ultimately, be embraced as a productive member of U.S. society.¹⁸

¹⁶ Barbara P. Billauer, *Optimal Justice: Education, Rehabilitation, Forgiveness – Or How Joseph Ends Sibling Rivalry and Becomes a Saint* (2011); see U.S. Conference of Catholic Bishops, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice*, OLD.USCCB.ORG (Nov. 15, 2000), www.oldusccb.org/sdwp/criminal.shtml.

¹⁷ *Id.*

¹⁸ For example, using one of the primary vehicles for undocumented immigrants to gain legal status in the U.S., an applicant for cancellation of removal for non-Lawful Permanent Residents under INA §240A(1)(b) is not offered the opportunity to even attempt to demonstrate rehabilitation for any crimes committed or immigration laws violated. Immigration and Nationality Act (INA) 8 USC §1229b Cancellation of Removal; Adjustment of Status.

*II. Rehabilitation Under Current U.S. Immigration Law**A. Lack of Discretion and Uniform Standards*

Current immigration laws and regulations do not offer much in the way of precedential guidance for how comprehensive immigration reform should address violations of immigration or criminal laws. In fact, only two forms of relief currently recognize rehabilitation as a factor: cancellation of removal and waivers of inadmissibility and deportability.¹⁹ For example, cancellation of removal, which is the most common form of relief sought by immigrants in removal proceedings with criminal convictions or immigration violations, relies upon discretionary decisions by Immigration Judges regarding whether an applicant possesses good moral character, which is itself an illusory concept, and contains strict prohibitions on relief for all but the most low-level criminal offenses.²⁰ As a result, grant rates for cancellation of removal are exceptionally low – 5 percent for non-Lawful Permanent Resident (LPR) cancellation of removal and 10 percent for LPR cancellation of removal.²¹ The only other current process by which immigrants can gain legal status, sponsorship through marriage to a U.S. citizen or, in rare instances, employment with a U.S. firm, requires a waiver of immigration and criminal law violations to be issued.²² Under existing immigration law, it is exceedingly difficult, even for immigrants with U.S. citizen spouses and children and who committed either administrative immigration violations or nonviolent crimes, to obtain waivers needed to gain legal status or cancel deportation.²³ With a strict policy of granting waivers only in the

¹⁹ 8 U.S.C. § 1229b(a) – (b) (2012).

²⁰ 8 U.S.C. § 1229a(a)(1); 8 U.S.C. § 1229b(a) – (b) (2012).

²¹ The status of “Lawful Permanent Resident” derives from the definition of “immigrant” under INA § 212(a)(15) and includes all aliens who are not classified as nonimmigrants. U.S. Dept. of Justice Executive Office for Immigration Review, FY 2011 Statistical Year Book 55 (Feb. 2012), *available at* www.justice.gov/eoir/statpub/fy11syb.pdf.

²² 8 U.S.C. § 1182(a)(9)(B)(v) (2012).

²³ *Id.*

case of well-documented exceptional and extremely unusual hardship to U.S. spouses and children and, in equal measure, willful blindness to whether an immigrant has been rehabilitated, the U.S. takes an unduly doctrinaire and rigid approach.²⁴ The consequences of the failure to grant cancellation of removal or waivers are not only the deportation and subsequent long-term or permanent bar from readmission of many thousands of immigrants each year but also the separation of U.S. citizens from their closest family members and, in many cases, their sole means of support. In addition, the process to adjudicate applications for cancellation of removal and waivers is attenuated and prone to the vagaries of human discretion and bias. Comprehensive immigration reform needs to find a better way forward.

The shape and direction of comprehensive immigration reform remain elusive but, if past attempts are prologue, then reforms will consist of a priority system under which immigrants will receive more or less preferential treatment based on their familial ties to the U.S., duration in the U.S., and whether they have any incidents in their past which impact their good moral character.²⁵ Comprehensive immigration reform, if adopted, will inevitably have a winnowing effect: immigrants with immediate family members who are U.S. citizens and who entered legally but overstayed their visas and have not violated any criminal laws will likely be allowed priority status in this process whereas other immigrants who entered illegally or have criminal convictions will be reviewed on a non-priority basis to determine whether their transgressions should bar them from legalizing their immigration status or even trigger deportation.²⁶ Like any other significant undertaking, the devil is in the details and the process used to select desirable immigrants from undesirable immigrants, which has long vexed U.S. policymakers, is critical to the success or failure of comprehensive immigration reform. If the process is seen as unfair or becomes overly litigious, then proponents and opponents of comprehensive immigration

²⁴ Elwin Griffith, *The Meaning of Admission and the Effect of Waivers Under the Immigration and Nationality Act*, 55 HOWARD L. J. 1 (2011).

²⁵ *Blueprint for Building a 21st Century Immigration System*, *supra* note 2.

²⁶ *Id.*

reform will have ample reason to claim that the effort was a failure.

The increased use of rehabilitation as a factor to grant benefits under comprehensive immigration reform is a radical departure from existing practices. Current U.S. immigration law is noted for its severity and lack of proportionality between an offense committed and the resulting punishment.²⁷ In addition, in contrast to criminal law, U.S. immigration law is not explicitly designed to punish transgressors.²⁸ If it was punitive, then the Constitution requires that the punishment fit the crime.²⁹ Yet, immigration law violations are expressly not crimes but breaches of administrative laws and regulations.³⁰ As a result, persons in removal proceedings based on criminal acts, unlawful entry or overstaying a visa may only avail themselves of limited procedural safeguards under the Due Process Clause.³¹ As Professor Daniel Kanstroom noted, “[w]e deport people as part of our efforts to control serious crime in our communities . . . [and] to maintain the credibility and legitimacy of our immigration laws.”³² While, as Professor Kanstroom maintains, these rationales are distinct, they each beg the question whether rehabilitation can and should ameliorate some of the harsh consequences of such laws. In other words, can the waivers needed to make comprehensive immigration reform a viable program still allow serious crime to be controlled while not undermining the credibility and legitimacy of our immigration laws? This article

²⁷ Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 UC L. REV. 415, 416 – 44 (2012); see also Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009) [hereinafter Stumpf, *Fitting Punishment*].

²⁸ Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011).

²⁹ *Id.* at 1422, 1454-55.

³⁰ *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952); see also *Mahler v. Eby*, 264 U.S. 32, 39 (1924).

³¹ *Yamataya v. Fisher*, 189 U.S. 86, 97 (1903).

³² Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1892 (2000). Professor Kanstroom also contends that, in particular, the deportation of long-term permanent residents for post-entry crimes is punishment in the sense that it incapacitates the offender and deters others from committing crimes, while also operating as a form of retribution for the crimes. *Id.* at 1894.

supports the view that waivers and the underlying rationales for comprehensive immigration reform can and, in fact, should peacefully coexist. Indeed, a fair argument can be made that, given the increased severity of immigration laws since 1996, immigration laws now appear to be dissonant with less severe state and federal criminal laws. In recent years, due to budgetary pressures and a growing recognition that treatment alternatives – rather than lengthy jail sentences – are a more efficacious means of reducing recidivism, state legislatures have moved away from tough sentences for non-violent drug offenders.³³

Apart from greater discretionary consideration of rehabilitation, other elements of comprehensive immigration reform could ameliorate the harsh consequences of immigration violations. For example, Professor Juliet Stumpf argues that immigration violations should not trigger a one-size-fits-all response but that the severity of the violation should play a greater role in the degree of sanction imposed.³⁴ Professor Stumpf equates U.S. immigration law to an on-off switch in the sense that almost any violation of the Immigration and Nationality Act (INA) triggers deportation and points to the example that a college student with a student visa who works longer than allowed is treated the same under the INA as a tourist who commits murder.³⁵ Both are treated the same under U.S. immigration law in the sense that the response to both of their actions is deportation.³⁶ This binary nature of U.S. immigration law does not well serve the goals of the immigration system because it imposes too harsh a sanction on persons who could greatly benefit the U.S. If comprehensive immigration reform is enacted, the student who works beyond the allowable hours could graduate from a U.S. university, obtain a high-paying job in the U.S. and drive the U.S.

³³ Teresa A. Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement's Failed Experiment with Penal Severity*, 38 *FORDHAM URB. L.J.* 217, 231 (2010).

³⁴ Stumpf, *Fitting Punishment*, *supra* note 27 at 1730.

³⁵ *Id.* at 1691.

³⁶ *Id.* Professor Stumpf is correct in her analysis of the immediate consequences of such violations, but the student who violated the terms of the student visa will find it easier to return to the U.S. in the future than would the murderer.

economy forward.³⁷ Certainly, some form of sanction should be imposed and rehabilitation should be assessed to determine whether he or she is likely to re-offend; deportation or failure to qualify for a benefit under comprehensive immigration reform should not be a knee jerk reaction to relatively innocuous violations of administrative and lesser criminal laws.

B. Rehabilitation As a Factor in Waiver Determinations

As noted above, rehabilitation is barely a factor in U.S. inadmissibility and deportability determinations. In fact, rehabilitation is more of a footnote in terms of discretionary waivers of inadmissibility and deportability and its application is haphazard, inconsistent and absent of any clear guidelines.³⁸ For example, various waivers of inadmissibility allow for rehabilitation to be considered a discretionary factor, although rehabilitation is not listed in the INA or the corresponding regulations as a factor which must be assessed.³⁹ Indeed, even in the leading decision by the Board of Immigration Appeals clarifying the balancing of discretion in the adjudication of a waiver under INA Sec. 212(d)(3), which waives many grounds of inadmissibility for persons seeking a nonimmigrant visa to the U.S., rehabilitation is not cited as a formal criterion for the exercise of discretion.⁴⁰ In fact, the Board of Immigration Appeals (BIA) only listed rehabilitation as a factor to be considered but did not explain how and when rehabilitation could be shown.⁴¹

³⁷ See, e.g., Raul Hinojosa-Ojeda, *The Economic Benefits of Comprehensive Immigration Reform*, CATO JOURNAL, Vol. 32, No. 1 (Winter 2012); Robert Lynch & Patrick Oakford, *National and State-by-State Economic Benefits of Immigration Reform*, Center for American Progress, AMERICANPROGRESS (May 17, 2013), available at <http://www.americanprogress.org/issues/immigration/report/2013/05/17/63295/national-and-state-by-state-economic-benefits-of-immigration-reform/>.

³⁸ Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 142, 142 (2012).

³⁹ See, e.g., INA § 212(i), 237(a)(1)(H), and 212(k).

⁴⁰ Matter of Hranka, 16 I&N Dec. 491 (BIA 1978).

⁴¹ *Id.*

Similarly, the Immigration Judge Benchbook, which is the authoritative guidance for Immigration Judges to consult in their daily decisions and is issued by the Executive Office for Immigration Review, notes that “proof of genuine rehabilitation” may be considered as a factor justifying favorable consideration of cancellation of removal but fails to provide Immigration Judges any guidance regarding how to assess whether rehabilitation is genuine or not.⁴² The Foreign Affairs Manual likewise lists rehabilitation as a factor to be considered but offers no other guidance to adjudicating officers.⁴³ Comprehensive immigration reform should fill that gap and provide clear, consistent and meaningful factors to address whether rehabilitation is present.

Similarly, under the BIA’s holding in *Matter of Mendez-Moralez*, INA Sec. 212(h) allows rehabilitation to be considered as a discretionary factor for persons seeking a waiver of inadmissibility.⁴⁴ However, rehabilitation and other discretionary factors are only reviewed if the person seeking admission falls within a *narrow class* of persons with limited criminal records and is able to prove extreme hardship to a parent, spouse, or child who is a U.S. Citizen or Lawful Permanent Resident.⁴⁵ In that sense, while rehabilitation is a factor under BIA fiat (which is subject to reversal or revision by subsequent decisions), it is not a listed factor in the applicable statute or regulations, and it may only be assessed for relatively few people and only if they can demonstrate extreme hardship to specified close

⁴² Immigration Judge Benchbook, *available at* [www.justice.gov/eoir/vll/benchbook/templates/benchbook%20cancellation%20240A\(a\)%20template%201%20upload%201-30-08.htm](http://www.justice.gov/eoir/vll/benchbook/templates/benchbook%20cancellation%20240A(a)%20template%201%20upload%201-30-08.htm).

⁴³ U.S. Department of State Foreign Affairs Manual Vol. 9 40.301 (advising Consular Officers to “consider the following factors, among others, when deciding whether to recommend a waiver: (1) The recency and seriousness of the activity or condition causing the alien’s inadmissibility; (2) The reasons for the proposed travel to the United States; and (3) The positive or negative effect, if any, of the planned travel on U.S. public interests”).

⁴⁴ 21 I&N Dec. 296, 301 (BIA 1996).

⁴⁵ Immigrant Legal Resource Center, *Inadmissibility and Deportability* 127–35 (2d ed. 2010).

family members.⁴⁶ Clearly, the ambit of rehabilitation needs to be expanded under comprehensive immigration reform, to avoid such a crabbed and narrow application.

While similar in nature to cancellation of removal, which can only be pursued by immigrants in removal proceedings, the exercise of existing waiver authority is the most efficacious and likely means by which comprehensive immigration reform will address persons with immigration and criminal violations.⁴⁷ One reason for waivers to be used to separate deserving from non-deserving immigrants is that U.S. Citizenship and Immigration Services (USCIS) already possesses the authority and expertise needed to adjudicate waivers.⁴⁸ The difficulty, then, lies in the fact that USCIS is unduly parsimonious in the exercise of waiver approvals and lacks sufficient statutory and regulatory guidance to consider a variety of mitigating factors, such as rehabilitation, in consideration of waiver requests.⁴⁹ The recent decision by USCIS to allow so-called I-601 waivers of unlawful presence to be processed while the person subject to the waiver request remains in the U.S. is a simple, practical step to reduce hardship and promote family unity.⁵⁰ Yet, even this advancement fails to acknowledge any role for a showing of rehabilitation within the factors weighed by USCIS adjudicators.

Comprehensive immigration reform, then, needs to clarify who qualifies for waivers and, perhaps more importantly, provide a streamlined process to adjudicate such waivers and inject some degree of certainty among both immigrants and adjudicators that an immigrant either will or will not qualify for a waiver. In particular, comprehensive immigration reform needs to embrace rehabilitation as a positive factor for the consideration of eligibility for benefits under comprehensive immigration reform and any waivers needed

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 8 C.F.R. § 212.2.

⁴⁹ Chris Gafner & Stephen Yale-Loehr, *Attracting the Best and the Brightest: A Critique of the Current U.S. Immigration System*, 38 *FORDHAM URB. L.J.* 183 (2010).

⁵⁰ Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 *FR* 535 (Jan. 3, 2013).

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for individual immigrants to benefit from comprehensive immigration reform. If the U.S. were to allow adjudicators of waivers of criminality or immigration violations to more broadly consider whether an immigrant has been rehabilitated, immigrants and their families would be able to live without the fear of deportation and family separation. Further, the national dialogue on immigration might also shift as policymakers recognize that immigrants with blemished records are not beyond rehabilitation and that banishment is antithetical to American values and hurts U.S. families, employers and society far more than it serves any legitimate enforcement objectives.

Greater respect for rehabilitation as a factor in immigration reform, in order to provide USCIS increased discretion to grant waivers of immigration violations and low-level criminal convictions, does not mean that U.S. immigration laws would be rendered toothless. To the contrary, under current U.S. immigration law, any chance at relief from deportation is only available to immigrants who meet strict temporal requirements, who can verify hardship to their U.S. citizen and LPR immediate family members, and whose records include minimal immigration violations and nonviolent criminal convictions. Indeed, rehabilitation is not a backchannel attempt to achieve broad-based amnesty for undocumented immigrants; rather, rehabilitation is a concept applied largely in the context of criminal law and can be evaluated using reliable indicia and measurable outcomes.⁵¹ In fact, in an environment when immigration laws are increasingly criminal in nature, in the sense that they are punitive and deterrent-minded, rehabilitation can equally be applied in the context of comprehensive immigration reform.

⁵¹ ADAM VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 11–12 (1976).

C. The Use of Rehabilitation in Other Immigration Contexts

Rehabilitation is also rarely found for immigrants seeking waivers needed to obtain immigrant visas. In the context of waivers of inadmissibility for immigrant visas (as distinguished from nonimmigrant visas, which are issued more liberally), discretionary factors are even more narrowly construed. In the case of a foreign national with a criminal record seeking an immigrant visa, a waiver under INA Sec. 212(h) is only available if the conviction is for a fairly minor crime, including a single offense of simple possession of 30 grams or less of marijuana, certain crimes involving moral turpitude, and if a conviction was more than 15 years before the immigrant visa is sought.⁵² In addition, INA Sec. 212(h)(1)(A) expressly requires that, before a waiver request will be entertained, the specified 15-year waiting period must have expired and the immigrant must demonstrate rehabilitation.⁵³ The statute does not, however, provide any guidance as to how such rehabilitation must be shown.⁵⁴ It is small wonder, then, that few immigrants qualify for such waivers under existing law and, if comprehensive immigration reform does not broaden waiver authority, immigrants who could potentially benefit from such reforms will be excluded from eligibility, blunting the impact of comprehensive immigration reform.

In addition, while not a specified factor in the determination of eligibility for cancellation of removal for LPRs, rehabilitation may be used to determine whether an applicant possesses “good moral character.”⁵⁵ The statute governing cancellation of removal does not specifically refer to rehabilitation as a factor in good moral character determinations but the BIA clarified that rehabilitation is an important factor and, in cases where a criminal conviction or a history of substance abuse are recent and serious, rehabilitation is

⁵² *Id.* at 137; INA § 212(h).

⁵³ INA § 212(h)(1)(A).

⁵⁴ *See* *Matter of Tin*, 14 I&N Dec. 371 (R.C. 1973); *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978).

⁵⁵ VON HIRSCH, *supra* note 51, at 144.

required to demonstrate good moral character.⁵⁶ In *Matter of Marin*, the BIA created a list of acceptable discretionary factors for cancellation of removal under former INA 212(c) for LPRs, and that list includes rehabilitation but the BIA failed to provide any guidance as to how and when rehabilitation can be shown.⁵⁷

In terms of demonstrating rehabilitation, neither the INA or the corresponding regulations, nor the various BIA decisions listing rehabilitation as a discretionary factor, illuminate how rehabilitation is to be demonstrated, analyzed or measured. Attorneys specializing in waivers have developed several informal, ad hoc avenues of inquiry, including whether the applicant is genuinely remorseful and if there are any repeated offenses or, if relevant, continued drug use.⁵⁸ This guidance, of course, is extrajudicial and may work in specific contexts before certain adjudicators but it does not create either a uniform process to determine when rehabilitation is merited or tangible metrics for its consideration. Yet, in the absence of other guidance, these informal ad hoc standards could provide a baseline for rehabilitation in the context of comprehensive immigration reform.

Of course, while this article addresses solely whether rehabilitation should be a factor in decisions to grant or deny immigration relief, such as in the context of waivers under comprehensive immigration reform, rehabilitation could also be used as a factor by Immigration and Customs Enforcement (ICE) to decide which immigrants are placed in removal proceedings for the commission of or conviction for state or local crimes. While little exercised, ICE prosecutors have some degree of discretion with respect to decisions to issue Notices to Appear and commence removal proceedings.⁵⁹ The degree to which such discretion has

⁵⁶ See *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990); *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991); INA § 240A(1)(a) and (b) Removal Procedures.

⁵⁷ *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

⁵⁸ Joseph Reina, *Waivers of Misrepresentation or Fraud in Procuring Visa or Entry*, in *THE WAIVERS BOOK: ADVANCED ISSUES IN IMMIGRATION LAW PRACTICE* 111 (Irene Scharf ed., 2011).

⁵⁹ Memorandum from John Morton, Director of U.S. Immigration and Customs Enforcement, on the Exercise of Prosecutorial Discretion (Jun. 17, 2011),

been exercised is extremely limited and, as Professor Hiroshi Motomura notes, “[t]he enforcement discretion that matters in immigration law has been in deciding who will be arrested—not in deciding who, among those arrested, will be prosecuted.”⁶⁰ In that sense, then perhaps the use of rehabilitation should be further embraced by ICE prosecutors and prosecutorial discretion should allow a showing of rehabilitation as a qualifier. The June 2011 Morton Memorandum, clarifying the basis for the most recent iteration of prosecutorial discretion, is silent on whether rehabilitation for past immigration or criminal violations is to be considered.⁶¹ Prosecutorial discretion failed due to an unduly narrow approach to its exercise by local ICE Chief Counsel but, leaving the operational defects aside, if prosecutorial discretion is to be used as a means to forestall deportation for deserving immigrants, then rehabilitation should be a factor. The Morton Memorandum indicates that any crimes must be low-level and not show a pattern of criminality. However, it does not specify the applicable crimes or allow an applicant to show a lack of propensity for repeated criminality or immigration violations.⁶² If considered, rehabilitation could satisfy ICE that a potential grantee will sin no more, has expressed remorse, and has been rehabilitated by virtue of becoming a productive member of U.S. society. Then prosecutorial discretion could work in tandem with comprehensive immigration reform to not only avoid removal proceedings but also legalize deserving immigrants.

<http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter Morton Memorandum].

⁶⁰ Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line*, 58 *UCLA L.REV.* 1819, 1826 (2011).

⁶¹ Morton Memorandum, *supra* note 59.

⁶² Morton Memorandum, *supra* note 59.

III. *Rehabilitation Under U.S. Criminal Law*

A. *Parallels Between Immigration Law and Criminal Law*

Under U.S. immigration law, there is a distinction between the punishment meted out by the criminal justice system and the consequences of such punishment on immigration status. In *Reno v. American-Arab Anti-Discrimination Committee*, Justice Scalia wrote for the majority that “[e]ven when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act . . . but is merely being held to the terms under which he was admitted [a]nd in all cases, deportation is necessary in order to bring to an end an ongoing violation of the United States law.”⁶³ In that sense, then, any effect on immigration status is collateral to violations of criminal law. Nor, as several commentators have noted, is deportation any different than criminal sanctions which punish and incapacitate offenders.⁶⁴ Most recently, in *Padilla v. Kentucky*, the U.S. Supreme Court recognized that deportation is a “particularly severe ‘penalty’” for the violation of a criminal law.⁶⁵ In this sense, then, the Supreme Court clearly recognized that deportation triggered by the commission of a crime is punitive. Arguably, if the lines between crimes and their punitive immigration consequences are blurred, then the same or similar rehabilitative factors used in criminal sentencing and parole decisions should be applied to discretionary grants of status under comprehensive immigration reform.

Immigration law and criminal law are also both public law systems, as contrasted with systems of private law, in which private

⁶³ 525 U.S. 471, 491 (1999).

⁶⁴ See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 514 (2007); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 332 (2000); Juliet Stumpf, *Penalizing Immigrants*, 18 Fed. Sent’g Rep. 264, 264-65 (2006).

⁶⁵ 130 S. Ct. 1473, 1481 (2010) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

parties sue each other for redress or compensatory damages.⁶⁶ As with crimes, a violation of immigration law causes societal harm in that “the injury suffered involves “a breach and violation of public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity.”⁶⁷ The U.S. criminal justice system has embraced different models of punishment for crimes but the use of the retributive, deterrent, and incapacitation models in recent decades has led to a historically high rate of incarceration in the U.S. In 2009, U.S. prisons and jails held over two million people or nearly 7.5 of every 1,000 members of the U.S. population.⁶⁸ The U.S. immigration system is based on the same models of punishment and, in fiscal year 2010, ICE removed 169,000 “criminal aliens” from the U.S.⁶⁹ These “criminal aliens” were removed from the U.S. for a variety of offenses but over one-quarter were removed for “dangerous drug” offenses; “dangerous drug” offenses, according to ICE, include the manufacturing, distribution, sale and possession of illegal drugs.⁷⁰ Under state and federal criminal laws, there is a significant difference between the punishment meted out to a drug manufacturer or dealer and the possessor of a small amount of illegal drugs.⁷¹ Immigration law does not differentiate between such conduct and, instead, lumps anyone with a drug conviction into the same category of persons removed

⁶⁶ THOMAS J. GARDNER & TERRY M. ANDERSON, CRIMINAL LAW 6 (10th ed. 2009).

⁶⁷ Thomas L. Hafemeister, Sharon G. Garner & Veronica E. Bath, *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L.REV. 147, 159 (2012), quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, Sec. 1.01 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769)).

⁶⁸ *World Prison Brief: United States of America*, INT’L CTR. FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpd_country.php?country=190 (last visited August 27, 2012).

⁶⁹ U.S. Department of Homeland Security, Immigration Enforcement Actions: 2010, June 2011, available at www.dhs.gov/xlibrary/assets/statistics/operations/enforcement-ar-2010.pdf [hereinafter Immigration Enforcement Actions].

⁷⁰ *Id.*

⁷¹ *Id.*

due to “dangerous drug” convictions.

The second- and third-ranking crime categories are also noteworthy. In 2010, nearly eighteen percent of immigrants removed for crimes had immigration violations on their records, which, according to ICE, includes unauthorized entry and reentry, false claims to citizenship and alien smuggling.⁷² Unauthorized entry to the U.S. is a criminal violation under 8 U.S.C. 1325, but, until recently, it was rarely prosecuted and, in fact, prior to 2000, illegal reentry under 8 U.S.C. 1326 as a criminal offense was sparsely prosecuted.⁷³ Illegal reentry is now the most common criminal charge brought by federal prosecutors.⁷⁴ Again, ICE generously lumps all manner of immigration violations, which may or may not have been prosecuted as crimes, into the broad category of removal on the basis of immigration crimes. The third-ranking reason for removal is traffic offenses: over eighteen percent of all persons deported in 2010 were deported for traffic offenses, which runs a wide gamut of offenses, including speeding, moving violations such as failing to stop at a stop sign or to yield properly, lack of insurance, expired tags, and lack of a valid drivers license.⁷⁵ Deportation as the punishment for traffic offenses, which could also include serious offenses, such as repeated incidents of driving under the influence of drugs or alcohol or grossly negligent driving, stems from an institutional inability to differentiate between serious and less-serious offenses and the resulting immigration consequences. The criminal prosecution of immigration violations has reached a fever pitch: “[n]ot since Prohibition has a single category of crime been prosecuted in such record numbers by the federal government. Immigration, which now constitutes over half of the federal criminal workload, has eclipsed all other areas of federal prosecution.”⁷⁶

The lesser-ranked grounds for removal of persons with

⁷² *Id.*

⁷³ Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L.REV. 1281 (2012); 8 U.S.C. 1325; 8 U.S.C. 1326.

⁷⁴ *Illegal Reentry Becomes Top Criminal Charge*, TRAC IMMIGRATION (June 10, 2011), available at <http://www.trac.syr.edu/immigration/reports/251>.

⁷⁵ Immigration Enforcement Actions, *supra* note 69.

⁷⁶ Eagly, *supra* note 73, at 1281-2.

criminal convictions include crimes of a more serious nature, such as assault, larceny, burglary, fraud, robbery, domestic violence and sexual assault.⁷⁷ Yet, all of the more serious crimes added together account for just over twenty-percent of removals from the U.S. in 2010, while dangerous drugs, immigration violations, and traffic offenses accounted for nearly two-thirds of all removals.⁷⁸ Removal is a fitting consequence for certain criminal offenses by immigrants but, under current U.S. immigration law and policy, no distinction is made between immigrants who have committed serious and less-serious crimes and precious few opportunities are available for such immigrants to demonstrate that they have been rehabilitated. The result is not simply the removal of immigrants with criminal and immigration violations. Each removal results in the loss of a loved family member, a breadwinner, a valued employee or employer, a taxpayer, or a community member. Rehabilitation, if properly considered, offers a way to smooth the hard, uncompromising edges of U.S. immigration laws and to recognize that many immigrants with lesser offenses can learn from their mistakes and become productive members of society.

The desire in some quarters to banish immigrants for violations of immigration laws and for low-level criminal offenses appears to be unquenchable. Indeed, some policymakers call for an even more direct tie between violations of immigration laws and criminal acts. For example, legislation nearly passed the U.S. Congress in 2006 which would have made unlawful presence in the U.S. a crime punishable by a maximum of 366 days in jail for a first offense and clarifying that such an offense would constitute an aggravated felony under U.S. immigration laws.⁷⁹ Several states, including Arizona, Alabama and Georgia, have made failing to maintain or possess lawful immigration status a crime under state law.⁸⁰

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ H.R. 4437, 109th Cong. § 201, 203 (2005); Securing America's Borders Act, S. 2454, 109th Congress § 203, 206 (2006).

⁸⁰ See Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Az. 2010); Illegal Immigration Reform and

B. *Theories of Punishment in the Criminal Justice System*

This close connection between criminal and immigration laws militates in favor of the same factors, notably rehabilitation, being considered in each context. Before examining the construct of rehabilitation under criminal law, it is helpful to consider the competing rationales of criminal law, as the rationales are closely tied to the consideration of rehabilitation. Despite the connection between immigration law and criminal law, each has distinct and differing rationales. In general, the criminal justice system has four rationales for punishment: deterrence, incapacitation, rehabilitation, and retribution.⁸¹ In the criminal law context, rehabilitation is a prospective consideration: the analysis is forward-looking in terms of whether an offender is likely to offend again.⁸² Certainly, retribution and deterrence also look forward, particularly when serving the goal of convincing the offender and society that consequences exist for crimes as a means to prevent future crimes as well as the expressivist goal of reaffirming certain moral values to the offender and society. Yet, the primary purpose of the rehabilitation analysis in criminal law is to reduce recidivism.⁸³ Rehabilitation looks then at the reasons why a person committed an offense and attempts to address some of those reasons, be they mental, behavioral, social or economic.⁸⁴ Rehabilitation was heavily used in the U.S. starting in the 1920's and then waned in the mid-1970's in the wake of a perceived crime wave, election of more "law and order" politicians,

Enforcement Act of 2011, H.B. 87 2011-2012 Leg., Reg. Sess. (Ga. 2011); Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg., Reg. Sess. (Al. 2011).

⁸¹ SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES*, 101-53 (6th ed. 1995); see JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW*, Sec. 1.01 (3d ed. 2001).

⁸² See Gabriel Hallevy, *Therapeutic Victim-Offender Mediation Within the Justice Process – Sharpening the Evaluation of Personal Potential for Rehabilitation While Righting Wrongs Under the ADR Philosophy*, 16 HARV. NEGOT. L. REV. 65, 66-67 (2011).

⁸³ MICHAEL D. MALTZ, *RECIDIVISM*, 18-19 (2d ed. 2001).

⁸⁴ Hallevy, *supra* note 82, at 69-70.

and reports criticizing whether rehabilitation was cost-effective.⁸⁵ After a shift back to a more retributive model of sentencing, the pendulum may be swinging back towards increased rehabilitation due to overcrowded prisons and continued high recidivism.⁸⁶

The other leading criminal justice theories do not fit well with the reality of immigration violations. Immigration violations are often singular events in the sense that immigration law violations occur only when a person enters the U.S. illegally or overstays a validly-issued nonimmigrant visa and, to the extent that the singular violation leads to the hoped-for reward – physical presence in the U.S. – there is no need to repeatedly violate the immigration laws. Certainly, an immigrant who is removed from the U.S. for illegal entry and then reenters illegally is a serial violator of immigration laws and is even subject to federal criminal prosecution. However, the vast majority of undocumented immigrants violated immigration laws on the day they entered the U.S. or overstayed a visa. They remain in the U.S. and, absent contact with ICE or the criminal justice system, do not continue to violate immigration laws. A draconian approach to immigration violations could deter would-be undocumented immigrants from attempting to enter the U.S. but, again, the reality is that the economic lure of the U.S. is so great as to overcome any trepidation at being interdicted at the border or apprehended in the interior of the U.S.

In addition, an important premise of rehabilitation is that rehabilitation is “something done *by* the offender rather than to the offender.”⁸⁷ In this sense, rehabilitation originates with the offender demonstrating that he or she has learned from past misdeeds and will not re-offend. In effect, then, rehabilitation “is best understood not primarily as the prevention of re-offending, but as the promotion of

⁸⁵ *Id.* at 67.

⁸⁶ *Id.* at 68; See FRANCIS T. CULLEN & KAREN E. GILBERT, *REAFFIRMING REHABILITATION* (2d ed. 2012) (noting that the use of rehabilitation, while once anathema in a climate of retribution-based criminal justice, is once again attractive in an era of shrinking state penal budgets).

⁸⁷ PETER RAYNOR & GWEN ROBINSON, *REHABILITATION, CRIME AND JUSTICE* 175 (2nd ed. 2009).

desistance from offending.”⁸⁸ This is a very different approach from competing theories of criminal punishment, such as retribution, which require the government to impose a punishment on the offender.⁸⁹ Highlighting the differences between the competing theories of criminal justice does not, of course, mean that they are mutually exclusive. A harsh sentence imposed in a retributivist system can be mitigated, after a certain period, by a showing of genuine rehabilitation.⁹⁰ So, too, could comprehensive immigration reform embrace this approach: undocumented immigrants with immigration violations and minimally negative criminal histories could pay penalties in the form of fines and steep filing fees and endure a lengthy path to lawful status and eventual citizenship, while at the same time being required to demonstrate rehabilitation in the form of community service, other good acts and a commitment to not reoffend. In the criminal justice context, others have labeled such an approach as “rehabilitation with attitude.”⁹¹

C. *The Evaluation of Rehabilitation in the Criminal Justice System*

Rehabilitation is used as a factor in parole determinations but is also commonly used by defense attorneys in plea negotiations and in arguing for leniency at sentencing and, in particular, for juvenile defendants.⁹² The U.S. Sentencing Guidelines allow sentencing courts to consider “post-offense rehabilitative efforts (e.g. counseling or drug treatment)” and the U.S. Supreme Court and various lower

⁸⁸ *Id.*

⁸⁹ Monica M. Gerber & Jonathan Jackson, *Retribution as Revenge and Retribution as Just Deserts*, 26 SOCIAL JUSTICE RESEARCH 61, 67 (2012).

⁹⁰ Mary Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C.L. REV. 102, 150 (2012).

⁹¹ Roger Moore, *Beyond the prison walls: Some thoughts on prisoner ‘resettlement’ in England and Wales*, CRIMINOLOGY & CRIMINAL JUSTICE, at 12 (Nov. 9, 2011).

⁹² Paul H. Robinson, Sean E. Jackowitz & Daniel E. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good-Deeds, Apology, Remorse and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 755 (2012), available at <http://ssrn.com/abstract=1798725>.

courts have recognized rehabilitation as a legitimate basis for a downward departure in sentences.⁹³ In considering whether rehabilitation is a worthy goal in the context of criminality and immigration law, it is helpful to reflect on the purpose of punishment. As Beccaria noted in the 14th Century:

It is evident . . . that the purpose of punishment is not that of tormenting or afflicting any sentient creature, nor of undoing a crime already committed. How can a political body, which as the calm modifier of individual passions should not itself be swayed by passion, harbor this useless cruelty which is the instrument of rage, or fanaticism or of weak tyrants? Can the wailings of a wretch, perhaps, undo what has been done and turn back the clock? The purpose, therefore, is nothing other than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise. Therefore, punishments . . . should . . . be so selected as to make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.⁹⁴

Under Beccaria's view of punishment in the criminal context, then, if the punishment imposed on violators of immigration laws is to fit the crime, rehabilitation is necessary to overcome the harsh consequences of deportation and inadmissibility.⁹⁵ Rehabilitation allows punishment to be meted out but also offers a means to leave a lasting impression regarding the nature of the violation while affording an opportunity for the violator to demonstrate a change of heart and be allowed to return to society. The deterrent model of imprisonment, which later shifted to a prison-based system

⁹³ *Id.* (citing U.S. Sentencing Guidelines Manual Sec. 3 E 1.1 (2004), *Pepper v. United States*, 131 S. Ct. 1229 (2011)); *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992); *Simon v. United States*, 361 F. Supp. 2d 35 (E.D.N.Y. 2005).

⁹⁴ CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* 31 (Richard Bellamy ed., Richard Davies trans., 1995).

⁹⁵ *Id.*

promoting rehabilitation and then, to varying degrees, a retribution-based model was centered on the precept that “[t]ogether with the loss of freedom comes a different hurt, “a single, monotonous accusation: ‘You are a bad man and we hate you.’ [Prisoners are] slapped in the face by society.”⁹⁶ Rehabilitation, in contrast, is “fanned by a new optimism, the faith that science could find a solution to the problems that stumped the philosophers and that government, by the right combination of laws, could be a positive force for the public good.”⁹⁷

In a sense, then, immigration laws, regulations and procedures in the U.S. remain stuck in a deterrent mode under which, for most crimes and immigration violations, banishment is the solution and the immigrant is seen as inherently evil and unfit for redemption.⁹⁸ As crime came to be seen as a symptom of a disease in the first half of the 20th Century, rehabilitation held out a curative promise. Immigration law also views certain immigrants as diseased, both literally and figuratively, and uses that supposition to bar immigrants from the U.S. and to banish those immigrants already present in the U.S.⁹⁹ In particular, the concept under immigration law of “crimes involving moral turpitude,” reflects this sentiment.¹⁰⁰ A crime involving moral turpitude is carried out by an immigrant with a “depraved heart,” who holds “evil intent” and who acts “contrary to the bounds of morality.”¹⁰¹ Yet, despite the fact that certain deportable and inadmissible offenses, such as crimes involving moral turpitude, require an immigrant to display symptoms of a disease, the punishment for such crimes is not to use rehabilitation to cure and evaluate the prospects for recurrence of the symptoms of the disease but to banish persons with the symptoms

⁹⁶ Julian P. Alexander, at 241 (1922), *quoted in* KATHLEEN DEAN MOORE, PARDONS, MERCY, AND THE PUBLIC INTEREST 57 (1997).

⁹⁷ *Id.*

⁹⁸ *See, e.g.*, INA § 212(a)(1)(A)(ii) Visa Ineligibility.

⁹⁹ INA § 212(a)(1)(A)(ii).

¹⁰⁰ *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

¹⁰¹ INA § 212(a)(1)(A)(ii); *see also* INA § 237(a)(2)(A)(i); *See Franklin v. INS*, 72 F.3d 571 (8th Cir. 1995) (clarifying that “evil intent” is an essential element for a showing of a lack of good moral character).

without any chance at rehabilitation or effort to evaluate redemptive acts by the wrongdoer.

The determination of which criminal offenders should be sentenced to rehabilitation programs is fairly advanced and is not at the whim of the sentencing judge. Rather, probation service officers, many of whom have degrees in social work as well as advanced studies in medicine, psychology, psychiatry or criminology, evaluate offenders and issue written recommendations to the sentencing judge.¹⁰² For example, if an offender is addicted to drugs and that was one reason why he committed a robbery, then the report might recommend placement in a prison with a drug treatment program.¹⁰³ The most important component in the reports is whether the offender has a high personal potential for rehabilitation because there is simply no point wasting resources on sociopaths or others with low indicia for rehabilitation.¹⁰⁴ The probation service officer examines the personal character of the offender, the offender's personal and social background, and whether the offender is genuinely remorseful.¹⁰⁵ The issue of whether the offender is remorseful is often the most significant of the three factors.¹⁰⁶ Similar objective reports could be generated in the immigration context to help adjudicators determine prospects for rehabilitation. Applicants for cancellation of removal already routinely provide evidence of good moral character; a report from a professional regarding rehabilitation would be similarly valuable.¹⁰⁷

In the immigration content, rehabilitation is both backward- and forward-looking.¹⁰⁸ Before relief is granted, the trier of fact

¹⁰² Gary Maveal, *Federal Presentence Reports: Multi-Tasking at Sentencing*, 26 SETON HALL L. REV. 544, 545 (1996).

¹⁰³ OFFICE OF PROBATION & PRETRIAL SERVICE, ADMIN. OFFICE OF THE U.S. COURTS, THE PRESENTENCE INVESTIGATION REPORT, II-8, III-27 (Mar. 2006).

¹⁰⁴ KATHLEEN DEAN MOORE, PARDONS, MERCY, AND THE PUBLIC INTEREST 73 (1997).

¹⁰⁵ *Id.* at 72-73.

¹⁰⁶ *Id.* at 73.

¹⁰⁷ IMMIGRANT LEGAL RESOURCE CENTER, REMEDIES AND STRATEGIES FOR PERMANENT RESIDENT CLIENTS IN REMOVAL PROCEEDINGS (2011).

¹⁰⁸ Eagly, *supra* note 73.

wishes to determine if the offender has been rehabilitated as shown by a track record clean of any additional criminal or immigration violations and whether the offender is likely to re-offend.¹⁰⁹ The distinction between criminal convictions and immigration violations is clear: crimes may be repeated multiple times due to the recidivist and acquisitive nature of many criminals but a single immigration violation, such as illegal entry, is unlikely of repetition because the alien has attained what was sought, namely entry into the U.S., leaving aside the obvious situation when the alien is caught, deported and returns without permission.¹¹⁰ For that reason, then, rehabilitation reports in the immigration context could assess not only whether the violator has already achieved some degree of rehabilitation but also whether that rehabilitation is likely to continue if relief is granted.

One critical component from rehabilitation assessments in the criminal context that could be applied in the immigration context is the notion of remorse.¹¹¹ In the criminal law context, the absence or presence of remorse is a clear indicator whether the person who has violated the law is ready for rehabilitation.¹¹² Prisoners may be motivated to undergo rehabilitation by the chance at parole or conditional release.¹¹³ Violators of immigration laws, in a similar fashion, would likely be inclined to demonstrate rehabilitation, whether from the crimes that led to their deportation or inadmissibility or the failure to comply with the terms of visas or repeated illegal entries into the U.S. if their ability to remain in or return to the U.S. were to be predicated upon rehabilitation. Probation service officers are trained to pick up on fairly-obvious

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1296.

¹¹¹ Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VANDERBILT L. REV. 737, 745 (2012).

¹¹² See Tony Ward et al., *The Multifactor Offender Readiness Model*, 9 AGGRESSION & VIOLENT BEHAVIOR 645 (2004).

¹¹³ David B. Wexler, *Spain's JVP (Juez de Vigilancia. Penitenciaria) Legal Structure as a Potential Model for a Re-Entry Court*, 7 CONTEMPORARY ISSUES IN LAW 1, (2004).

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cues from offenders.¹¹⁴ If an offender claims that the crime was not his or her fault, or “everybody does it” or the victim deserved what happened, then a lack of remorse is evident and the consequent chances for rehabilitation are dim.¹¹⁵ Similar cues could be considered by evaluators in the immigration context to determine whether the immigrant understands that a law was broken, that the law exists for a valid reason, and that breaking that law has negative consequences for others. Only then, perhaps, will the putative immigrant understand and comport with the nature of the social contract inherent in the U.S.

The criminal law concept of pardon has a rough immigration law analog in the form of waivers, which are granted to forgive immigration violations.¹¹⁶ Pardons are defined as “an act by the executive . . . that lessens or eliminates a punishment determined by a court of law, or that changes the punishment in a way usually regarded as mitigating.”¹¹⁷ A pardon is distinct from forgiveness or mercy, which “are virtues that persons exhibit as individuals.”¹¹⁸ Pardons may be issued for a variety of reasons, including to alleviate an unduly harsh sentence, because the offender has suffered enough (i.e. the basis for the pardon of Richard Nixon by Gerald Ford), and simply due to the passage of time since the offense was committed.¹¹⁹ A pardon does not excuse or overlook that a crime or

¹¹⁴ *Id.*

¹¹⁵ Matter of Marin, 16 I&N Dec. 581 (BIA 1978).

¹¹⁶ INA §212(h)(1)(B), Visa Ineligibility; 8 U.S.C. § 1182(h)(1)(B); INA §212(i)(1), Additional requirements for alien receiving graduate medical education or training; 8 U.S.C. §1182(i); INA § 212(a)(9)(B)(v), Waiver of unlawful presence bar; 8 U.S.C. § 1182(a)(9)(B)(v).

¹¹⁷ RAYNOR, *supra* note 87, at 193.

¹¹⁸ *Id.*

¹¹⁹ RAYNOR, *supra* note 87, at 166-78. Rehabilitation is also used outside of the criminal context with great efficacy. Perhaps the area in which many attorneys encounter rehabilitation as a factor in their lives is during the bar admission process. Prospective attorneys are carefully screened by state boards of bar examiners for fitness to practice law and prior bad acts, whether or not criminally charged, may determine whether a candidate is admitted to the bar. The American Bar Association and the National Council of Bar Examiners have developed a code to promote uniformity among state bar authorities with respect to admission standards. ABA-NCBE Code at III. Among several other factors, bar examiners

a violation was committed and, importantly, pardons are compatible with deterrent- and retribution-focused models of punishment because they recognize that pardons “are necessary to bring about a more perfect form of justice.”¹²⁰ Like any other enforcement measure, pardons are capable of abuse and misuse. For example, rationales for pardons that are open to criticism include pardons issued not based on merit but a slavish desire to serve the public welfare (e.g. granting a pardon to a confessed criminal in exchange for his testimony against other criminals), to enrich the official granting the pardon (as was commonly practiced by James II of England and Oklahoma governor J.S. Walton), or as a reward or due to pity.¹²¹ In that regard, pardons are an effective tool in immigration law if they are issued based upon evidence that the immigrant appreciates the consequences of the violation, has been rehabilitated and is unlikely to transgress in the future.

are directed to consider evidence of rehabilitation if an applicant has committed an act of prior misconduct. *Id.* at ABA-NCBE Code at III(15). Perhaps not surprisingly, because would-be attorneys are highly motivated to gain the license for which they have worked so hard, the factors used to determine what rehabilitation is and how it is manifested are fairly well-established. For example, in the context of a sought-after admission to the bar, the Georgia Supreme Court held that rehabilitation restores a person to being useful and constructive. *In re Lee*, 571 S.E.2d 720, 720-21 (Ga. 2002). Similarly, as noted by Professor Sonya Harrell Hoener, “[r]ehabilitation may consist of positive action through the occupation, religion, or community and civic service of the applicant . . . [and that a]n applicant must show some extra effort to overcome past misconduct.” Sonya Harrell Hoener, *Due Process Implications of the Rehabilitation Requirement in Character and Fitness Determinations in Bar Admissions*, at 5 (2008), available at <http://ssrn.com/abstract=1096297>. Yet, despite the focus by bar examiners on rehabilitation and clarifying how it can be shown, jurisdictions vary considerably in terms of what level of rehabilitation is needed for specific prior bad acts. *Id.* at 23.

¹²⁰ RAYNOR, *supra* note 87, at 196.

¹²¹ RAYNOR, *supra* note 87, at 197-210; see P.S. Ruckman, Jr., *The Study of Mercy: What Political Scientists Know (And Don't Know) About the Pardon Power*, U. ST. THOMAS L. REV. (forthcoming 2013).

IV. *A Model Exists: Canada's Use of Rehabilitation
in Immigration Adjudications*

A. *Structure of Canadian Immigration Law*

Canada has long embraced rehabilitation as a factor to determine which persons should be allowed to enter and which persons should be removed from Canada.¹²² For that reason, the U.S. could look to Canada in the drafting and implementation process of comprehensive immigration reform for a workable model. To be clear, Canada and the U.S. differ substantially in their immigration experiences. First, Canada does not have a sizable population of undocumented immigrants.¹²³ Like the U.S., Canada shares a southern border with a country with whom a large percentage of its population shares familial, historical and cultural connections, yet Canada's southern neighbor has not accounted for a large share of immigration to Canada in recent decades. Nor does Canada's southern neighbor provide a large share of less-skilled workers for its economy, although, like the U.S., its southern neighbor's southern neighbors increasingly do provide such workers.¹²⁴ Second, Canada has a more liberal regime than the U.S. for accepting immigrants from abroad and for legalizing immigrants already physically present in Canada.¹²⁵ Despite these differences, the adjudication of immigration status decisions in Canada can be a useful foil for the U.S. to consider in the sense that both countries have established bodies of immigration law and regulations, adjudicative bureaucracies, and judicial review of such decisions. In that sense, the U.S. and Canada are more similar than not and, in fact, following recent reforms to the Canadian process for

¹²² Immigration and Refugee Protection Act (IRPA), 2001 S.C., ch. 27 Para. 36(3)(c) (Can.).

¹²³ Elisabeth Smick, *Canada's Immigration Policy*, available at www.cfr.org/canada/canadas-immigration-policy/p11047#p11.pdf (last viewed July 16, 2013) (Estimating that Canada's undocumented immigrant population ranges from 100,000 to 200,000 people).

¹²⁴ *Id.*

¹²⁵ Smick, *supra* note 123.

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adjudicating immigration relief, the Canadian process even more closely emulates the U.S.¹²⁶

In order to understand the role rehabilitation plays in Canadian adjudications, it is helpful to briefly explore the contours of the Canadian immigration system. The Immigration and Refugee Protection Act (IRPA) and the Immigration and Refugee Protection Regulations (IRPR) are the federal legislation which govern immigration, both temporary and permanent, to Canada.¹²⁷ Persons seeking admission to Canada are screened at Ports of Entry, which include border crossings and international airports, by officers from the Canadian Border Services Agency (CBSA).¹²⁸ Often, such persons include Permanent Residents (PRs) of Canada, who are screened to determine if they violated the terms of their PR status by remaining outside of Canada longer than permitted.¹²⁹ Likewise, foreign nationals already present in Canada and who are applying for an immigration benefit, such as PR status based on marriage to a Canadian citizen or change of status from, for example, a student visa to an employment-based visa, will be reviewed for inadmissibility by an officer from Citizenship and Immigration Canada (CIC).¹³⁰

In the event that either a CBSA or a CIC officer believes that a person may be inadmissible, the officer prepares an Inadmissibility Report, explaining the basis for the officer's belief.¹³¹ The Inadmissibility Report is then reviewed by a senior officer from the Ministry of Citizenship and Immigration.¹³² If a foreign national is applying for admission as a Temporary Resident and the senior officer affirms the information in the Inadmissibility Report, the senior officer issues a Removal Order.¹³³ If the person's claimed

¹²⁶ *Protecting Canada's Immigration System*, CIC.GC.CA, available at www.cic.gc.ca/english/refugees/reform.asp (last visited July 7, 2013).

¹²⁷ IRPA § 1.

¹²⁸ IRPA § 3.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ IRPA § 44.

¹³² IRPA § 44(2).

¹³³ *Id.*

status as a PR is at issue, the Inadmissibility Report is referred for a hearing before a Member of the Immigration Division (ID), a division of the Immigration and Refugee Board (IRB), which is a quasi-independent body and does not answer directly to the Minister of Citizenship & Immigration.¹³⁴ The only instance in which a PR does not have recourse to the ID is if the Inadmissibility Report is based on a determination that the PR forfeited residency due to an absence from Canada longer than permitted and, in which case, a senior officer may execute the Removal Order.¹³⁵ If a Member of the ID, pursuant to IRPA Sec. 45(d), issues a Removal Order against a PR, the PR may appeal the Removal Order to the Appeal Division of the IRB.¹³⁶ A foreign national issued a Removal Order does not have a right to appeal to the Appeal Division of the IRB but may seek leave to commence a judicial review proceeding in the Federal Court.¹³⁷ If the Federal Court grants leave to commence a judicial proceeding, the Federal Court will review the decision by CIC or the ID to ensure that it was not patently unreasonable, as demonstrated by either CIC or the Member ignoring or misconstruing evidence or misapplying the applicable law.¹³⁸

*B. Contrast with U.S. Treatment of Immigrants with
Criminal Records*

Unlike the U.S., Canadian immigration law uses a bifurcated process to determine the fate of immigrants with criminal convictions.¹³⁹ IRPA separates criminal acts into two categories: serious criminality and criminality.¹⁴⁰ As suggested by its moniker, “serious criminality” imposes greater restrictions on immigrants than

¹³⁴ IRPA § 44; IRPA Reg. 228.

¹³⁵ *Id.*

¹³⁶ IRPA § 63.

¹³⁷ IRPA § 72; Federal Courts Act R.S.C., 1985, c. F-7.

¹³⁸ *Id.*

¹³⁹ IRPA § 36(3)(c).

¹⁴⁰ IRPA Reg. 226.

does mere “criminality.”¹⁴¹ Under section 36(1) of IRPA, serious criminality only applies to immigrants and PRs as a basis for securing their deportation from Canada.¹⁴² By definition, then, persons seeking admission to Canada are not affected by serious criminality but, rather, are barred from entry to Canada based on acts which constitute criminality, as defined in section 36(2) of IRPA.¹⁴³

Under section 36(2) of IRPA, Canada imposes restrictions on immigration based on “criminality,” which includes less serious crimes than those covered by the definition of “serious criminality.” A critical difference between serious criminality and criminality is that criminality only applies to foreign nationals.¹⁴⁴ In other words, a PR’s immigration status is not affected if the PR commits a crime constituting criminality, while deportation could be triggered based on serious criminality. IRPA bars admission for PRs and foreign nationals who have been convicted of or committed serious offenses listed in sections 35 and 36(1), while foreign nationals are inadmissible based on the conviction or commission of less serious crimes listed in section 36(2).¹⁴⁵ The crimes listed in sections 35 and 36(1) include any crimes for which the maximum possible sentence is ten years imprisonment.¹⁴⁶ Section 36(2) crimes include summary conviction offenses, indictable offenses and hybrid offenses.¹⁴⁷

Serious criminality distinguishes between crimes committed within and outside of Canada. If a crime is committed in Canada, but no conviction results, there is no basis for inadmissibility.¹⁴⁸ Yet, if a crime is committed outside of Canada and does not lead to a conviction, inadmissibility will be established if the acts committed were a crime where committed and, if they had been committed in Canada, would have been punishable by at least a ten-year

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ IRPA § 36(2)(b) and (c).

¹⁴⁴ *Id.*

¹⁴⁵ IRPA §§ 35, 36(1-2).

¹⁴⁶ IRPA §§ 35, 36(1).

¹⁴⁷ IRPA § 36(2).

¹⁴⁸ CITIZENSHIP AND IMMIGRATION CANADA, ENFORCEMENT OPERATIONS MANUAL, (2010) [hereinafter Enforcement Operations Manual].

sentence.¹⁴⁹ For a crime committed within Canada to be classified as serious criminality, it must have a maximum jail term of ten years or, regardless of the maximum term, a six month or longer sentence imposed.¹⁵⁰ For a crime committed outside of Canada to be classified as serious criminality, it must carry a maximum jail term of ten years, and the term actually imposed is irrelevant.¹⁵¹ In addition, for crimes committed outside of Canada but for which a conviction did not result, serious criminality may be implicated if the crime committed is a crime in both the foreign country and under Canadian law and, if it is a crime in Canada, a jail term of at least ten years may be imposed.¹⁵² This approach differs considerably from the U.S. process, under which the committed offense need only be a crime under U.S. law.¹⁵³

Section 212 of the Immigration and Nationality Act contains the U.S. counterpart to Canadian inadmissibility laws.¹⁵⁴ Under section 212(a)(2)(A)(i), the conviction, admission of commission, or admission of acts which constitute the essential elements of a “crime involving moral turpitude” or violates any state, U.S. or foreign law regarding controlled substances, renders an applicant for admission inadmissible. U.S. inadmissibility law differs considerably from Canadian inadmissibility law. First, U.S. law refers to “crimes involving moral turpitude” but does not separately define such crimes. Rather, CIMTs, as they are commonly known, include offenses which include conduct which is “inherently base, vial, depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”¹⁵⁵ Canadian law is somewhat ambiguous with respect to which crimes or conduct would be considered indictable offenses or summary convictions.

¹⁴⁹ IRPA § 36(1)(c).

¹⁵⁰ *Inadmissibility – Serious Criminality*, CANADAVISA.COM, <http://www.canadavisa.com/canadian-immigration-serious-criminality.html> (last visited July 17, 2013).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ INA § 212(a)(2)(A)(i); 8 U.S.C. § 1182 (2006).

¹⁵⁴ *See generally* INA § 212.

¹⁵⁵ *Matter of Danesh*, 19 I. & N. Dec. 669, 670 (BIA 1988).

Nonetheless, in comparison to the shifting and imprecise nature of CIMTs, the Canadian law is a model of clarity.

Second, the U.S. offers a “petty offense exception” and “juvenile exception” in order to lessen the severe impact of the broad definition of CIMTs.¹⁵⁶ Under the petty offense exception, if only one CIMT was committed, the sentence of imprisonment was less than six months, and the maximum possible sentence is one year or less, then inadmissibility will not be found.¹⁵⁷ Yet, even this exception is narrow, primarily due to the third requirement: many criminal codes provide for high maximum sentences well in excess of a year in order to grant sentencing judges great leeway to craft a punishment to fit the crime.¹⁵⁸ The juvenile exception is similarly of limited utility. It provides that, if a CIMT was committed when the applicant for admission was under 18 and the applicant was released from confinement more than five years prior to filing for admission to the U.S., then inadmissibility will not be found.¹⁵⁹ While not part of the juvenile exception, the INA does not consider convictions in juvenile proceedings to be crimes for purposes of inadmissibility under the INA. So, by implication, the juvenile exception is limited to those juveniles tried as adults.

One distinction under Canadian immigration law is that, pursuant to section 36(3)(a), a hybrid offense, which could be prosecuted by way of summary conviction or as an indictable offense, is by operation of law considered to be indictable.¹⁶⁰ On that basis, the punishment actually received in a summary conviction proceeding is not relevant; rather, the punishment which could have been doled out had the crime been charged as an indictable offense controls whether a person will be admitted. The implications of criminality, like serious criminality, depend upon where the conviction occurred and where the crime was committed. If a foreign national was convicted of a crime in Canada, the crime must be an indictable offense or two summary conviction offenses not

¹⁵⁶ INA § 212(a)(2)(A)(ii)(II).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ IRPA § 36(2).

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within a single scheme.¹⁶¹ Likewise, if a foreign national is convicted of a crime outside of Canada, the foreign crime is analogized to an equivalent Canadian crime to determine whether it would be an indictable offense or, if more than one conviction, whether the convictions constitute summary convictions not within a single scheme.¹⁶²

The process by which foreign crimes are evaluated for equivalency with Canadian crimes is complex but the guiding principle is that the Canadian standard for the seriousness of a crime governs.¹⁶³ The CIC officer must look to the “essential elements” of a crime and determine if they correspond to the essential elements of a Canadian crime.¹⁶⁴ Under the so-called *Brannson* factors, the names assigned to crimes are not relevant but the conduct specified in the criminal statutes is.¹⁶⁵ In *Hill v. Canada (Minister of Employment & Immigration)*, the Court of Appeal clarified that adjudicators are to first examine the “precise wording” of each country’s statutes and the “essential ingredients” of the offenses and then, second, examine the evidence presented to the adjudicator to determine if it was or was not sufficient to show that the essential ingredients of a Canadian offense were found in the foreign proceedings.¹⁶⁶ For example, Driving Under the Influence (DUI) convictions are a frequent source of bars to entry to Canada, especially by U.S. citizens planning to visit or traverse Canada.¹⁶⁷ Because DUI can be treated as either an indictable offense or a summary conviction offense, it is classified as a hybrid or dual procedure crime.¹⁶⁸ Under IRPA, CBSA officers are to interpret hybrid or dual procedure crimes as if they were indictable offenses and, in many instances, the second occurrence of DUI would be

¹⁶¹ IRPA § 36(2)(a).

¹⁶² IRPA § 36(2)(b) and (c).

¹⁶³ *Canada v. Burgon*, 3 F.C. 44 (C.A. 1991).

¹⁶⁴ *Brannson v. Canada*, 2 F.C. 141 (C.A. 1980).

¹⁶⁵ *Id.*

¹⁶⁶ *Hill v. Canada (Minister of Employment & Immigration)*, 73 N.R. 315 (C.A. 1987).

¹⁶⁷ IRPA § 36(2).

¹⁶⁸ *Id.*

classified as an indictable offense and therefore bar admission into Canada.¹⁶⁹

C. Rehabilitation Under Canadian Immigration Law

Unlike U.S. immigration law, Canadian immigration law broadly recognizes that persons with criminal convictions are capable of rehabilitation and that certain crimes, with the presence of legitimate rehabilitation, should not either trigger deportation or bar entry to Canada.¹⁷⁰ Perhaps even more significant, Canadian immigration law takes a nuanced and deliberative approach to rehabilitation and has a streamlined process to determine whether rehabilitation exists and, if it does, whether it merits relief. In short, the Canadian system sidesteps much of the guess work and slippery standards prevalent in U.S. adjudications of rehabilitation. Canada differentiates between “deemed rehabilitation” and “individual rehabilitation.”¹⁷¹ Under section 18 of the IRPR, deemed rehabilitation may be extended to a foreign national who has been convicted of a single indictable offense either inside or outside of Canada or who has committed a single indictable offense outside of Canada, provided that ten years have passed since the completion of the imposed sentence or ten years have elapsed since the commission of the offense (in the case of a foreign national who committed a single indictable offense outside of Canada) and the offense committed would be punishable in Canada by a maximum term of imprisonment of less than ten years, and the foreign national has not been convicted of, or committed, any additional offenses.¹⁷² A request for deemed rehabilitation is made at the port of entry (POE) or submitted to a Canadian consulate along with a request for a visa

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Under IRPA § 36(3)(c), Waiver of inadmissibility for those deemed rehabilitated allows persons to be automatically rehabilitated when the Minister’s criteria are met, which is a departure from the standard practice of individual rehabilitation governed by IRPA § 36(2).

¹⁷² IRPR § 18.

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to enter Canada.¹⁷³ If the CBSA officer at the POE or the visa officer at the consulate decides that a foreign national qualifies for deemed rehabilitation, the officer will enter a Visitor Record into the CBSA database to eliminate problems during future entries to Canada.¹⁷⁴ In that sense, while it is fairly difficult to qualify for deemed rehabilitation, the process injects an element of certainty which allows immigrants and Canadian adjudicators to clearly understand who does and does not qualify.

Deemed rehabilitation is also available to a foreign national who was convicted of two or more summary offenses, not arising out of a single occurrence, outside of Canada, provided that five years have elapsed since the sentences were served and the foreign national was not convicted of any other offenses.¹⁷⁵ Only war crimes and crimes against humanity are not subject to rehabilitation.¹⁷⁶ Importantly, the rules for deemed rehabilitation differ depending on where the offense was committed. For example, if a foreign national was convicted or found to have committed a crime in a foreign country which, if committed in Canada, would be subject to at least a ten-year prison sentence, then the person must complete the sentence, wait ten years and satisfy CIC that the person is rehabilitated.¹⁷⁷ Similarly, if a foreign national was convicted of or found to have committed a foreign offense which, under Canadian law, would be an indictable offense then that person must wait five years from completion of the sentence and only then apply for rehabilitation.¹⁷⁸

If a foreign national does not qualify for deemed rehabilitation, individual rehabilitation may be available. If a person was convicted of an indictable or hybrid offense and five years have passed since the completion of the sentence, that person may apply for individual rehabilitation.¹⁷⁹ In order to qualify for individual

¹⁷³ Enforcement Operations Manual, *supra* note 148, at 56.

¹⁷⁴ *Id.*

¹⁷⁵ IRPA § 36(2).

¹⁷⁶ IRPA § 35(1)(a).

¹⁷⁷ IRPA §§ 36(1)(b) and (c).

¹⁷⁸ IRPA § 36(3)(c).

¹⁷⁹ IRPA § 26(2).

rehabilitation, the foreign national must demonstrate true rehabilitation, including remorse for the crime committed, a clean record since the crime, community service, and good moral character.¹⁸⁰ Absent contrary evidence to counter a finding of rehabilitation, such as the commission of subsequent offenses, CIC should find rehabilitation.¹⁸¹ Canadian immigration law does not specify what constitutes “rehabilitation” although the Immigration Enforcement Manual refers to Black’s Law Dictionary, which defines the term as follows: “The process of seeking to improve a criminal’s character and outlook so that he or she can function in society without committing other crimes.”¹⁸² Building on this broad definition, the Federal Court of Appeal has described the rehabilitation decision as an assessment of possible future comportment based on actions, attitudes and behavior since conviction.¹⁸³ The foreign national submits an Application for Criminal Rehabilitation (Form IMM 1444) for individual rehabilitation to a Canadian consulate or, if the foreign national is located in Canada, to a central processing office in Canada.¹⁸⁴ Unlike deemed rehabilitation, decisions on individual rehabilitation are made by CIC officers and not CBSA or visa officers.¹⁸⁵

The deemed rehabilitation regulations do not amount to a free pass for foreign nationals with criminal records. For example, when a foreign national is deemed rehabilitated and then commits another offense, the previously-granted deemed rehabilitation is stripped away.¹⁸⁶ The fact that rehabilitation is embraced as a core concept under Canadian immigration law does not mean that all applicants for admission based upon a showing of rehabilitation are granted.

¹⁸⁰ *Id.*

¹⁸¹ *See* *Dee v. Canada*, (2000) 3 F.C. 245 (Can.); *Thamber v. Canada*, (2001) FCT 177 (Can.).

¹⁸² Canadian Bar Association, *supra* note 11; ENF 14/OP 19, Criminal Rehabilitation; BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁸³ ENF 14/OP 19, Criminal Rehabilitation.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ ENF 14/OP 19, Criminal Rehabilitation.

V. *Summing Up: The Argument for Expanded Use of Rehabilitation*

A. *Rehabilitation Offers a More Nuanced View of Immigrants*

There is a psychological gulf between U.S. citizens and LPRs and immigrants seeking to avoid deportation or inadmissibility. Many persons lawfully in the U.S., by birth or otherwise, accept that there is a bright line between them and immigrants who have violated the immigration laws.¹⁸⁷ Professor Romero points to the corrosive effect of this distinction, namely, that “there is a tendency to neglect – or worse, actively oppress – those in the disfavored group for no better reason than the law allows it.”¹⁸⁸ While perhaps felt most acutely by those violating immigration laws, that neglect or oppression also eats away at the emotional intelligence of the American public. Professor Romero advocates for the integration of Christian principles of mercy and compassion into the debate over U.S. immigration policy, while also recognizing the reality that open borders are unworkable.¹⁸⁹ Allowing putative immigrants to show rehabilitation for their crimes or violations of immigration laws requires a shift towards a more “emotionally intelligent” approach to U.S. immigration laws and regulations. Emotional intelligence has been defined as: “[A] type of social intelligence that involves the ability to monitor one’s own and others’ emotions, to discriminate among them, and to use the information to guide one’s thinking and actions. The scope of emotional intelligence includes the verbal and nonverbal appraisal and expression of emotion, the regulation of emotion in the self and others, and the utilization of emotional content in problem solving.”¹⁹⁰

Again, U.S. policy makers can tear a page from the lessons

¹⁸⁷ Victor C. Romero, *Christian Realism and Immigration Reform*, 7 U. ST. THOMAS L.J. 310, 330 (2010).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 321.

¹⁹⁰ John D. Mayer & Peter Salovey, *The Intelligence of Emotional Intelligence*, 17 INTELLIGENCE 433 (1993).

learned in the criminal justice system, which now roughly mirrors the immigration justice system in terms of sanctions and enforcement. Emotionally intelligent justice is aimed at “helping offenders, victims, communities and officials to manage each other’s emotions to minimize harm.”¹⁹¹ According to Professor King, “[t]herapeutic jurisprudence examines the law’s effect on the wellbeing – including the emotional wellbeing – of its subjects.”¹⁹² Creating a role for rehabilitation in the context of immigration laws both requires and fosters a certain degree of emotional intelligence among all actors in the realm of immigration law and policy: advocacy groups who might thoughtfully examine their opponents’ arguments rather than defaulting to the visceral (nativist or pro-immigrant, right or wrong) reaction; policy makers who might find the courage to explain to their constituents the values of forgiveness, mercy, and decency; immigration officials who might be trained to evaluate immigrants seeking relief from deportation or inadmissibility based on a holistic view of their role in their families and society rather than their criminal or track record of immigration violations; and, finally, immigrants who might shake off the chains of victimhood, recognize the consequences of their choices and examine methods by which they could regain the public trust.

Both the changes needed in U.S. immigration law to allow for rehabilitation to be considered and the consideration of rehabilitation in the myriad of decisions made by immigration officials require elevated and sustained levels of emotional intelligence. Therapeutic jurisprudence, which lies at the heart of emotional intelligence, has been successfully implemented in a variety of contexts, including school safety, family law, criminal law, mental health law, civil litigation, workers’ compensation, disciplinary proceedings, and even appellate law.¹⁹³ It is necessarily a two-way street for

¹⁹¹ See Michael King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELBOURNE U. L. REV. 1096, 1097 (quoting Lawrence Sherman’s 2002 presidential address to the American Society of Criminology).

¹⁹² *Id.* at 1097-1098.

¹⁹³ See King, *supra* note 191, at 1112 (citing examples of therapeutic jurisprudence); see generally Shirley S. Abrahamson, *Therapeutic Jurisprudence:*

therapeutic jurisprudence in the context of immigration laws: if rehabilitation is allowed as a factor to be considered to ameliorate the otherwise harsh aspects of immigration laws, immigrants who are subject to deportation or inadmissibility will have a greater sense that the law treats them with respect and not merely as the sum of their crimes or immigration violations and, in turn, immigrants are more likely to not only accept the decisions made by immigration officials in their cases and, if successful, to have greater respect for all of the laws of the U.S., immigration and otherwise.¹⁹⁴ A touchstone of rehabilitation in the context of therapeutic jurisprudence is also how attorneys, judges and other officials can create the conditions in which an individual is willing to rehabilitate.¹⁹⁵ A legal environment which embraces rehabilitation for immigrants who have committed lesser offenses allows immigrants to engage in meaningful rehabilitation – rather than acts to present a façade of rehabilitation. The consideration of rehabilitation factors in an immigration context not only promotes more thoughtful decisions by immigration officials but also a sense of self-determination by immigrants, rather than continued reprobate attitudes and behaviors.

The growing use of restorative justice in the criminal law context is also helpful when considering effective means to secure the removal of immigrants who are truly reprobate.¹⁹⁶ Restorative justice offers a “more accountable, understandable, and healing system of justice” than traditional criminal justice models.¹⁹⁷ In essence, restorative justice includes the victim, the offender and community members in an effort to craft a punishment that attempts

Issues, Analysis, and Applications: The Appeal of Therapeutic Jurisprudence, 24 SEATTLE U. L. R. 223 (explaining that therapeutic jurisprudence determines the healing and/or detrimental effects that the legal system has on people).

¹⁹⁴ See King, *supra* note 191, at 1114.

¹⁹⁵ David B. Wexler, *Therapeutic Jurisprudence and Readiness for Rehabilitation*, 8 FLA. COAST. L. REV. 111, 112 (2007).

¹⁹⁶ Lawrence W. Sherman, *Domestic Violence and Restorative Justice: Answering Key Questions*, 8 VA. J. SOC. POL’Y & L. 263 (defining restorative justice as a way of “emphasizing reparations to crime victims and society rather than punishment to offenders”).

¹⁹⁷ Mark S. Umbreit et al., *Restorative Justice in the 21st Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 304 (2005).

to undo any harm done and prevent the offender from harming the same victim or others in the future.¹⁹⁸ Offenders express shame and remorse, victims forgive and, together with community members, a punishment is crafted that allows the victim to recover, reduces repeat offenses, and offers the chance for the offender to rejoin society.¹⁹⁹ In certain contexts, restorative justice works: in a study of restorative justice in New Zealand, all parties expressed a high level of satisfaction.²⁰⁰ Restorative justice also works in the sense that victims feel respected and gain a sense of closure while offenders comply with punishment and restitution agreements.²⁰¹ Further, offenders are less likely to engage in repeat offenses.²⁰² While certain aspects of restorative justice are inapplicable in the immigration context – such as the lack of an identifiable victim for illegal entry or reentry, possession of drugs or certain traffic offenses – other components have merit. For example, the emphasis in restorative justice on an expression of shame or remorse by the offender and the extension of forgiveness by the victim is a valuable lesson: if immigration law embraced restorative justice, by allowing for a showing of rehabilitation, which includes an expression of remorse, and society, to the extent it is a victim of public crimes such as immigration violations, could forgive immigrants who have transgressed, then some of the resentment and bitter feelings harbored by immigrants and society could be lessened and each could realize the importance and worth of the other.

B. Rehabilitation Recognizes Proportionality

U.S. immigration law is also characterized by a broad disconnect between offenses and the consequences for offenses. Each year, thousands of persons are deported because they entered

¹⁹⁸ Hafemeister, *supra* note 67, at 192.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 196, citing New Zealand Ministry of Justice, Reoffending Analysis for Restorative Justice Cases: 2009 and 2009 – A Summary (2011).

²⁰¹ *Id.* at 196-199.

²⁰² *Id.*

the U.S. illegally or committed a crime in the U.S., despite that they are married to U.S. citizens or LPRs, and they must return to their home country in order to obtain a visa to reenter the U.S. as an LPR.²⁰³ Depending on the country of nationality, the nature of the crime or immigration violation, and the vagaries of the U.S. consulate which processes the visa, these immigrants may have to wait years to return to their families in the U.S.²⁰⁴ Professor Michael Wishnie makes a compelling argument that immigration law, like its sister jurisprudence of criminal law, should consider whether the penalty imposed is proportional to the offense committed.²⁰⁵ In *Padilla v. Kentucky*, the U.S. Supreme Court recognized that the immigration consequences of criminality are direct and clear by noting that the “nearly . . . automatic” deportation of LPRs with criminal convictions is a “particularly severe ‘penalty.’”²⁰⁶ Professor Maureen Sweeney has also championed the argument that immigration consequences of criminal convictions should better fit the offense because removal is punishment for breaking the law and should not be “grossly disproportionate to the offense.”²⁰⁷

In the view of Professors Wishnie and Sweeney, the answer to the lack of proportionality lies in a fundamental overhaul of the U.S. immigration system, such that criminal convictions do not automatically lead to deportation.²⁰⁸ This is a well-reasoned approach and, perhaps, the most direct fix to the problem of lack of proportionality. It may, however, be politically untenable to, in effect, redraft laws to excuse immigrants with a criminal history from deportation. In addition, negating the consequences of criminality or immigration violations implicitly sanctions such behaviors and does little to ensure that the intending immigrant has learned a valuable lesson and will not transgress in the future.

²⁰³ INA § 212(a)(9).

²⁰⁴ *Id.*

²⁰⁵ Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 101, 416 (2012).

²⁰⁶ *Padilla v. Kentucky*, 130 S.Ct. 1473, 1480-81 (2010).

²⁰⁷ Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 87-88 (2010).

²⁰⁸ *Id.*

C. *Rehabilitation Appeals to Our Better Selves*

The concern with rehabilitation, then, in the immigration context is not merely that the immigrant desires to be reunited with family and the ability to work and achieve; the immigrant should also desire to be part of a social contract in which law-breaking is discouraged, rather than excused and remorse and accountability are the only means by which such a desire can be evaluated. Lord Patrick Devlin noted that “[s]ociety is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.”²⁰⁹ Ensuring that would-be members of U.S. society understand that they are equal members in a social contract, which depends upon uniform application of the laws, would not only enhance the social contract but increase unity among often disparate elements of American society separated by alienage, national and ethnic origin, race, religion and other characteristics.

Nor, as several observers of U.S. immigration policy have noted, is the social contract overly legalistic: “Most Americans are less worried about immigrants having proper documents or being able to answer questions about American history and politics than their behaving like responsible members of the community. Are immigrants making too much noise? Are they attempting to communicate in English? Are they parking their cars where there is supposed to be grass? Are they crowding too many people into their living quarters? Are they cluttering the neighborhood with abandoned shopping carts or cars? In sum, we believe that when Americans complain about immigrants, their concern is less about immigrants failing to be good citizens than about their failing to be good neighbors.”²¹⁰ In that sense, then, integrating immigrants –

²⁰⁹ Patrick Devlin, *The Enforcement of Morals* (1965), reprinted in *CRIMINAL LAW AND ITS PROCESS: CASES AND MATERIALS* 160-61 (Sanford H. Kadish & Stephen J. Schulhofer, eds., 6th ed., Wolter Kluwer Law & Business 1995).

²¹⁰ Noah Pickus & Peter Skerry, *Good Neighbors and Good Citizens: Beyond*

even those who have not abided by the terms of the social contract – can bring such immigrants back into the fold of the social contract and, in doing so, address some of the concerns among average Americans regarding whether immigrants adhere to the most basic elements of the social contract, including being good neighbors.

*D. Rehabilitation Fits Within the Dominant
Religious-Cultural Ethos*

While U.S. immigration law is, of course, secular in its origins and implementation, religious precepts offer both context and guidance in the acceptance of rehabilitation as a factor in deportation and inadmissibility determinations.²¹¹ Some observers of U.S. immigration policy call for Americans to love the alien as their neighbor by ending the harsh immigration consequences of criminal convictions and granting amnesty for undocumented immigrants.²¹² As Professors Elizabeth and Patrick McCormick argue, “[i]nstead of criminalizing and deporting millions of undocumented noncitizens – an option that is likely to be unworkable in any event – we should find a way to effectively welcome them as full members of our community.”²¹³ Yet, the Professors McCormick ignore that, while hospitality is a hallmark of biblical teachings and a touchstone of emotional intelligence so, too, is the need for contrition and examination of self that is central to effective and meaningful

the Legal-Illegal Immigration Debate, in *DEBATING IMMIGRATION* 107 (Carol M. Swain, ed., 2007).

²¹¹ See Michele R. Pistone, *The Devil in the Details: How Specific Should Catholic Social Thought Teaching Be?*, 1 J. CATH. SOC. THOUGHT 507 (2004); MICHELE R. PISTONE & JOHN J. HOFFNER, *STEPPING OUT OF THE BRAIN DRAIN: APPLYING CATHOLIC SOCIAL TEACHING IN A NEW ERA OF MIGRATION* 77 (2007); Michael Scaperlanda, *Immigration and Evil: The Religious Challenge*, 83 U. DET. MERCY L. REV. 835 (2006); Stephen H. Legomsky, *Emigration, Obligation and Evil: A Response to Michael Scaperlanda's Keynote Address*, 83 U. DET. MERCY L. REV. 849 (2006).

²¹² Elizabeth McCormick & Patrick McCormick, *Hospitality: How a Biblical Virtue Could Transform United States Immigration Policy*, 83 U. DET. MERCY L. REV. 857, 871 (2006).

²¹³ McCormick & McCormick, *supra* note 212, at 894.

rehabilitation.²¹⁴ The extension of hospitality to persons who have offended the laws of those who offer hospitality without any introspection on the part of the offenders is but mercy and does little to either discourage future law breaking or curb resentment among those offering mercy.

As a legal construct, remorse serves an important function. As noted by Professor Linda Ross Meyer: “Acceptance of a defendant’s sincere remorse changes the nature of sentencing. Instead of punishing a remorseful offender, that is, imposing pain to cancel a debt, deter, or teach, we sanction a remorseful offender, imposing a settlement, not a retribution, that is necessary to put an end to remorse itself.”²¹⁵ In other words and, as applied to the immigration context, allowing an immigrant with a low-level criminal record to express rehabilitation by, in part, demonstrations of remorse not only satisfies the need among society at large for such an immigrant to suffer for his or her misdeeds but, when coupled with some form of punishment, also allows immigrants to expiate their guilt over their crimes, reconcile any feelings of low self-worth, and to feel welcome as full-fledged members of American society.²¹⁶ Because remorse concerns whether a person feels that he or she has committed an offense and some degree of regret from having committed the offense, all of which requires a sense of morality, religious practices can be a helpful lens through which to examine remorse as a factor in establishing legitimate rehabilitation. In fact,

²¹⁴ See, e.g., Rabbi David Rosen, *The Concept of Forgiveness in Judaism*, available at <http://www.rabbidavidrosen.net/articles.htm> (last visited July 31, 2013) (affirming that “[t]he Biblical concept of Divine Forgiveness reveals the view of a compassionate Deity who responds accordingly to human contrition and moral rehabilitation”); *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (Nov. 15, 2000), available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/criminal-justice-restorative-justice/crime-and-criminal-justice.cfm> (“Just as God never abandons us, so too we must be in covenant with one another. We are all sinners, and our response to sin and failure should not be abandonment and despair, but rather justice, contrition, reparation, and return or reintegration of all into the community.”).

²¹⁵ Linda R. Meyer, *Eternal Remorse*, 36 QUINNIPIAC U. SCH. L. 1 (2005), available at <http://ssrn.com/abstract=960472>.

²¹⁶ See *Id.* at 4.

as Professor Michael Scaperlanda noted, “[r]eligious values . . . can and should play a vital role in the discussion of emigration and immigration for at least two reasons. First, the religious lens may be able to bring into focus truth about the person and community missed by prevailing theories, helping us to better understand the cost of emigration/immigration. . . . Second, . . . religious values can help inform the debate over immigration law and policy in the broader context.”²¹⁷

For example, the Catholic sacrament of penance offers a formulaic, step-by-step approach, which many persons who have transgressed find helpful as a means to regain their sense of self-worth and value to society.²¹⁸ That is not to suggest that immigrants seeking relief from deportation and inadmissibility should participate in a ritualistic sacrament of penance; the sacrament is only offered to illustrate an example of one means of demonstrating remorse and rehabilitation. However, given that the majority of persons who would benefit from comprehensive immigration reform are Mexican nationals, and Catholicism predominates among the Mexican population, the sacrament of penance may not be a foreign concept.

The sacrament of penance has four elements: contrition, confession, the acts of penance, and absolution.²¹⁹ According to the Catholic Church, “[t]he most important act of the penitent is contrition, which is heartfelt sorrow and aversion for the sin committed along with the intention of sinning no more.”²²⁰ Brother Celichowski notes that, “[i]n the Catholic understanding of conversion, however, contrition is just a starting point. Contrition alone is as futile as faith without works. Confession, penance, and absolution are also necessary, both symbolically and practically, to

²¹⁷ Michael Scaperlanda, *Immigration and Evil: The Religious Challenge*, 83 U. DET. MERCY L. REV. 835, 843 (2006).

²¹⁸ John Celichowski, O.F.M. Cap., *Bringing Penance Back to the Penitentiary: Using the Sacrament of Reconciliation as a Model for Restoring Rehabilitation as a Priority in the Criminal Justice System*, 40 CATHOLIC L. 239, 249 (2001).

²¹⁹ *Id.*

²²⁰ See DECREE OF THE SECOND VATICAN ECUMENICAL COUNCIL, *Rite of Penance*, in THE RITES OF THE CATHOLIC CHURCH 335, 345 (1976).

be fully reconciled – literally, reunited with God and the Church.”²²¹ The same argument applies in the context of relief sought from deportation or inadmissibility: heartfelt remorse, a track record of good behavior, and strong prospects for future stability, when coupled with penance in the forms of administrative filing fees, payment of any unpaid back taxes, and a civil penalty, as provided for under comprehensive immigration reform, will do much to ensure that such a program is not too parsimonious to be practical for many immigrants, while also ensuring buy-in from a U.S. society that does not want a non-consequences amnesty for immigrants who have violated the law. Under the sacrament of reconciliation, confession is followed by imposition of penance, which can run a gamut based on the severity of the sin committed.²²² In the immigration context, penance is obvious: it can be the imposition of a fine, a time-based bar on return to the U.S., or even banishment from the U.S. for life. Penance is designed not as a punishment, however, but as a means to awake in the person who has sinned the reality of the consequences of that transgression and, for that reason, the penance meted out by the Catholic Church is not intended to be severe or to cause physical pain or deprivation.²²³ As the final act in the sacrament, absolution allows the transgressor to rejoin the community, conscious of self-directed desire not to sin again.²²⁴

E. Rehabilitation Has a History in U.S. Immigration Law

The concept of rehabilitation as a factor in comprehensive immigration reform is not without precedent. As Professor Maureen Sweeney notes, the initial iteration of the Immigration and Nationality Act of 1952 allowed federal officials to apply discretionary factors to forestall deportation for persons present in

²²¹ DECREE OF THE SECOND VATICAN ECUMENICAL COUNCIL, *supra* note 220, at 253-54.

²²² *Id.*

²²³ *Id.*

²²⁴ Sweeney, *supra* note 207, at 60.

the U.S. for at least seven years.²²⁵ Professor Sweeney explains that former INA section 212(c) allowed equities to be weighed.²²⁶ Negative equities included nature and underlying circumstances of the immigration violation, the nature, seriousness and recency of criminal convictions, and other evidence of bad character while positive equities included family in the U.S., duration of residence, age at time of entry to the U.S., hardship to the immigrant and family members, employment history, property ownership, military and community service, rehabilitation, and other evidence of good character.²²⁷ Even after section 212(c) was eliminated by the U.S. Congress in 1996, the U.S. Supreme Court allowed immigration officials to continue to apply it due to reliance by persons who pled guilty to certain crimes in reliance that section 212(c) relief would be available.²²⁸ There is a clear historical precedent for the recognition of rehabilitation as a factor to be considered in deportation and inadmissibility proceedings and, as Professor Sweeney notes, “Automatic removal is not calibrated in any way to the severity of the underlying offense [A]s a punishment, it is a very blunt instrument.”²²⁹

F. Rehabilitation Can Be Readily Implemented

Attorneys for immigrants will play a central role in the implementation of comprehensive immigration reform. As Professor Evelyn Cruz noted: “Immigrants feel that they are denied access, they are not treated with respect, and that immigration procedures are not trustworthy.”²³⁰ Attorneys can first broach the concept of

²²⁵ Sweeney, *supra* note 207, at 60.

²²⁶ *Id.*

²²⁷ *Id.* at 61, citing *Matter of Marin*, 16 I & N Dec. 581, 584-85 (BIA 1978).

²²⁸ See *INS v. St. Cyr*, 533 U.S. 289, 296 (2001); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-304(b), 110 Stat. 3009-597 (1996).

²²⁹ Sweeney, *supra* note 207 at 85.

²³⁰ Evelyn F. Cruz, *Validation Through Other Means: How Immigration Clinics Can Give Immigrants a Voice When Bureaucracy Has Left Them Speechless*, 17 ST. THOMAS L. REV. 811, 812 (2005) (explaining that Professor

rehabilitation with their clients, explain to clients the rationale for the laws (whether the attorney agrees with the rationale or not) which penalize their prior behaviors, and encourage clients to reflect on how their actions created their current dilemmas, and, finally, empower clients to make positive choices and take affirmative steps to demonstrate their rehabilitation from either criminal activity or immigration violations. The point is not to castigate or shame clients for their bad acts; they doubtless feel the sting of shame for how they have jeopardized their future and those of their family members. Nor is the point to turn attorneys into confessors; attorneys are ill-equipped for that role and the focus is not on invoking clients' sense of morality. Rather, attorneys can simply explain to clients that their actions led to the relevant immigration consequences and enlighten clients that their sincere efforts to rehabilitate may help them to ameliorate the harsh consequences of their actions.²³¹ Shame is not an effective change agent for human behavior. Acceptance of responsibility for one's own predicament, honest reflections on why certain crimes or violations were committed, and executing a plan of action to avoid recurrences and become a contributing member of society are powerful steps towards rehabilitation.

This notion runs counter to the prevailing thinking that violations of immigration laws should be readily excused because the violations are perceived as minor or justified by economic need or a desire to reunite with family. Whether or not that is a valid argument is beyond the scope of this article but, like it or not, the immigration laws of the U.S. exist for specific reasons, such as maintaining the integrity of the immigration system, in which priorities are assigned based on closeness of family relations, country of origin and other factors, all of which have a rationale. It does little good for attorneys to instill in their clients a sense of self-righteous indignation at the

Cruz calls for law school clinics and, by extension, all attorneys to use therapeutic techniques to "increase client satisfaction, comprehension, and acceptance, thereby preserving the client's voice and providing the client with validation").

²³¹ The role of a lawyer in this regard has changed little since Justice Oliver Wendell Holmes wrote *The Path of the Law*. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461-2 (1897). Holmes opined that the lawyer's role is to explain the consequences of certain actions to clients and to ensure that clients are aware of their role in bringing about such consequences. *Id.*

perceived unfairness of the laws when, in fact, their clients made choices to break those laws and the laws have a valid basis to protect not only U.S. citizens and LPRs but also other immigrants, who choose not to violate the laws. Better yet, attorneys could not only promote a deeper understanding and respect among their clients for U.S. laws while also affording them an opportunity to show genuine rehabilitation. Surely, attorneys do not want their clients to pick and choose which laws they will obey in the future, if they gain valid immigration status. Implicitly or explicitly fostering a sense of moral rectitude in clients for violating U.S. immigration laws may make clients feel empowered in the short term but it does not nothing to make them appreciate the nature of the U.S. legal system or, indeed, to advance their own ability to demonstrate rehabilitation.

One obvious factor militates against the use of rehabilitation in the context of removal proceedings: while rehabilitation in the criminal setting allows an offender to become a productive, law-abiding citizen, rehabilitation in the immigration context is not relevant because it will occur, if at all, after the would-be immigrant is deported. In that sense, whether the immigrant rehabilitates is irrelevant because, in most cases, re-entry is not allowed for persons deported from the U.S.²³²

Comprehensive immigration reform offers the greatest opportunity for the U.S., as a nation and a society, to heal what divides us perhaps more than any other factor: our varying degrees of legal status. Certainly, race, gender, region, income, education, and class also polarize U.S. society, but legal status is a defining attribute of full membership in U.S. society. If done expeditiously and fairly, comprehensive immigration reform can allow valuable members of society to no longer live in the shadows. In large measure, the success of comprehensive immigration reform rises and falls on the ability of USCIS to exercise its bureaucratic muscle to adjudicate millions of applications for relief, many of which will require individual determinations and interviews to address criminality and

²³² See Teresa A. Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement's Failed Experiment with Penal Severity*, 38 *FORDHAM URB. L. J.* 217, 244-45 (Nov. 2010).

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immigration violations. Rehabilitation, if judiciously and fairly applied, offers USCIS the ability to quickly adjudicate applications for benefits, without protracted review and litigation. The promise of comprehensive immigration reform, then, relies in large part on a showing of rehabilitation. As Supreme Court Justice Anthony Kennedy argued, if the American people are “confident in [the] laws and institutions . . . [they] should not be ashamed of mercy.”²³³ If comprehensive immigration reform is implemented according to fair and open standards, then most Americans will recognize that its merits far outweigh any downsides, and immigrants and their families who stand to benefit from comprehensive immigration reform will be more likely to share fully in a society which has graced them with leniency.

²³³ Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003).