A JUSTICE SCHOOL: TEACHING FORCED MIGRATION THROUGH EXPERIENTIAL LEARNING

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Introduction

The need for committed and competent public interest lawyers has never been greater, in light of the recent assault by our own government on individual rights.[1] We are at a unique juncture in U.S. history where there is both a supply and demand for social justice lawyers.[2] Law schools, however, still fall short in their support and preparation of students who want to be public interest lawyers.[3] As Dean of St. Thomas University School of Law from 1999 to 2003,

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[1] *See, e.g.,* Joan Biskupic, *Trump's Sustained Attack on American Rights*, CNN POLITICS (May 26, 2018), https://www.cnn.com/2018/05/26/politics/trump-rights-due-process-curiel/index.html; Sherilyn Ifill, *Trump's First Year Was an Affront to Civil Rights*, TIME (Jan. 17, 2018), http://time.com/5106648/donald-trump-civil-rights-race/.

[2] *See* Corilyn Shropshire, *After Trump's election, more students consider law school, hoping to make a difference,* CHICAGO TRIBUNE (Nov. 17, 2017), http://www.chicagotribune.com/business/ct-biz-lsat-registration-up-trump-bump-20171116-story.html.

[3] Alexi Freeman and Katherine Steefel, *The Pledge for the Public Good: A Student-Led Initiative to Incorporate Morality and Justice in Every Classroom*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 49, 51-52 (2016); Aliza B. Kaplan, *How to Build a Public Interest Lawyer (and Help All Law Students Along the Way),* 15 LOY. J. PUB. INT. L 153 (2013); Eli Wald & Russell J. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403 (2011); Adrienne Stone, *The Public Interest and the Power of the Feminist Critique of Law School: Women's Empowerment of Legal Education and its Implications for the Fate of Public Interest Commitment*, 5 AM. U.J. GENDER & L. 525 (1997); ROBERT. V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL 3 (1989).

John Makdisi demonstrated a commitment to training community lawyers who could provide high-quality, low-cost legal services to persons who otherwise would not have access to legal representation.[4] This article is a tribute to him. Law school administrations that talk the talk of serving underrepresented communities also need to walk the walk by prioritizing such work through their curricular offerings and extracurricular programs, including pro bono activities. It is vital that students see from Day One of law school that they can use their legal training to make a positive difference in the world, and that throughout their three years of law school they learn the doctrine, develop the litigation skills, and have the kinds of experiential opportunities that will prepare them for this work. Law schools that embrace this mission should redefine themselves as justice schools.[5]

The first year of law school is often disappointing for students with a commitment to social justice. In their 1L courses, they quickly realize that learning the law involves a different way of thinking: memorization of rules, the development of dispassionate analytical skills, and an almost mechanical way of writing.[6] Professors and advisors urge 1Ls to focus on their studies so that they survive their first year, and not to over-commit to extracurricular activities.[7] They may experience depression and anxiety wondering whether they have chosen the right profession.[8] Studies show that the percentage of students who enter law school to become public interest lawyers drops

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[4] *Nurturing New Lawyers: A Q & A with Dean Garcia on the Solo/Small Practice Incubator*, ST. THOMAS LAW MAGAZINE, May 2015 at 10-11 (recognizing John Makdisi, whose Community Law Center was a forerunner to the incubator movement).

[5] *See* Peter L. Davis, *Why Not a Justice School? On the Role of Justice in Legal Education and the Construction of a Pedagogy of Justice*, 30 HAMLINE L. REV. 513-14 (2007).

[6] Kaplan, *supra,* note 3, at 176, 178-79 (observing that, "[f]or public interest students in particular, the case method's strict reliance on objectivity without an application of problem-solving principles often removes morality, politics, feelings, ethics, and justice from the discussion").

[7] Freeman & Steefel, *supra* note 3, at 69.

[8] Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow & Deborah Lee Stachel, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 44 (1994).

off dramatically by the time they reach their final year.[9] Legal education tends to reproduce social hierarchies, as competitive students are channeled into high paying jobs at big firms and only the very top and most persistent students qualify for judicial clerkships or a handful of prestigious fellowships.[10]

This article demonstrates how experiential learning in law school can prepare students for the practice of law and, if done well, instill in them a life-long commitment to social justice. I use my efforts to integrate a public service component into my immigration courses to illustrate this. Despite institutional obstacles encountered along the way, the success of this effort ultimately turned on working collaboratively with student leaders with a shared commitment to equal justice, winning the support of well-placed individuals within our administration, and ensuring that the experience for students was rewarding. Our signature achievement has been the Karnes Pro Bono Project. Teams of students, including 1Ls, 2Ls and 3Ls, have, on three separate occasions, worked side by side with attorneys and staff from RAICES – the Refugee and Immigrant Center for Education and Legal Services, Texas's leading immigration legal services agency, at the Karnes County family detention center, assisting Central American parents and children through the credible fear screening process and helping them qualify for asylum and release from detention. Not only have the students acquired a deeper understanding of the legal, political, and practical obstacles to asylum faced by refugees at the border. They have had the deeply moving and transformative experience of working with parents and children, hearing their stories, preparing their declarations, helping them at every stage of the credible fear screening process, and learning their fates.

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[9] *Id*. at 3 (disproportionate number of women studied entered law school with commitments to public interest law, but their third-year female counterparts left law school with corporate ambitions and some indications of mental health distress"). *See also* Kaplan, *supra* note 3, at 175; Stover, *supra* note 3, at 3.

[10] Wald & Pearce, *supra* note 3, at 422-23.

I. What Do I Mean by "Public Interest Law"?

Many definitions of public interest law exist,[11] but the version embraced here is the one reflected in ABA Model Rule 6.1: serving underrepresented communities that cannot otherwise afford an attorney.[12] It also is part of most law schools' mission. St. Thomas Law School includes in its mission statement a commitment "to fostering a public order of human dignity, [and] to training lawyers sensitive to the needs of the region's underrepresented communities."[13] Most Catholic law schools share this commitment, although Jesuit law schools often stand out in this regard.[14] Boston

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[11] Kaplan, *supra* note 3, at 157-59.

[12] MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N 2018) ("A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means").

[13] ST. THOMAS UNIV. SCH. OF LAW, *Mission & Learning Outcomes*, https://www.stu.edu/law/academics/mission-and-learning-outcomes/index.html (last visited Jan. 20, 2019).

[14] To name a few, Barry University's law school in Orlando, Florida states in its mission statement that its legal education includes a "religious dimension so that study and reflection lead to informed action and a commitment to social justice leads to collaborative service". Irene Scharf & Vanessa Merton, *Table of Law School Mission Statements*, Univ. of Mass. Sch. of Law Scholarship Repository 1, 6 (2016). Catholic University's Columbus School of Law in Washington, D.C. includes "a core commitment to the ideals of the dignity of each human person; respect for the inviolability of all human life; justice rooted in the common good; the recognition and protection of human rights as gifts of the Creator; care for the poor, the neglected, and the vulnerable; and the obligation of love for one another." *Id*. at 16. Gonzaga Law School, a Jesuit institution in Spokane, Washington, is committed "to educating the whole person to serve the public good, to engaging in a dialogue with all cultures and religious or ethical traditions, and to pursuing justice." *Id*. at 30. Loyola Law School in Los Angeles, "[s]eek[s] to educate men and women who will be leaders of both the legal profession and society, demonstrating in their practice of law and public service the highest standards of personal integrity, professional ethics and a deep concern for social justice." *Id*. at 37. Marquette University Law School in Milwaukee, Wisconsin, states that "Part of the Jesuit tradition of education is encouraging students to become agents for positive change in society. This is

College of Law's mission statement is a particularly good example. It states:

> Boston College and its law school are rooted in the Jesuit tradition of service to God and others. In that tradition, we believe that the purpose of higher education is both the search for knowledge, and the preparation of women and men who are moved to a constructive, responsible, and loving use of their knowledge. The Law School recognizes its commitment to social and economic justice, and strives to advance this commitment both through its curricular offerings and in the extracurricular projects that it supports.[15]

This is not, however, just a Catholic law school phenomenon. The Association of American Law Schools recognizes that law professors have a professional duty to "assist students to recognize the responsibility of lawyers to advance individual and social justice."[16] Many public and secular law schools have made similar commitments, and a smaller number of law schools focus on preparing students to be public interest lawyers. At Northeastern Law School in Boston, for example, their mission is "to fuse theory and practice with ethical and social justice ideals so that students understand what it is lawyers do, how they should do it and the difference they can make in the lives of others."[17]

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especially important in a law school." *Id.* at 39. Seattle University School of Law, another Jesuit institution, "is committed to educating outstanding lawyers who are leaders for a just and humane world." *Id.* at 60.

[15] *Id.* at 9.

[16] THE ASS'N OF AM. LAW SCH., LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES, AALS HANDBOOK: STATEMENT OF GOOD PRACTICES (1989) (amended 2017), https://www.aals.org/about/handbook/good-practices/ethics/.

[17] Scharf & Merton, *supra* note 14, at 44. Similarly, the mission of the Cleveland-Marshall College of Law "is to foster a more just society through legal education, service, and scholarship." *Id.* at 20. The University of Louisville Brandeis School of Law is guided by the vision of its namesake to "[a]ctively engage the community in addressing public problems, resolving conflicts, seeking justice, and building a vibrant and sustainable future through high-quality research and

When the forced migration of Central Americans reached crisis proportions in 2014, the Jesuit Refugee Service partnered with Jesuit law schools "to identify and address the challenges presented by the recent influx of Central American child migrants and migrant families."[18] Other Catholic law schools followed suit. In addition to students volunteering with Catholic Legal Services of Greater Miami to assist Central American children, our law school hosted several *pro se* clinics where law student teams prepared asylum applications for Central American children at the cusp of adulthood and about to lose their protected status.[19] We launched the Karnes Pro Bono Project in 2016, sending a scouting mission to the Karnes City detention center in June[20] and another team that December in the final days of the Obama Administration.[21] In late July 2018, with the Trump Administration dismantling asylum protections at break-neck speed, we trained and sent our third team that would face the greatest challenges of all.[22]

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innovative ideas, and application of research to solve public problems and serve the public." *Id.* at 92.

[18] Matthew Hall, *Jesuit Refugee Service/USA and Jesuit Law Schools Launch Partnership to Address Challenges Faced by Child Migrants*, SANTA CLARA LAW NEWS (March 16, 2015), https://law.scu.edu/news/jesuit-refugee-serviceusa-and-jesuit-law-schools-launch-partnership-to-address-challenges-faced-by-child-migrants/.

[19] Lauren Gilbert, *Femicide as a Basis for Asylum*, ST. THOMAS LAWYER 17-18 (May 2015), http://docplayer.net/2618690-Th-o-m-a-s-la-w-y-e-r.html (inserts and photos describe students' experience volunteering at Catholic Legal Services).

[20] *See* Kendra Parker, *Summer of Selflessness*, STU LAW NEWS (Aug. 4, 2016), https://www.stu.edu/law/news/summer-of-selflessness-immigration-law-students-aid-immigrant-families-at-karnes-detention-center-in-texas/.

[21] Kendra Parker, *St. Thomas Law Students Experience a Life-Changing Week at the Karnes Family Detention Center in Texas*, STU LAW NEWS (Dec. 20, 2016), https://www.stu.edu/law/news/st-thomas-law-students-experience-a-life-changing-week-at-the-karnes-family-detention-center-in-texas/.

[22] *See* Raychel Lean, "*Two Skins": Hard Lessons for Law Students at Immigration Detention Center*, DAILY BUS. REV. (Aug. 27, 2018), https://www.law.com/dailybusinessreview/2018/08/27/two-skins-hard-lessons-for-law-students-at-immigration-detention-center/. *See also* Kendra Parker, STU Law Delegation Aids Separated Migrant Families in Texas, STU LAW NEWS (Aug. 3, 2018), https://www.stu.edu/law/news/st-thomas-law-delegation-aid-separated-migrant-families-in-texas/.

II. Witnesses to Injustice

From July 29 through August 3, 2018, twelve law students, four trauma specialists, and I worked side by side with RAICES, the leading immigration non-profit in Texas, at the Karnes family detention center in Karnes City. This was my third trip with students to Karnes. Since 2014, Geo Group, Inc. had been operating the privately run detention center as a "family residential center" to detain women and children asylum seekers coming across the southern border.[23] Two weeks before we arrived, however, the women and children at Karnes were shipped to the Dilley Detention Center, about an hour and a half due west,[24] to make room for fathers and sons who had just been reunited under the court's class-wide preliminary injunction in *Ms. L- v. ICE* ordering an end to family separation.[25]

We arrived on Saturday, July 28, 2018, two days after the court-ordered deadline for family reunification. We were to begin work on Monday. While meeting up at the Alamo, we received a call from RAICES that they urgently needed us at Karnes the next day, Sunday, to meet with dozens of fathers and sons whom ICE had just transferred there. ICE planned to "comply" with the Court order, reunify parents and kids, and then, while they were under the same roof, quickly deport them.[26] The judge had issued a stay, but RAICES was concerned that he was about to lift it, and we needed to meet with as many of the fathers and sons as possible to identify who wanted to

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[23] The Geo Group, Inc., *Our Locations, Karnes County Residential Center*, https://www.geogroup.com/FacilityDetail/FacilityID/58 (last visited Jan. 22, 2019) (indicating that on July 11, 2014, the GeoGroup's contract with Karnes County was modified to convert the facility from a Civil Detention Facility into a Family Residential Unit for females and their children).

[24] Gus Bova, *Trump Administration Sets Up Potential Deportation Factory for Reunified Families in South Texas*, THE TEXAS OBSERVER (July 27, 2018), https://www.texasobserver.org/trump-administration-sets-up-potential-deportation-factory-for-reunified-families-in-south-texas/.

[25] *Ms. L- v. ICE*, No. 18-cv-00428 (S.D. Cal. June 26, 2018).

[26] Dara Lind, *Judge blocks Trump from deporting reunited families*, VOX NEWS (Aug. 17, 2018), https://www.vox.com/2018/8/17/17714918/children-separated-parents-deport-asylum.

fight their cases.[27] Together with RAICES staff, we spent that first Sunday meeting with fathers and sons to sort out where they were in the process, advise them of their rights, and encourage both fathers and sons who wanted to pursue asylum to submit a *papelito* (a half-page form) to ICE indicating that they were afraid of being sent back to their countries. Donna Nasimov, who created and managed our STU Karnes Blog, wrote:

> Working non-stop from 10am-8pm, the STU Karnes team saw over 100 immigrants, all fathers and their sons. It was tedious, long, emotional, physically exhausting, but most of all, rewarding. Most of these fathers and sons were separated for months at a time, some for a couple of weeks, others for 7 months. At the end of the day, we met with our trauma specialists who are joining us starting today and spoke about our fears, concerns, experiences, and expectations. We have all experienced vicarious trauma, but thankfully, we have a good support system between ourselves, our trauma specialists, and our professor.[28]

Over the next several days, students took statements from fathers and sons who described how they had been separated on arrival, usually within hours, often without a chance to say goodbye. Fathers who entered irregularly were prosecuted for illegal entry.[29] Most pled guilty in mass trials because their public defenders told them it was the quickest way to see their children.[30] After completing their sentences, fathers were moved to ICE facilities. ICE then gave them a "choice:" accept deportation, and we'll let you see your child;

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[27] Lauren Gilbert, *Trump doesn't need a wall – he has Jeff Sessions*, THE HILL (Sept. 15, 2018), https://thehill.com/opinion/immigration/406734-trump-doesnt-need-a-wall-he-has-jeff-sessions.

[28] *An Emergency State*, STU KARNES BLOG (July 30, 2018), https://stukarnes.wordpress.com/2018/07/30/an-emergency-state/.

[29] *See* 8 U.S.C.A. § 1325(a) (2016) (making it a misdemeanor to enter the United States at other than a port of entry).

[30] Debbie Nathan, *Hidden Horrors of "Zero Tolerance" – Mass Trials and Children Taken from Their Parents*, THE INTERCEPT (May 29, 2018), https://theintercept.com/2018/05/29/zero-tolerance-border-policy-immigration-mass-trials-children/.

fight your case and you will remain separated.[31] Many fathers we saw that first Sunday had agreed to deportation under these conditions. Others asked for asylum and had credible fear interviews while separated from their children. Parents described these interviews in heart-wrenching detail: not being able to think straight; not understanding the government official; how their hearts were pounding; losing their train of thought when the interpreter would tell them to pause; and not being able to tell their stories.[32] After losing their credible fear interviews ("CFIs"), many did not seek a review with the immigration judge ("IJ Review"), believing it was pointless, while others did and saw the Asylum Office's decision rubber-stamped.[33] With the July 26 deadline for family reunification approaching, ICE shipped many fathers and kids to a facility in El Paso. Some fathers received humanitarian parole after being made to sign many documents, told they were being released, and then reunited with their sons. This was a moment of great hope until that same night most were put on busses and sent to Karnes. ICE had cancelled their parole.[34]

RAICES used students to do high volume work, particularly on that first Sunday. The next day, students helped families fill out questionnaires regarding their experience in detention. Students also did the typical work of RAICES volunteers, prepping some for credible fear interviews, preparing declarations for those who had failed their CFIs and would be going before an Immigration Judge (IJ), and Requests for Reconsideration ("RFRs") for those who had been unsuccessful in their IJ Reviews. What made this week unique was that it occurred against the backdrop of family reunification and Attorney General Jeff Sessions' efforts to dismantle protections for asylum seekers. As Stefanie wrote:

> Each day I entered Karnes County Residential Center eager to help, yet unprepared for the imminent

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[31] Lind, *supra*, note 26.

[32] Gilbert, *supra*, note 27.

[33] Lauren Gilbert, *Strength, Character and Love*, STU KARNES BLOG (Aug. 2, 2018), https://stukarnes.wordpress.com/2018/08/02/strength-character-and-love-by-professor-lauren-gilbert/.

[34] *Id.*

> emotional rollercoaster inherent in the task of digging into the unhealed wounds of trauma stories in order to craft the most effective stories for their asylum claims. Each day I left feeling empty from the heartbreaking circumstances from which the asylum seekers came, and frustrated by Jeff Sessions et al. for exacerbating the trauma many asylum seekers experienced in their home countries.[35]

III. Lessons Learned from a Week at Karnes in the Age of Trumpism

Students learned many lessons that week that they typically do not learn in a doctrinal immigration law class or even in a clinical setting. While helping families through the credible fear process, they were also performing tasks that were critical to ongoing impact litigation in federal court challenging the Government's efforts to dismantle asylum protections. The significance of all their endeavors, however, became clearer after the week was over, when federal district judges issued several orders in favor of the detained families.[36] The learning experience has been ongoing with each new development in the courts.

The team was well-prepared. All the law students participated in a mandatory all-day training the Thursday before departure, which covered asylum laws and regulations, the credible fear screening process, client counseling, and the impact of trauma on clients and care providers.[37] Several students had previous experience. Most had taken immigration law, worked in the immigration clinic, or had some

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[35] Stefanie Morse, *I Drew a Cat and Named It Monkey*, STU KARNES BLOG (Aug. 4, 2018), https://stukarnes.wordpress.com/2018/08/04/i-drew-a-cat-and-named-it-monkey-by-stefanie-morse/#more-160.

[36] *See, e.g.,* MMM v. Sessions, 18-cv-001832 (S.D. Cal. Oct. 9, 2018) (granting preliminary approval of proposed settlement); *See, e.g.,* E-mail from Lauren Gilbert, Professor, to Karnes Team (Nov. 9, 2018) (on file with author) (regarding interim regulation barring irregular entrants from asylum).

[37] STU Karnes Pro Bono Project: Orientation for Trip to Karnes City, Texas (July 26, 2018) (on file with author).

other practical experience. Several students had done pro bono work at the Glades Detention Center in Moore Haven, Florida the previous semester, helping Somali refugees fighting their removal.[38] One student was a licensed social worker with extensive experience working with trauma survivors.[39] Almost all students were fluent in Spanish, and the two who were not were paired with bilingual students. The director of our University's Graduate Family Counseling Program, Professor Judith Bachay, also accompanied us, as did three trauma specialists from the Trauma Resolution Center.[40]

Consistent with clinical pedagogy, opportunities for reflection occurred throughout the process, including that first Sunday at Karnes, when the team gathered that night and sat in a circle to reflect on what they had learned and experienced, and what they hoped to accomplish during the week. In addition, the STU Karnes Blog allowed for journaling throughout the week. Virtually every law student and faculty member blogged, which memorialized the entire experience poignantly.[41]

Equally important, students' on-the-ground experience gave them skills and knowledge about the asylum process that they could use in other settings. Lessons learned included: (a) the intake process in a high-volume setting; (b) client counseling in the context of trauma and conflicts of interest; (c) the complex relationship among the asylum and withholding statutes, case law, and regulatory law; (d) the impact of the centralization of power over immigration in the U.S. Attorney General's office; (e) the root causes of the "surge" in Central America; and (f) the value of impact litigation when direct services are not enough.

Students grappled with issues of professional responsibility in

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[38] Kendra Parker, *STU Law Students' Life-Changing Experience Assisting Detained Somali Refugees*, STU LAW NEWS, March 5, 2018, *available at* https://www.stu.edu/law/news/st-thomas-law-students-life-changing-experience-assisting-detained-somali-refugees/.

[39] Affidavit on Behalf of G-P-A-, Declaration of Stefanie Morse, LMSW (Feb. 22, 2018) (redacted) (on file with author).

[40] Gilbert, *supra* note 27.

[41] STU KARNES PROJECT (Aug. 6, 2018), https://stukarnes.wordpress.com/ (last visited Jan. 22, 2018).

a high-volume, fast-moving, emotionally-draining setting, where not everyone's interests were aligned and not everyone was seeking or qualified for relief. RAICES' family detention project had focused on serving women and children, often in situations where their asylum claims related to their gender.[42] Suddenly, it was working with hundreds of recently reunited fathers and sons who had suffered the trauma of family separation and it had to make difficult decisions about clients and priorities.[43] This presented a unique learning opportunity for students interested in public interest work, the moral and ethical dilemmas presented, and the demands and limits of direct service work. Who *were* the clients? Given the competing interests of migrant workers—most of whom wanted to be sent back—and asylum seekers wanting to fight their cases, as well as children whose interests might diverge from their parents, who were they there to serve? What were their obligations, if any, to parents who just wanted to go home and take their children with them? Did they have any separate obligation to the children in these situations? How could a deeper understanding of history and politics in each of these countries help them effectively counsel detainees? How did what they were doing on the ground inform and feed into impact litigation challenging new Department of Justice policies in federal court?

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[42] RAICES, *Karnes Pro Bono Project*, https://www.raicestexas.org/volunteer/karnes-pro-bono-project/ (last visited Nov. 25, 2018).

[43] Lind, *supra* note 26.

A. Intake in a High-Volume Context

> *[W]hen I first entered the visitation room in the detention center in Karnes and saw dozens of fathers and children lined up to see us, it shocked me. I thought, "children should be in school or at home – a safe home – and not locked in a prison." Meeting with these fathers, who were carrying not only questions, but desperation and sadness in their shoulders, was a heartbreaking experience. Many of them cried for having exposed their children to such a traumatic experience, others were thankful for having been reunited with their children after many months.*[44]

For most students, the high-volume, fast-paced intake process at RAICES that first Sunday was a challenge. RAICES originally had scheduled meetings with about sixty families, but an equal number arrived as walk-ins that day. The final rush occurred in the half-hour before closing time, when RAICES tried to meet with every person they had not yet seen before Karnes staff closed them down at 8:00 p.m. RAICES explained to the students that their goal that Sunday was to determine the legal status of each parent and child, where each of them stood in the asylum process, which parents already had orders of removal and whether a parent wanted to seek asylum for himself and/or his child. RAICES urged each parent and child who might have wanted to fight their case to fill out a *papelito* indicating his fear of returning and to submit it to ICE. Several fathers already had orders of removal and RAICES did this to prevent their immediate deportation until they had an opportunity to evaluate their options. Students with some asylum experience quickly connected with families and wanted to delve into cases they saw as promising. Others were hearing from fathers that they just wanted to go home. As one student wrote:

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[44] Alexsandra Simoes, *When Being Resilient Just Isn't Enough*, STU KARNES BLOG (Aug. 4, 2018), https://stukarnes.wordpress. com/2018/08/04/when-being-resilient-just-isnt-enough-by-alexsandra-simoes/.

> Have you seen 50 year old men crying [?] They don't want to be separated from their children, they don't want to be incarcerated. They don't even want to be in this country anymore, they're pleading to go home. Let them go[.][45]

Part of student learning was helping them contextualize what was happening and understand that they were not just there to counsel each individual client, but to respond to the Trump Administration's well-orchestrated effort to turn its loss in the courts on family separation into a victory by quickly removing the recently-reunited families.[46]

B. Counseling Clients in the Context of Trauma and Ethical Quagmires

The Karnes experience raised an abundance of moral and ethical issues. Students saw how traumatized many fathers and sons were from family separation, and many students experienced their own secondary trauma. As Donna wrote:

> [T]o see the haunting, worried and untrusting look in the fathers' eyes every time they lose sight of their son for a few minutes it's jarring. To know that even though they are together at the moment, these fathers lie awake at night wondering if they will be separated again is heartbreaking. There is nothing more that we can offer or promise them than support, understanding, an ear to listen, and reassurance that we are doing everything in our limited power to help them.[47]

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[45] Nathalia Lozano, *Even Grown Men Cry*, STU KARNES BLOG (Aug. 2, 2018), https://stukarnes.wordpress.com/2018/08/02/even-grown-men-cry-by-nathalia-lozano/.

[46] MMM v. Sessions, No. 18-cv-1832 (Aug. 16, 2018) (finding that government's intent was to reunify and deport families).

[47] Donna Nasimov, *A Flawed Justice System*, STU KARNES BLOG (July 31, 2018), https://stukarnes.wordpress.com/2018/07/31/a-flawed-justice-system-bydonna-nasimov/.

Some students felt that RAICES was being paternalistic towards those fathers who said they wanted to go home. Were we really "doing everything in our limited power to help" all of them, or only those who wanted to stay and fight? What if a father wanted to go home and a son wanted to seek asylum? Did parents always have the right to decide for their children in this setting? It was important for students to think through the role of RAICES in assisting asylum seekers going through the credible fear process while spotting and analyzing the ethical and moral dilemmas presented. Having the blog, where students could raise these concerns, provided a good avenue for identifying, discussing and working through the moral and ethical dilemmas that RAICES and the students faced each day.

The other challenge was preparing students to deal with the impact of trauma, including post-traumatic stress disorder ("PTSD"), which many parents and children were experiencing, as well as the secondary trauma that many students were feeling.[48] Jasmine writes:

> I had the privilege of reviewing a declaration from a young man who was fleeing threats of MS-18. He started out telling his story and in the middle of his recount he started to share that ever since he had been reunited with his son, his son has not been able to sleep. His son has been waking up in the middle of the night screaming. It was very hard to watch his son playing and laughing with the other children while listening to the father share how his son has been suffering.[49]

Another student, Sofia, who was the mother of two young children, writes:

> The dads are nothing but a ball of anxiety, of pain and weight carried on their shoulders. They will not tell you, they try to be the strong one, but you see it in their hands. Yes, they want to be brave: brave enough to

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[48] *See, e.g.,* Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma Informed Lawyering*, 22 CLINICAL L. REV. 359 (2016).

[49] Jasmine Ramos, *Just Listening to Someone Can be Helpful*, STU KARNES BLOG (July 31, 2018), https://stukarnes.wordpress.com/2018/07/31/just-listening-to-someone-can-be-helpful-by-jasmine-ramos/.

> have left half of the family somewhere else, brave enough to fight, brave enough to quit and sometimes even brave enough to leave their child here for him to get a better future. With decisions like these, there is no way to think clearly, no way to be calm. But they want to be strong, which parent doesn't?[50]

I had learned from previous trips that we needed help from individuals with these skills, both to assess the impact of trauma on individuals and families, and to help students deal with their own vicarious trauma. During our all-day training, a team of trauma specialists discussed with students some of the basic tools they would need to identify trauma and understand its impact.[51] At Karnes, we had several trauma specialists with us to help students identify trauma, ask the right questions to illustrate how it was manifested, and intervene in situations of distress, such as where a parent broke down in tears or a child demonstrated anger, fear, or depression. Reflecting on these experiences in evening discussions and writing pieces for the blog proved therapeutic and illuminating.[52]

In terms of their legal cases, we were able to identify how parents suffering from the trauma of family separation were prejudiced during their credible fear interviews. In their declarations, they described the physical symptoms of trauma, and how what they were experiencing negatively impacted their ability to concentrate or respond to the asylum officer's questions. Ultimately, this information proved critical in negotiating a settlement in several cases, including one of the class action lawsuits, *MMM v. ICE*.[53] The Government had

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[50] Sofia Henshaw, *What Are You Smiling About?,* STU KARNES BLOG (Aug. 2, 2018), https://stukarnes.wordpress.com/2018/08/02/wtf-are-you-smiling-about-by-sofi-henshaw/.

[51] Professor Judith Bachay, Dr. Maria Kaldani and Martha Vallejo, *Interviewing and Counseling Victims of Trauma* (July 26, 2018), https://stuedu.zoom.us/recording/play/QbfoY6pNBI1fw0707FG2ujYZ7ssSRacYWm49d2BOsLktO2GgZn8nSpi2Q3c931ef?continueMode=true.

[52] Judith Bachay, *One thought on "Working on the Front Lines: The Impact of Secondary Trauma By: Professor Lauren Gilbert"*, STU KARNES BLOG (Aug. 6, 2018), https://stukarnes.wordpress.com/2018/08/06/working-on-the-front-lines-the-impact-of-secondary-trauma-by-professor-lauren-gilbert/#comments.

[53] MMM v. ICE, 18-cv-00428 (S.D. Calif. Oct. 9, 2018).

argued that jurisdictional limits on judicial review of expedited removal orders prevented parents who had failed their credible fear interviews from challenging the negative decisions in their cases.[54] They also argued that parents had waived their children's rights. The Court issued a preliminary injunction, finding that any parental waiver of the children's rights was not meaningful given the circumstances under which the parents' credible fear interviews took place.[55] It ordered the parties to come to a solution.[56] As a result, the Government agreed to new credible fear interviews for all the parents affected, even though the Court probably did not have the jurisdiction to order this remedy on its own.[57] The students' ability to identify and record the manifestations of trauma not only benefitted the individuals they helped, but the entire class of separated families who were seeking relief in federal court. It also provided a great learning opportunity after the week concluded for students to see how the work that they had done had more far-reaching effects.[58]

C. A Lesson in Law and Jurisprudence

To effectively assist the Central American families, students required a basic understanding of the relationship among international refugee law, including relief under the United Nations Refugee Convention,[59] the 1967 Protocol,[60] the Convention Against Torture,[61]

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[54] MMM v. ICE, 18-cv-00428 (S.D. Calif. July 30, 2018)

[55] MMM v. ICE, 18-cv-00428 (S.D. Calif. Aug. 16, 2018).

[56] *Id.* at 16.

[57] MMM v. ICE, *supra* note 53.

[58] Email from Lauren Gilbert, Professor, to Karnes Team (Sept. 13, 2018) (on file with author).

[59] United Nations Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

[60] United Nations Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (hereinafter Protocol) (together with 1951 Convention, hereinafter Refugee Convention).

[61] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, implemented in 8 C.F.R. §§ 208.18, 1208.18.

statutory asylum and withholding law,[62] case law – including federal court decisions and decisions of the Board of Immigration Appeals, relevant regulations,[63] and policy guidance. Normally a basic introduction on the sources of law would have sufficed. Given, however, the Government's efforts to dismantle asylum protections, students needed to be able to evaluate critically the validity of the Government's new policies, in light of existing law.[64]

Under the 1980 Refugee Act, asylum seekers must apply for asylum either at the border or within the United States.[65] They must show that they have a well-founded fear of persecution because of their race, religion, nationality, political opinion, or membership in a particular social group, and that their government is unable or unwilling to protect them.[66] While the 1980 Act codified U.S. international obligations under the 1967 Protocol on the Status of Refugees,[67] the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) created many of the mechanisms that the Government was now employing to limit the rights of asylum seekers,[68] including expedited removal.[69]

In 1996, however, when Congress created expedited removal for persons at or near the border without proper entry documents, it carved out an important exception for persons seeking asylum or indicating a fear of returning to their countries.[70] Persons at the border or physically present in the United States were entitled, regardless of their manner of entry, to a credible fear interview ("CFI") before an asylum officer.[71] If they could show a significant possibility that they

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[62] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.A.).

[63] 8 C.F.R. §§ 208.1 *et seq.*, 1208.1 *et seq.*

[64] Gilbert, *supra* note 27.

[65] *See* INA § 208(a)(1); 8 U.S.C.A. § 1158(a)(1).

[66] *See* INA § 101(a)(42)(A); 8 U.S.C.A. § 1101(a)(42)(A).

[67] See H.R. Conf. Rep. 96-781 (1980) (stating that both houses of Congress adopted the internationally-accepted definition of "refugee").

[68] Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current U.S. Immigration Policy Crisis*, 6 J. MIGRATION & HUM. SECURITY 1, 4 (2018)

[69] INA § 235(b)(1); 8 U.S.C.S. § 1225(b)(1).

[70] *Id*. at §§ 235(b)(1)(A)-(B); 8 U.S.C.S. §§ 1225(b)(1)(A)-(B).

[71] INA §§ 208(a)(1); 8 U.S.C.S. § 1158(a)(1).

qualified for asylum, they were to be placed into regular removal proceedings where they could apply for asylum.[72] Those who failed their CFIs were entitled to an IJ Review, within a week,[73] but were not entitled to administrative or judicial review beyond that point.[74] The Asylum Office could, however, in its discretion, grant a request for reconsideration or a new interview.[75] The credible fear test was supposed to be a low threshold to screen out frivolous claims.[76] Nonetheless, in 2014, largely in response to the "surge" of asylum seekers from Central America, the Asylum Division updated its Lesson Plan for Asylum Officers, heightening the standard out of concern that officers were approving cases with only a minimal possibility of success and requiring an applicant to "demonstrate a substantial and realistic possibility of succeeding".[77]

This, of course, did not satisfy the new Administration. Fanning the flames of border hysteria, both Jeff Sessions and Trump argued that the overwhelming majority of Central American asylum claims were frivolous, but that most asylum seekers at the border were getting into the United States at the credible fear stage because of the low standard and then never leaving.[78] Indeed, Trump, in various

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[72] INA § 235(b)(1)(B)(ii); 8 U.S.C.S. § 1225(b)(1)(B)(ii). *See also* 8 C.F.R. § 208.30(f).

[73] INA § 235(b)(1)(B)(iii)(III); 8 U.S.C.S. § 1225(b)(iii)(III).

[74] INA § 235(b)(1)(C); 8 U.S.C.S. § 1225(b)(1)(C).

[75] 8 C.F.R. § 1208.30(g)(2)(iv)(A).

[76] Bo Cooper, *Procedures for Expedited Removal and Asylum Screening under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1501 (1997).

[77] Memorandum from John Lafferty, USCIS Asylum Division Chief, *Release of Updated Asylum Division Officer Training Course Lesson Plan, Credible Fear of Persecution and Torture Determinations* (Feb. 28, 2014).

[78] *See, e.g.*, Office of the Attorney General, *Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program, Executive Office for Immigration Review* (June 11, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal [hereinafter "Sessions' Remarks"]; Proclamation No. 9822, 83 Fed. Reg. 221, 57661 (Nov. 9, 2018) (addressing mass migration through the southern border of the United States), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/ [hereinafter "Presidential Proclamation"].

Tweets, described the credible fear process as "ridiculous."[79] Rather than seeking a Congressional fix, Sessions interpreted his powers as Attorney General broadly, including the power to overturn existing precedent, issue new regulations, and to change course.[80]

The Immigration Act grants broad powers to the Executive Branch when it comes to immigration. Although the Act grants the Secretary of Homeland Security enforcement powers, it also clarifies that the Attorney General's interpretation of the immigration laws shall be controlling.[81] It goes on to provide that:

> The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries and other papers, issue such instructions, *review such administrative determinations in immigration proceedings*, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.[82]

The Attorney General has relied on this provision to claim broad powers to interpret the immigration laws, including the power to certify BIA decisions to himself and overturn agency precedent with which he disagrees.[83] Thus, students needed to be able to analyze critically the proper role of executive agencies and officers in regulating asylum, withholding and relief under the Convention Against Torture.

D. A Lesson in Administrative Law: The Immigration Powers of the Attorney General

The students' experience at Karnes dramatically showcased the vast powers of the modern administrative state, and especially those of the Attorney General with regard to immigration. Students

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[79] *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (June 21, 2018, 5:12 AM), https://twitter.com/realDonaldTrump/status/1009770941604298753.

[80] *See* Sessions' Remarks, *supra* note 78.

[81] INA § 103(a)(1), 8 U.S.C.S. § 1103(a)(1).

[82] INA § 103(g)(2), 8 U.S.C.S. § 1103(g)(2) (emphasis added).

[83] *See* 8 C.F.R. § 1003.1 (h)(1)(i).

learn in law school that a major criticism of the administrative state is that it combines all powers of government, legislative, judicial, and executive, in one branch, which conflation James Madison once described in Federalist Paper No. 47 as "the very definition of tyranny."[84] Immigration is the quintessential case study for it. The Executive Branch not only enforces the immigration laws through Homeland Security ("DHS"), but, through the Department of Justice ("DOJ"), issues precedent decisions and, together with DHS, regulations with the power of law.[85] The Karnes experience was a valuable way to introduce students to the content of various doctrines of administrative law and judicial interpretation, and to give them some of the tools they would need for analyzing the legality of agency action.

For example, the Justice Department has invoked the Chevron Doctrine[86] to justify Jeff Sessions' interpretation of the immigration laws and his decision to override various BIA precedent decisions, including his rewriting of gender-based asylum law in *Matter of A-B-*.[87] The Chevron Doctrine states that, where a statute is ambiguous, the administering agency's reasonable interpretation of it is binding on federal courts.[88] A two-step analysis is required: (a) whether the statute is ambiguous; and (b) whether the agency's interpretation of the statute is reasonable.[89] Although the Board of Immigration Appeals is normally the body that interprets immigration law, deciding cases on appeal from immigration judges, the Attorney General has the authority, under federal regulations, to certify a decision of the Board with which he disagrees to himself, overturn that decision, and

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[84] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 342 (5th ed. 2017) (quoting James Madison in THE FEDERALIST No. 47).

[85] STEPHEN LEGOMSKY & DAVID THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 2-6 (7th ed. 2019).

[86] Chevron USA v. Natural Resource Defense Council, 467 U.S. 837 (1984) (hereinafter *Chevron*).

[87] Memorandum of Law in Support of Defendant's Motion for Summary Judgment, Grace v. Sessions, 1:18-cv-01853 (D.D.C., Sept. 12, 2018) (arguing that "A-B- is a sound decision that is entitled to Chevron deference in all respects").

[88] *Chevron, supra* note 86, at 842.

[89] *Id*. at 842-43.

issue his own precedent decision.[90] In the past, Attorneys General have used that power sparingly. By reading his power to certify and overturn BIA decisions together with the Chevron Doctrine, however, Attorney General Sessions claimed broad authority during his tenure to rewrite U.S. asylum law, limited only by the clarity of Congressional intent and the reasonableness of his actions.[91]

In 2017 and 2018, Sessions certified several cases to himself, gradually chipping away at the discretionary powers of immigration judges as well as at well-established precedent. He ruled that immigration judges did not have the power to use administrative closure to suspend cases indefinitely.[92] He set new limits on judges' power to grant continuances, limiting them to "only for good cause shown," and setting forth guidelines on what this meant.[93] He ruled that asylum seekers are not entitled to a full asylum hearing, where the immigration judge finds that the application fails to establish a prima facie basis for relief.[94]

Then, on June 11, 2018, he issued his decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), reversing a decision of the Board of Immigration Appeals granting asylum to a survivor of domestic violence. In so doing, he overturned *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014), a groundbreaking precedent decision of the Board that had recognized domestic violence as a basis for asylum, if

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[90] 8 C.F.R. § 1003.l (h)(1)(i).

[91] *See* Sessions' Remarks, *supra* note 78. In recent years, however, *Chevron* deference has been called into question. Although it has come under attack as giving too much power to the Executive, the Court reaffirmed the doctrine in National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 982 (2005) ("Brand X"). More recently, however, in Pereira v. Sessions, 138 S. Ct. 2105 (2018), Justice Kennedy, in a concurring opinion, criticized the "reflexive deference" of the courts, finding it troubling "when deference is applied to an agency's interpretation of the statutory provisions that concern the scope of its own authority." *Id*. *See also* Gutierrez-Brizuela v. Lynch, 834 F.3d. 1142 (10th Cir. 2016) (Gorsuch, concurring)("*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.")

[92] Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018).

[93] Matter of L-A-B-R-, 27 I&N Dec. 405 (A.G. 2018).

[94] Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018).

the harm rose to the level of persecution and the state failed to provide protection. He concluded that *Matter of A-R-C-G-* had been wrongly decided. This turned back the clock on gender-based asylum claims by nearly 20 years. Indeed, he indicated that *Matter of R-A*, 22 I. & N. Dec. 906 (BIA 1999), a highly criticized BIA decision denying asylum to a survivor of domestic violence, which had been vacated by Attorney General Janet Reno,[95] had been rightly decided.[96] He also stated in *dicta* that gang-based claims would also likely fail, and that generally criminal activity by non-state actors would not be a basis for asylum.[97] A month later, DHS issued guidance to asylum officers directing them to follow *Matter of A-B-*, including the *dicta* regarding gang-based claims.[98] It emphasized repeatedly that the new standards applied to persons in expedited removal proceedings, including persons seeking asylum at the border.[99]

For the students, this was a hands-on lesson in asylum law, a tutorial in administrative law, and an engaging review of executive powers. The Administration's goal seemed to be to turn the asylum process into a dystopian gauntlet that few Central American asylum seekers could survive.[100] As each new effort to weaken asylum protections was challenged in federal court, it came up with increasingly questionable approaches to stop asylum seekers, including sending troops to the border[101] and a Presidential Proclamation denying the right to asylum to those who did not present

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[95] Matter of R-A, 22 I. & N. Dec. 906 (BIA 1999), *vacated*, 23 I&N Dec. 694 (A.G. 2004).

[96] Matter of A-B-, 27 I & N Dec. 316, 319 (A.G. 2018).

[97] *Id*. at 320. He said that where the persecutor is a non-state actor, an applicant must show either that the government condoned the violence or showed a "complete helplessness" to prevent the persecution. *Id*. at 337.

[98] USCIS, *Policy Memorandum*: *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-* (July 11, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf.

[99] *Id*.

[100] Gilbert, *supra* note 27.

[101] Michael D. Shear &Thomas Gibbons-Neff, *Trump Sending 5,200 Troops to the Border in an Election-Season Response to Migrants*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/2018/10/29/us/politics/border-security-troops-trump.html.

themselves at ports of entry.[102] The Department of Justice published interim regulations implementing the Proclamation the same day that went into effect immediately, without going through Notice and Comment.[103] When a federal district judge in California enjoined this policy as contrary to plain language in the asylum statute, [104] which allows an asylum seeker physically present or at a port of entry to seek asylum regardless of the manner of entry, President Trump attacked the federal court system, and particularly the Ninth Circuit and "Obama judges."[105] This invited an unusual rebuke from Chief Justice John Roberts, who defended the independence of the federal judiciary.[106] A dry area of the law had come to life, and students had new tools for challenging similar actions in the future.

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[102] Presidential Proclamation, *supra* note 78.

[103] Department of Justice, Executive Office for Immigration Review*, Interim Rule: Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018).

[104] East Bay Sanctuary Covenant v. Trump, 18-cv-06810 (N.D. Cal., Nov. 19, 2018).

[105] Adam Liptak, *Trump Takes Aim at Appeals Court, Calling it a Disgrace*, N.Y. TIMES (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html (noting that "Mr. Trump's remarks came after a federal trial judge ordered the administration to resume accepting asylum claims from migrants no matter where or how they entered the United States").

[106] Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html.

E. A Lesson in History: The Root Causes of the Surge in Central America

> *After three days of working with fathers and sons in the detention center my mind and my soul are shocked. We keep hearing about hazardous journeys from remote rural villages in Guatemala, Honduras or El Salvador; painful stories of kids being separated from their dads, as soon as they arrived, facing the unknown; men who faced months of detention in inhumane conditions, being mistreated and blamed for doing what any parent should do for his children: protect him from danger and attempt to give him at least an opportunity in life.*[107]

While conservatives blamed the Central American "surge" and continuing border crisis on President Obama's immigration policies, immigration law teachers who had cut their proverbial teeth representing South and Central American asylum seekers in the 1980s and 1990s traced the root causes of the so-called "surge" back to the civil wars and human rights abuses of the 1980s.[108] It was clear to them that the modern-day crisis was tied, inextricably, to the region's past, including authoritarian rule, extreme disparities in income, military repression, death squads, civil war, U.S. involvement in funding and training military forces, and the failure, after peace processes, to integrate demobilized troops or to achieve a lasting peace or national reconciliation. A causal connection also was fairly traceable to U.S. immigration policy, including the deportation of Central Americans

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[107] Florencia Maria Cornu Laport, *Hens and Little Chicks*, STU KARNES BLOG, (Aug. 1, 2018), https://stukarnes.wordpress.com/2018/08/01/hens-and-little-chicks-by-florencia-maria-cornu/.

[108] Rocio Cara Labrador & Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (June 26, 2018), https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle; Dylan Matthews, *A Central America expert explains the root causes of the migrant crisis*, VOX (July 20, 2014), https://www.vox.com/2014/7/20/5916443/what-the-us-can-do-to-address-the-root-causes-of-the-migrant-crisis.

who had joined gangs while in U.S. prisons to countries where they had no ties.[109]

In 1992-93, as an attorney investigator with the U.N. Truth Commission for El Salvador, I confronted the horrors of gender-based violence as a weapon of war.[110] I investigated the case of four U.S. churchwomen who were raped and murdered by the Salvadoran National Guard. I took the testimony of survivors of massacres by the Salvadoran military and civil defense units, who described how women's breasts were chopped off with machetes, and that of a mother whose daughter had been tortured and raped while in police custody. Notwithstanding evidence of pervasive sexual violence, the Commissioners failed to address the use of gender violence as a weapon of war. In their final report on the U.S. Churchwomen, they decided not to mention the sexual assaults because – as they told me – it would detract from their conclusion that the men were acting under higher orders, and since the assaults did not appear to them to be politically motivated.[111]

In their Final Report, the Commissioners indicated that:

> As this Commission submits its report, El Salvador is embarked on a positive and irreversible process of consolidation of internal peace and modification of conduct for the maintenance of a genuine, lasting climate of national coexistence. The process of reconciliation is restoring the nation's faith in itself and in its leaders and institutions.[112]

Despite the 1991 Peace Accords in El Salvador, national reconciliation and reintegration of combatants into civilian life proved illusory. Then, in 2014, when the steady stream of asylum seekers

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[109] Dennis Rodgers & Adam Baird, *Understanding Gangs in Contemporary Latin America, in* HANDBOOK OF GANGS AND GANG RESPONSES 1, 4 (Scott H. Decker & David C. Pyrooz eds., 2015).

[110] *Id*. at 257-58.

[111] *Id*. at 258. *See also* PRISCILLA HAYNER, UNSPEAKABLE TRUTHS 87 (2d ed. 2011).

[112] U.N. Security Council, *Report of the Commission on the Truth for El Salvador: From Madness to Hope,* 7, U.N. Doc. S/25500, annex (1993) (English version) [hereinafter *Truth Commission Report*].

coming from El Salvador, Guatemala and Honduras turned into a "surge," it soon became apparent that horrific gang-based violence against women, as well as severe domestic violence, were major factors causing women to flee. I have argued elsewhere that the failure then to confront gender violence as a form of state-sponsored terrorism has led to its role today in contributing to the climate of fear and instability that plagues the region.[113] Even Obama Administration officials claimed that most Central American asylum seekers fleeing gang-based or gender-based violence would not qualify for relief.[114] *A-R-C-G-* came at a critical moment in August 2014, just as advocates meeting with detained Central American mothers and children were learning that many refugee women were domestic violence survivors. *A-R-C-G-* offered protection to women trapped in abusive relationships and without State protection, but it also led to growing government hostility to claims based on domestic violence, to charges that the claims were being fabricated, and to a backlash which culminated in *Matter of A-B-*. *A-B-* rolled back the law to what it had been when *Matter of R-A-* was decided in 1999: domestic violence was a private family matter outside the protection of asylum law. Similarly, recognition of persecution by non-state actors appeared to be in jeopardy, in light of efforts to exclude gang–related violence from asylum law's protections. Students needed a basic narrative of how these countries' pasts connect to the present in order to establish state complicity in the ongoing violence, and why actions by gangs and other non-state actors cannot simply be dismissed as generalized violence or "criminal activity."[115]

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[113] Lauren Gilbert, *Gender Violence, State Action and Power and Control in the Northern Triangle*, *in* FROM EXTRACTION TO EMANCIPATION: GUATEMALA REIMAGINED 257 (Aldana & Bender eds., 2018).

[114] P.J. Tobia, *No Country for Lost Kids*, PBS NEWS (June 20, 2014), https://www.pbs.org/newshour/nation/country-lost-kids (quoting Cecilia Muñoz, the White House director of the Domestic Policy Council, as stating that the vast majority of Central American children would be ineligible for relief and would be deported).

[115] Gilbert, *supra* note 113, at 257.

F. A Lesson in Judicial Review: Crafting a Winning Litigation Strategy

The week at Karnes gave students unique insights into strategies for combatting current asylum policies through impact litigation in federal court. Only after the week was over did we fully understand the relevance of everything we had been doing. The Immigration and Nationality Act, as amended in 1996 and again in 2005, places severe limits on judicial review of expedited removal proceedings. The statute provides that there shall be no judicial review of expedited removal orders or "any other cause or claim *arising from* or relating to implementation or operation of" an expedited removal order.[116] The statute also prohibits class actions to challenge expedited removal orders, even in those limited cases where judicial review is available.[117]

The Departments of Justice and Homeland Security have interpreted "arising from" very broadly.[118] Courts, including the U.S. Supreme Court, however, have been inclined to construe the language more narrowly.[119] Habeas petitions can only be brought to challenge whether the person with an expedited removal order is an "alien," whether the person was actually "ordered removed," or whether the petitioner already has been granted legal status as an LPR, refugee or asylee.[120] Challenges to the system are limited by statute: they must be brought in D.C. district court, within 60 days of the new law, regulation, policy, or guideline, and be limited to challenging the legality of a new law or policy.[121]

Advocates have been creative in challenging these new asylum policies in federal court in order to avoid the jurisdictional bars. *Grace*

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[116] INA § 242(a)(2)(A); 8 U.S.C.S. § 1252(a)(2)(A).

[117] INA § 242(e)(1)(B); 8 U.S.C.S. § 1252(e)(1)(B).

[118] *See, e.g.,* Grace v. Sessions, 1:18-cv-01853 (Sept. 12, 2018); *See also* Jennings v. Rodriguez, 138 S.Ct. 830, 840 (2018).

[119] Jennings, 138 S.Ct. at 840 (refusing to give the "arising from" language an expansive interpretation, since that would lead to staggering results).

[120] INA § 242(e)(2); 8 U.S.C.S. § 1252(e)(2).

[121] INA § 242(e)(3)(A); 8 U.S.C.S. § 1252(e)(3)(A).

v. Sessions, which challenges *Matter of A-B-* and the USCIS Guidance that followed a month later, is a prime example.[122] The lawsuit was filed less than two months after Sessions' decision in *Matter of A-B-* and brought in D.C. District Court. It was not brought as a class action, although it had multiple plaintiffs. It was brought as a systemic challenge to the new asylum policies; it challenges *Matter of A-B-* and the new guidance as systematically rewriting asylum law and altering the credible fear screening process in a way at odds with the 1980 Refugee Act and our international obligations.[123] Unsurprisingly, the Government has moved to dismiss on several jurisdictional bases.[124] The Judge, however, granted a temporary restraining order, pending a determination of whether he had jurisdiction to enter a stay.[125]

The broad "arising from" language had been an issue in *Ms. L-v. ICE*,[126] the successful class action lawsuit challenging family separation, and in *Matter of MMM*,[127] the subsequent lawsuit brought on behalf of child asylum seekers by their parents, many of whom already had expedited removal orders. The ACLU lawyers in *Ms. L-* focused on "family reunification" as the relief sought, rather than on directly challenging parents' expedited removal orders, to avert a jurisdictional ruling in favor of the Government.[128] The Government argued that by reunifying the families, it had complied with the Court order and that the Court did not have jurisdiction to grant the parents any additional stay.[129] The ACLU argued that the Court had broad equitable powers to enforce its family reunification order, including giving parents sufficient time to consult with their children and counsel before removing them.[130] The Court's order in *Ms. L-* however, left unresolved what would happen to the parents with

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[122] Complaint for Declaratory and Injunctive Relief, Grace v. Sessions, 1:18-cv-01853 (D.D.C., Aug. 7, 2018).

[123] *Id*. at 3–5.

[124] Grace, *supra* note 118, at 14-25.

[125] Grace v. Sessions, 1:18-cv-01853 (Aug. 9, 2018).

[126] Ms. L- v. ICE, *supra* note 25.

[127] MMM v. Sessions, 3:18-cv-01832 (S.D. Cal. Aug. 16, 2018).

[128] *See* Plaintiffs' Reply in Support of Motion for Stay of Removal, Ms. L v. ICE, No. 18-cv-00428 (S.D. Cal. July 25, 2018) [hereinafter *Plaintiff's Reply*].

[129] *Id*., *citing* Defendant's Opposition to Stay at 18-20.

[130] *Plaintiffs' Reply*, *supra* note 128, at 10-14.

expedited removal orders once the families were reunited or to their children, and led to RAICES' very real concerns that first Sunday that their deportations were imminent.[131]

That led to another lawsuit in Washington, D.C., *MMM v. ICE*, brought be detained parents on behalf of their children the day after the deadline for family reunification.[132] The Administration argued that most parents waived their children's rights to bring a separate asylum claim when the parents lost their expedited removal case or signed a consent form, and that the Court lacked jurisdiction to hear *MMM*, because the children's cases arose from the parents' waiver of their children's rights when they accepted removal.[133] The case was transferred to Judge Sabraw, the same judge hearing *Ms. L-*. In his decision in *MMM*, he disagreed: the case "arose from" and "related to" the Government's family separation policy, and thus the jurisdictional bar did not apply.[134] He recognized that a stay was necessary to ensure that the children still had the opportunity to pursue their asylum claims, with their parents' assistance.[135] He got around the jurisdictional bar by focusing on the child's case, and recognizing that children had their own right to seek asylum, that their parents did not waive that right, and that none of the children had final removal orders that they were challenging.[136]

Judge Sabraw ordered the parties to negotiate a solution.[137] As a result, the Government agreed to new credible fear interviews for the fathers who had their interviews while separated from their children.[138] The settlement agreement bought those parents with expedited removal orders more time and another opportunity to prove

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[131] Gilbert, *supra* note 27.

[132] Complaint for Declaration and Injunctive Relief, MMM v. Sessions, 1:18-cv-01759 (D.D.C. July 27, 2018).

[133] Defendant's Opposition to Plaintiff's Motion for Temporary Restraining Order, MMM v. Sessions, 1:18-cv-01759 (D.D.C. July 30, 2018), at 4-5.

[134] MMM, *supra* note 127, at 7-8.

[135] *Id.* at 7.

[136] *Id.*

[137] *Id.* at 16.

[138] Order Granting Preliminary Approval of Class Settlement, MMM v. Sessions; Ms. L v. ICE, 3:18-cv-00428 (S.D. Cal. Aug. 9, 2018).

credible fear, but it has also raised a host of other issues. Even though most parents were reunited with their children under the injunction in *Ms. L- v. ICE*, many still faced an uphill battle in light of Jeff Sessions' decision in Matter of *A-B-*.[139] For most Central American asylum seekers and for the STU Karnes team, the fate of *A-B-* and the outcome in *Grace v. Sessions* would provide a key to the future.

IV. Legal Education Now and Then

Law school is transformative, but not always in a positive way. Nearly 90 years ago, Karl Llewellyn warned of the dangers of traditional legal education:

> The first year ... aims to drill into you the more essential techniques of handling cases .... It aims, in the old phrase, to get you to "thinking like a lawyer." The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice--to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law. It is not easy thus to turn human beings into lawyers. Neither is it safe. For a mere legal machine is a social danger.[140]

Over the last few decades, scholars have written about the negative impact of traditional legal education on women,[141]

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[139] Plaintiffs' Motion for Stay of Removal and Emergency TRO Pending Decision on the Stay Motion, Ms. L v. ICE, No. 18-cv-00428 (S.D. Cal. July 16, 2018)(arguing that decisions whether to stay and fight asylum cases had become much more complicated since Attorney General issued his decision in *A-B-* "purport[ing] to restrict asylum protection for individuals who fear so-called 'private violence,' including domestic violence and violence by brutal gangs").

[140] KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 101 (Oceana Publications, Inc. 1977) (1930).

[141] Guinier et al., *supra* note 8; Stone, *supra* note 3, at 26.

minorities,[142] and law students committed to social justice.[143] As Lani Guinier and her co-authors in their article, *Making Gentlemen*, write, their "data suggest that there is an academic cost, and perhaps a mental health cost, to discarding passions, politics, emotions, and community-based identities that were once central to the student's identity."[144] They go on to write:

> With remarkable consistency, students indicate that law school taught them to be "less emotional," "more objective," and to "put away ... passions." For some, this ability to suppress feelings is considered an enormous accomplishment; for others, it is considered a defeat.[145]

I, like many of my students, went to law school with a commitment to social justice. I soon learned that many of my professors and most of my fellow students at the University of Michigan had a different value system than mine. Ann Coulter was a student in my section and was as outspoken then as she is now. We had one African American woman and one man in our section, one Native American in our class, and a handful of Latino/a students. One Palestinian student from Dearborn, Michigan, dropped out after his first semester and became a doctor, disappointed with the conservative tenor of the law school, which was overwhelmingly white, with a large legacy class and a small minority student body. Michigan Law School seemed largely committed at the time I was there to channeling students into big law firms. Students seeking public interest or government jobs had to be self-motivated and self-confident.[146]

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[142] Alexi Nunn Freeman & Lindsey Webb, *Positive Disruption: Addressing Race in a Time of Social Change Through a Team-Taught, Reflection-Based, Outward Looking Law School Seminar*, 21 U. PA. J. L. & SOC. CHANGE 121, 122-29 (2018).

[143] Kaplan, *supra* note 3.

[144] Guiner et al., *supra* note 8, at 48.

[145] *Id*. at 49-50.

[146] A recent report indicates that two-thirds of Michigan Law graduates join private firms, 20 percent take judicial clerkships, and the remaining 14 percent take other jobs in Government, business, academia, or the non-profit sector. Mike Murphy, *University of Michigan Law School*, LAW CROSSING, https://www.lawcrossing.com/article/231/University-of-Michigan-Law-School/

Fellow classmates often criticized public interest work as attracting a lower caliber of student. I found myself channeled into the traditional job search process, accepting well-paid summer associate positions in Pittsburgh, Pennsylvania, and Washington, D.C, and eventually an associate position in Washington, D.C., at Arnold & Porter.

Fortunately, in my third year of law school, I was a student in Professor Alex Aleinikoff's immigration clinic. As an undergraduate, I had lived in Argentina in 1982 during the final months of military rule and had researched the role of repression for my honors thesis. The immigration clinic was the first time in law school that I felt I was doing work that mattered. Then, like now, the Government was denying most Central American asylum claims, largely for ideological reasons.[147] My team successfully represented, in two different cases, Salvadoreans and Hondurans seeking asylum. Our Salvadoran clients, a married couple, had been detained and tortured by the military. The wife had been sexually abused.

I knew within hours of joining Arnold & Porter in 1988 that big firm life was not for me. In 1991, I received a Fulbright Award to teach international trade law in Costa Rica. After completing my Fulbright, I worked at the Inter-American Institute for Human Rights in San Jose, Costa Rica. In 1992, I was hired as an attorney-investigator with the United Nations Truth Commission for El Salvador.[148]

I have stayed in contact with Alex Aleinikoff, who left Michigan to work in the Clinton Administration. There, he was pivotal as General Counsel of the Immigration & Naturalization Service ("INS") in developing the first U.S. guidelines for adjudicating gender-based asylum claims.[149] He then joined the faculty at

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(last visited Jan. 20, 2019).

[147] Carly Goodman, *Like Donald Trump, Ronald Reagan tried to keep out asylum seekers. Activists thwarted him*, WASH. POST (July 2, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/07/02/line-donald-trump-ronald-reagan-tried-to-keep-out-asylum-seekers-activists-thwarted-him/?utm_term=.d9d9d483d89f.

[148] *Truth Commission Report*, *supra* note 112.

[149] Phyllis Coven, IMMIGRATION AND NATURALIZATION SERVICE, *Memorandum Considerations for Asylum Officers Adjudicating Asylum Claims*

Georgetown Law School and eventually became dean, before leaving to become Deputy High Commissioner of the U.N. High Commission on Refugees ("UNHCR").[150] Today, he runs the Zolberg Institute on Migration and Mobility at the New School in New York City.[151] In August 2018, after I returned from our week at the Karnes detention center, he invited me to be a guest on his podcast, *Tempest Tossed: Lessons in Migration and Mobility*, where I discussed what we had witnessed at Karnes.[152] To have had Alex as a mentor over the years has kept me grounded, and I hope that I can serve a similar role for the students I have taught, supervised, and supported, as they face some of life's major decisions.

From Women (26 May 1995), https://www.state.gov/s/l/65633.htm. *See also* Lena H. Sun, *INS Expands Asylum Protections for Women*, WASHINGTON POST (June 3, 1995), https://www.washingtonpost.com/archive/politics/1995/06/03/ins-expands-asylum-protection-for-women/5c2fc9c1-12ed-4a51-98ea75be4c2b767a/?utm_term=.13ca1ec4dc9e.

[150] THE NEW SCHOOL, *Faculty: T. Alexander Aleinikoff*, https://www.newschool.edu/public-engagement/ma-ms-international-affairs-faculty/?id=4e6a-4d30-4f54-5935 (last visited Jan. 20, 2019).

[151] *Id.*

[152] *Cesar's Choice: The conditions and decisions facing reunited immigrant families—a conversation with Prof. Lauren Gilbert*, PUBLIC SEMINAR (Aug. 24, 2018), http://www.publicseminar.org/2018/08/tempest-tossed-3/ [hereinafter *Cesar's Choice*].

V. Some Final Reflections

> *To see these practitioners work doggedly, carefully, creatively, with a determination that can't be stopped, makes me want to let the world know that I am in the presence of powerful, true resistance and it is strong, and will not be silenced. Bearing witness to horrific human suffering, these students take the winding road searching for solutions in every nook and cranny. They apply hope and fearlessness, even and especially, in the face of despair and crazy-making socio-political challenges that test every vulnerability in their hearts and souls.*[153]

When law schools channel students into private firms and away from public interest careers they do a disservice to their students and to society. Public interest work, while often less remunerative than private sector work, can be both intellectually challenging and emotionally rewarding. When I think back on my law school experience and the ways in which the institution and many of my fellow students devalued public interest work, I am appalled. I am also embarrassed that I, at least temporarily, bought into that culture. I am grateful that I ultimately was able to reclaim my identity as a social justice lawyer, in large part because of the impact my own experiential learning in law school made.

The idea that "thinking like a lawyer" requires discarding passions, politics and emotions is a concept that law professors should examine critically and analytically and ultimately discard. Some of the best lawyering today is by lawyers driven by their passion for justice. ACLU attorneys across the country have brought challenge after challenge in federal court to the Trump Administration's xenophobic immigration policies and have engaged in complex litigation and discovery that has exposed the underbelly of

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[153] Professor Judi Bachay, *Love and Peace*, STU KARNES PROJECT BLOG (Aug. 1, 2018), https://stukarnes.wordpress.com/2018/08/01/love-and-peace-by-dr-judi-bachay/#more-106.

exclusionary Government policies. Their motions and legal briefs have challenged practices like family separation and the denial of access to asylum with legal acumen, creativity and passion. For example, in the opening paragraph to its reply brief in *Ms. L- v. ICE* in response to the Government's opposition to a stay of removal for the recently reunited parents and children, the ACLU writes:

> Defendants are seeking to deport Class Members and their children immediately upon reunifying them. In their months of separation, these parents have not spoken to their children for more than several minutes on the phone; many if not most have never spoken to a lawyer. And yet within moments of seeing their kids for the first time, Defendants propose to put them on planes, with no meaningful opportunity to receive legal advice and make a considered family decision about whether their children should remain in the United States without them . . . [D]uring settlement discussions, Defendants only offered, at best, 2.5 days to consult—an impossible demand, especially given the constraints on attorney access and the unprecedented task of advising hundreds of traumatized families all at once.[154]

A passionate commitment to justice is clearly compatible with first-rate lawyering.

Each of our three trips to Karnes proved more meaningful than the last. I also was learning each time. A mix of students that included law students at all stages of their education was particularly valuable. On our December 2016 trip, four 1L students who had just completed their first law school exams, were able to experience how their legal training could be used to achieve justice while bonding with 2Ls and 3Ls. The 2018 Karnes team saw how the work that they were doing was part of a bigger picture, and specifically, an essential part of a broader litigation strategy to challenge family detention and the Government's efforts to dismantle protections for asylum seekers.

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[154] Plaintiff's Reply in Support of Stay of Removal, Ms. L- v. ICE, No. 18-cv-00428 (S.D. Cal. July 25, 2018).

At the same time, students also needed to grapple with the moral and ethical dilemmas they encountered. Some students felt that RAICES was being paternalistic, and not doing enough to facilitate the return of parents who wanted to go home. They could not fully appreciate RAICES priorities and choices.[155] It was important to turn these observations into teaching moments, so that students could think through the ethics of what RAICES was doing, how it was defining the lawyer-client relationship, at what point that relationship began to exist, and what to do in the event of a conflict. At one point, several students and I were asked to meet with some of the children individually to determine if there were children who wanted to stay whose fathers wanted to take them home. This was a heartbreaking experience, but the reason for doing so was to identify possible conflicts between the interests of the fathers and their sons, and to obtain separate representation for the children where such a conflict existed.[156] Several of the fathers, however, experienced this as RAICES betraying their interests. Students needed to see how RAICES was struggling with these ethical dilemmas every day.

Conversations with students after the fieldwork is done should be ongoing if lessons are to be fully absorbed. The Karnes team has continued to communicate through WhatsApp, and to get together for debriefings and meals. Part of this is pedagogical, so that students see how what they did fits into a broader advocacy framework. Part of it is to continue mentoring students interested in pursuing public interest careers. Part of it is because faculty and many students established a special bond.

Professors engaged in experiential education should recognize that students involved in experiential learning are also their clients. Many students will experience secondary trauma, and as supervisors, they must have the resources to respond to their needs. Some students are differently able, and it is important to tap into all their unique gifts and channel their energies in the most positive ways. I realized after our first scouting trip to Karnes that for future missions, success would depend on ensuring that, to the greatest extent possible, each student

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[155] Lozano, *supra* note 45.

[156] *Cesar's Choice*, *supra* note 152.

felt that his or her experience was a rewarding one, that any concerns he or she had were addressed thoughtfully, and wherever possible, that they were turned into learning moments.

VI. Conclusion

I am grateful to Professor John Makdisi for having hired me while he was Dean, and for the opportunities I have had over the years to work with students with a commitment to social justice. Both John Makdisi and June Mary Makdisi have been supportive of this work. As a law professor, I have seen how these experiences have been transformative. Many of my students are zealously pursuing public interest opportunities and fellowships. Public interest work is not for everyone, but for those who see it as a calling or vocation, it is important that law schools emphasize these opportunities, publicize them as part of their mission, and make them available to students as part of career counseling. Highlighting students' experiences on websites and other publications underscores an administration's support for this work and sends a positive message to the student body that this work is both valued and valuable.[157]

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[157] *See* Parker, *supra* note 20; Parker, *supra* note 21; Parker, *supra* note 22; Parker, *supra* note 38.