When Criminal and Immigration Law Collide

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Nancy Morawetz, Rethinking Drug Inadmissibility, **50 Wm & Mary L. Rev. 163** (2008).

One of the most interesting (and frequently distressing) aspects of teaching and writing about immigration law is the opportunity it affords for studying the interplay between immigration regulations and the criminal law. A number of scholars, including contributing editor Jack Chin, have turned their attention to this interplay before. More recently, in Rethinking Drug Inadmissibility, Nancy Morawetz explores how changes to drug laws and to the inadmissibility standards in the federal immigration law have generated an inflexible, zero-tolerance immigration policy on minor drug use that is in dire need of reexamination.

Because her article highlights the interaction between the criminal law and the immigration regime, it is essential reading for anyone interested in criminal justice. It is also an interesting read for anyone interested in how a few small and relatively thoughtless changes to a complex statutory scheme can have tremendously harsh practical effects. Finally, it is a critical read for everyone who hopes to have a better understanding of upcoming legislative attempts to enact some form of comprehensive immigration reform. As Morawetz urgently notes, "[p]roposals for comprehensive immigration reform in 2007 all included, as a minimum requirement, that the individual be 'admissible.'" *Id*. at 182. Thus, absent legislative attention, the sweeping drug inadmissibility rules that Morawetz discusses in this article will likely bar a number of noncitizens with very old and very minor past drug use from normalizing their immigration status, even if the equities of their individual case should dictate a different result.

In the first section of her article, Morawetz discusses the changes to the immigration laws that have generated the harsh modern drug inadmissibility rules. The Anti-Drug Abuse Act of 1986, rushed through in the wake of the death of Len Bias, replaced the then-existing provision that had been interpreted to bar only those convicted of "illicit" drug possession with a provision that cross referenced the law or regulation of a state or foreign country 'relating to' a controlled substance. As Morawetz notes, this revision to the drug exclusion ground "opened the way for drug exclusion to automatically expand with state laws that made prosecution easy." *Id*. at 172-73. It also meant that from that point forward, drug inadmissibility was keyed not to federal standards, but to the law of the jurisdiction where the individual commits the offense. This has generated not only an expansive but also an uneven application of the bar.

According to Morawetz' account, the Immigration Act of 1990 compounded an already bad situation. In that Act, Congress consolidated the drug inadmissibility grounds with the grounds for inadmissibility for crimes involving moral turpitude (CIMTs). The effect was to expand the drug inadmissibility grounds to include not only drug convictions, but also admissions of violations of drug laws. Moreover, as the statute was reorganized, the exceptions that were carved out for CIMTs (for youth or petty offenses) did not apply to drug crimes. Interestingly, there is no indication that Congress deliberately set about to heighten the drug inadmissibility bar, and Morawetz suggests that it was a largely accidental result of statutory reorganization.

Finally, Morawetz notes that in enacting the Immigration and Nationality Act Amendments of 1981—the

one moment in recent legislative history when Congress did consider expressly the question of waivers for drug inadmissibility—Congress, with the urging of the administration, created an extremely narrow waiver that neither reached "many circumstances that Congress had previously found worthy" of exception, nor allowed for flexibility to cope with the ever-expanding drug laws. *Id*. at 180. The only available waiver for drug inadmissibility was, and remains, for simple possession of 30 grams or less of marijuana.

In the next section, Morawetz traces out the implications of the inflexible drug admissibility rules. Morawetz first notes that the bar does not simply affect noncitizens who are seeking to enter the country. It also affects many people who are already here and have deep ties to the United States, including those who are seeking to adjust from a temporary visa to a permanent immigrant visa (a green card), and those who are otherwise eligible for relief from removal because of longstanding ties to the country. As previously noted, the bar is also embedded in proposals for legalizing the undocumented.

Morawetz then notes that while the legal changes would be merely academic in the absence of serious enforcement "there are many signs that the drug inadmissibility ground is being applied expansively and that the government has begun to train officers to actively seek out admissions of past wrongdoing that can then be used to exclude or deport the unwary." *Id*. at 184. Her discussion of the interrogation tactics encouraged by Federal Law Enforcement Training Center materials highlights the fundamental problem that arises in the context of immigration questioning, where many of the procedural tools used to curb constitutional violations by law enforcement do not apply. Morawetz warns of an increased likelihood of arbitrary law enforcement and racial profiling—a danger that she argues will be magnified by the increasing participation of local law enforcement in immigration enforcement. Finally, Morawetz notes that changes in substantive criminal laws (which have been expanded in many jurisdictions to facilitate drug convictions) and criminal procedure (which has been fundamentally retooled to facilitate the war on drugs) have generated a situation where "drug inadmissibility grounds will be easier to prove in a greater number of cases for noncitizens who have lived in the United States in some capacity." *Id*. at 192.

Morawetz argues that the time is ripe for legislative reform of drug inadmissibility rules "because they are counterproductive, allow for arbitrary enforcement of the law, and are totally out of proportion to legitimate interests." *Id*. at 193. Her article provides a persuasive case for these claims. She also includes a list of three specific technical fixes that would go a long way toward rationalizing the drug admissibility bar. Alternatively, she proposes the formation of a commission charged with proposing reforms to inadmissibility grounds in a context less highly politicized than that which has historically constrained Congressional action on this issue.

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