The Green Card

Welcome to the Newsletter of the FBA's Immigration Law Section

Eileen Scofield, Chair

Quote of the Month

"If the people come to believe that the Constitution is *not* a text like other texts; that it means, not what it says or what it was understood to mean, but what it *should* mean … well, then, they will look for qualifications other than impartiality, judgment, and lawyerly acumen in those whom they select to interpret it. More specifically, they will look for judges who agree with *them* as to what evolving standards have evolved to; who agree with them what the Constitution *ought* to be."

—Antonin Scalia

In This Issue

PUBLISH IN THE GREEN CARD!

The Green Card always seeks news items and articles of all sorts. Have you formed a new firm, gotten promoted, or won a big case? Send me an article. I'm especially interested in hearing about Section activities (with photos!), such as luncheons, CLE's and Younger Lawyer activities. Here is your chance to gain the respect and admiration of your friends and colleagues! Send your article to me at LBurman@aol.com in Word format. Photos should not be imbedded in the Word document. Please attach them as jpegs to your email.

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Article

Like Dinghies in the Night: Refugees and Migrants in a Justice Blind Spot

By Sarah Pixler

Globally, the world is experiencing what the United Nations now describes as the largest migration crisis since World War II.[1] More than 430,000 people had applied for asylum in Europe through July 2015.[2] The United States received over 120,000 asylum applications in 2014;[3] that is not including the more than 130,000 unaccompanied children and family units, mostly from Central America, who asked for protection at the nation's southern border.[4] Whether in Europe or the United States, the processing of asylum applications is difficult enough. But someday, many of these immigrants will come into contact with the justice system again. This is partly due, of course, to the widespread albeit completely false stereotype of immigrants as disproportionately likely to engage in criminal activity.[5] Attorneys are poised within society as both able and responsible to ensure justice for all through increased cultural competence.

Imagine, for example, Carmen, a 38-year-old mother of three. She illegally entered the United States from Mexico with her children to join her husband in 2006. Several years later, she found herself in state court charged with felony child neglect. Her husband's brother – her oldest daughter's step-uncle—had been sexually abusing the teenage girl for two years, and Carmen didn't know anything about it. She had noticed some strange things here and there, but her daughter, husband, and brother-in-law were all working in concert to convince her she was crazy. So when the police and the lawyers told her how they thought she must have known about the abuse and negligently allowed it to continue, she pleaded guilty thinking that they must have been right. After all, they were wise, white, North American law enforcement officials. Who was she to disagree with them?

Culture greatly impacts the way people define justice.[6] The law and the legal system are part of a culture made up of nuanced norms that give meaning to and reinforce behavior.[7] Culture shapes attitudes about everything—including the criminal justice system.[8] Culture is a collection of a community's norms, beliefs, customs, and means of expression.[9] A cultural collision occurs when members of different groups encounter each other in a situation where neither side is able to understand or respect the other.[10] Increased migration and the resulting diversity create cultural collisions between people with different cultural views of justice systems.[11] Cultural competence, as opposed to a cultural collision, means gaining awareness of other groups in order to promote dignity, fairness, justice, and community.[12]

Much like language, the justice system is a foundational element of culture and social structure.[13] People constantly, and usually subconsciously, attach culturally-based meaning to what they see and hear.[14] We judge people to be truthful or dishonest, polite or rude, intelligent or superstitious based on our own cultural attributions.[15] Lawyers and clients from different cultures face unique challenges in developing a trust and open communication.[16] The worst-case scenario is that ignorance of cultural differences can result in inadvertent violations of individual rights.[17] But the best-case scenario we as attorneys should strive for is one where cross-cultural lawyering skills help people understand the reactions that they and the legal system may have towards each other.[18]

The law, like any culture, includes certain cultural biases that are invisible to the dominant cultural group.[19] Many laws in Western countries are not easily understood by immigrants, the majority of whom may be illiterate or lack formal education.[20] Gaining a keen awareness of developing-world justice systems opens an attorney's eyes to the cracks in her own system, enabling her to be a more culturally competent advocate.[21] We as members of a Western justice system culture have accepted a set of cultural assumptions as common as the air we breathe.[22] In staunch contrast to the norms in that culture, many refugees bring scars of political persecution or war trauma, the nature of which the majority of Westerners cannot even fathom.[23] Without ever having experienced life outside the rule of law, it is easy to take for granted the limitations and balances Western systems place on the use of state power.[24]

We as lawyers carry with us preconceived notions rooted in the cultural background of the justice system.[25] This impacts both a lawyer's expectations of her client as well as the lawyer's interpretation and understanding of the client's actions and goals.[26] Whenever two people come from entirely different cultures, there is the possibility of prejudice between them—a judgment or opinion formed before facts are known.[27] Because prejudice is private, people are often unaware of its effects on their judgments and decisions.[28] Effective cross-cultural interaction depends on a lawyer's capacity to identify the differences and similarities between the client and the legal system.[29] A simple first step is to ask better questions to learn about how the legal system works in the client's country of origin.[30] Studying the justice systems in developing nations allows attorneys to critically examine the assumptions of Western criminal justice systems in order to better serve those who find themselves here now.[31]

The justice culture we take for granted is absent in the developing world.[32] 2.5 billion of the world's poorest people live in developing nations, outside the protection of the rule of law we take for granted in the West.[33] But perhaps the greatest tragedy is that the legal institutions of the developing world are actually adding to the violence.[34] For centuries, colonial powers imposed their wills by force.[35] Twentieth-century reforms often lacked any clear theory or policy and have failed to consider how to build real and successful legal systems.[36] Colonial rule

altered the balance of power by favoring a small group of elites.[37] Those systems were never intended to protect the common people—they were intended to protect the colonial power, and they have never been redesigned to do anything different.[38] Corruption and abuse form the prevailing culture among law enforcement in the developing world.[39] tate officials are widely known to engage in fraud, embezzlement, labor exploitation, police brutality, torture, political imprisonment, murder, and kidnapping.[40] Especially in cities, the poor see the police as a threat.[41] While men fear being arrested, beaten, or detained as a way of extorting money, women and girls fear being raped and sexually assaulted by the police.[42] Poor people regard the police as agents of oppression, not protection.[43]

The vast majority of people who are imprisoned in the developing world have never been convicted or even charged with a crime.[44] Human rights lawyers describe sitting in "cramped, dilapidated, and stuffy developing world courts as a mangy clump of pre-trial detainees are shuffled into court for yet another charade of Kafkaesque insanity where they will sit through some intermittent non-event that they don't understand and in which nothing meaningful or comprehensible will happen."[45] Language barriers, among other problems, leave people totally dependent on others to tell them what is going on and what their choices are.[46] Many hearings are conducted in languages most people do not understand—usually English.[47] These proceedings would leave Western attorneys confused and dumbfounded.[48]

For these reasons, many immigrants believe that justice institutions and courts cannot be trusted; immigrants may be slow to trust these institutions until shown why they should do so.[49] Latino immigrants consistently reveal not just mistrust but fear of justice institutions.[50] The likelihood of distrust and misunderstanding coincides, however, with opportunities for creative, more effective solutions to complicated justice problems.[51] One factor is the difference between court culture and an individual's own culture.[52] Many immigrants may justifiably believe that the criminal justice system is stacked against them.[53] In many cultures, state systems are seen as tools of control and brute force used by oppressive regimes.[54] Immigrants from nations where authorities routinely violate human rights may have an especially difficult time adapting to the culture of Western justice systems.[55]

For many immigrants, the criminal justice system is not a level playing field.[56] Immigrants face many hardships such as cultural differences in conceptions of justice and lack of knowledge of the criminal justice system.[57] Little social science research has examined the effect of race on charging, plea bargaining, or other prosecutorial functions and discretionary practices.[58] But undoubtedly, great racial disparities exist at all stages of criminal justice processing.[59] Prosecutors may not adequately consider relevant equitable factors in petty cases; institutional concerns crowd out case-specific considerations.[60] Prosecutors may carry a general "presumption of guilt."[61] In many state courts, bail and other process costs generally outweigh perceived incentives to fight charges.[62] Many immigrant defendants often believe it futile to maintain one's innocence.[63]

For example, one of the foundational principles of justice in the United States is the concept of being innocent until proven guilty. Before deciding whether to plead guilty, all defendants are entitled to effective assistance of counsel. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). Critically, counsel must make her client aware of "the advantages and disadvantages of a plea agreement."130 S.Ct. at 1484 (quoting *Libretti v. United States*, 516 U.S. 29, 50–51 (1995)). Guilty pleas account for nearly 95 percent of all criminal convictions. *Id.* at 1485. And contrary to American cultural assumptions, facts other than guilt may provide the incentive to plead guilty. *Id.* at 1486. A conviction after a guilty plea normally rests on an admission in open court that the defendant committed the offense. *Brady v. United States*, 397 U.S. 742, 748 (1970); *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *see also McMann v. Richardson*, 397 U.S. 759, 766, 769-70 (1970).

The misdemeanor system works poorly for all defendants, but worst for immigrants.[64] A study by Human Rights Watch in 2010, for example, found that 99.6 percent of misdemeanor convictions in New York City are guilty pleas.[65] Defendants forced to negotiate directly with prosecutors invariably waive the right to counsel and plead guilty.[66] Those who don't waive counsel are matched with overburdened attorneys who simply do not have time to learn much about their client's personal circumstances.[67] Cultural and language differences may also reduce the lawyer's patience or empathy for her client; cultural barriers diminish the ability to negotiate, empathize, or build a successful defense.[68] When misdemeanor defendants (immigrants or not) plead guilty for reasons other than individual culpability, the system's legitimacy is reduced.[69] Even though race, nationality, and immigration status should not affect the outcome, in minor cases such factors often decide the case.[70] And those who come from nations with oppressive regimes may accept such outcomes because in their cultural experience, that's just the way it is. Their lawyers, unaware of the client's cultural perspective, do not know how to ask the right questions to get to a just result.

In the social justice context, compassion is the ability to admit that we do not know everything and to recognize that many of us have privileges that affect our perceptions both of clients and claims.[71] Compassion is a willingness to evaluate cultural assumptions, combined with the desire to avoid harming others.[72] The essence of empathy lies in the lawyer's conveying to the client the feeling that the client is being listened to, understood, and accepted, but not judged.[73] Increasing cultural competence improves confidence in the criminal justice system by helping all parties understand each other better.[74] Cultural competence unravels the intricacy of individual circumstances.[75] It means hearing individual stories, understanding crucial needs, and giving voice to clients' heartfelt concerns.[76] Advising clients solely about their case disempowers clients from making real choices about their lives.[77] Holistic and culturally-competent lawyering goes beyond the legal case to understand the whole person.[78]

Although overt discrimination has diminished, we continue to grapple with unfairness in Western justice systems.[79] While most of the burden inevitably falls on defense attorneys, broad justice policies in prosecutors' offices and more nuanced train-

ing might address some of the problems at the discretionary point of charging.[80] Prosecutors could be trained to more explicitly think about the equities.[81] Judges should ensure that defendants have more information about the strength of the prosecutors' cases before they plea.[82] Increasing the defendants' access to information and to effective counsel would also lead prosecutors to exercise more charging discretion, and may ultimately influence arrest discretion.[83] Immigrants, for their part, should learn a great deal about laws in their new home country, the law enforcement system in general, and the role of police.[84] An officer's or a judge's understanding of cultural traditions in the developing world can provide the insight needed to understand and even predict some of the reactions and difficulties new immigrants will have in the West.[85] No justice system is perfect, but cultural competence as it relates to justice system culture can begin to narrow the gap for immigrants coming to the West in search of freedom and a better life. Increased cultural competence will also lead to decisions that are culturally sensitive and judicially appropriate and that build respect for the rule of law at home and around the world.[86] ■

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Endnotes

[1]Anthony Faiola, *A global surge in refugees leaves Europe struggling to cope*, Washington Post, Apr. 21, 2015, *available at* www.washingtonpost.com/world/europe/new-migration-crisis-overwhelms-european-refugee-system/2015/04/21/3ab83470-e45c-11e4-ae0f-f8c46aa8c3a4_story.html.

[2]*EU migration: Crisis in graphics*, BBC News, Sep. 17, 2015, available at www.bbc.com/news/world-europe-34131911.

[3]*Asylum applications in industrialized world soar to almost 900,000 in 2014,* UNHCR, Mar. 26, 2015, available at www.unhcr.org/5512c51e9.html.

[4]*Southwest Border Unaccompanied Alien Children*, U.S. Customs and Border Protection, *available at* www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children.

[5]Carnegie Endowment for International Peace, *Immigration and the Justice System*, 1 Research Perspectives on Migration, July/August 1997, at 2, *available at* carnegieendowment.org/files/rpm/rpmvol1no5.pdf.

[6]John A. Martin, Marcus Reinkensmeyer, Hon. Barbara Rodriguez Mundell & Jose Guillen, Becoming a Culturally Competent Court 4 (California Judicial Branch 2007) www.courts.ca.gov/partners/documents/CultComp.pdf .

[7]Sue Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clinical L. Rev. 33, 40 (2001).

[8]Am. Bar Ass'n, Building Community Trust: Improving Cross-Cultural Communication in the Criminal Justice System 14 (2010), *available at* www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/bctext.authcheckdam.pdf.

[9]Am. Bar Ass'n at 13.

[10]Am. Bar Ass'n at 13.

[11]John A. Martin, Steven Weller, Angie Lederach, Jeff Yoder & David A. Price, What Does the Intersection of Language, Culture, and Immigration Status Mean For Limited English Proficiency Assistance in the State Courts? 6 (Center for Public Policy Studies 2012), *available at* www.centerforpublicpolicy.org/index.php?s = 13877 .

[12]Am. Bar Ass'n at 13.

[13]Leila Chirayath, Caroline Sage & Michael Woolcock, Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems 2 (World Bank 2005), *available at* siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf.

[14]Bryant, 8 Clinical L. Rev. at 40.

[15]Bryant at 40.

[16]Bryant at 42.

[17]Robert M. Shusta, Deena R. Levine, Herbert Z.Wong & Philip R. Harris, Pearson Education, Multicultural Law Enforcement: Strategies for Peacekeeping in a Diverse Society 4 (3rd ed., Prentice Hall 2005), *available at* wps.pearsoncustom.com/wps/media/objects/4173/4273671/Ch01.pdf.

[18]Bryant at 40.

[19]Am. Bar Ass'n at 68.

[20]Am. Bar Ass'n at 68.

[21]Lucien X. Lombardo, *Lessons from the Third World for Understanding American Criminal Justice,* 8 Int'l J. of Comparative and Applied Criminal Justice 75, 75-76 (1984), *available at* www.lxlombardo-lifexlearning.com/Articlces-for-pages/Lessons%20from%203rd%20World%20for%20American%20Criminal%20Justice.pdf.

[22]Lombardo at 65-76.

[23]Shusta, et al., at 7.

[24]Lombardo at 81.

[25]Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling,* 27 Golden Gate U. L. Rev. 345, 377 (1997). (examining how unconscious racism and cultural hegemony can affect the relationship between a lawyer and a client).

[26]Jacobs at 378.

[27]Shusta, et al., at 23.

[28]Shusta, et al., at 24.

[29]Bryant at 68.

[30]Bryant at 74.

[31]Lombardo at 82.

[32]Lombardo at 65-76.

[33]Gary Haugen and Victor Boutros, The Locust Effect 17 (Oxford University Press 2014). The Library of Congress defines a developing country as one in which "the majority

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75 Years of the Board of Immigration Appeals

By Jeffrey S. Chase

The Board of Immigration Appeals celebrated its 75th anniversary in 2015. The brief summary of its history that follows is intended to commemorate this milestone.[1]

Formation and Early Years

Matter of L-, 1 I&N Dec. 1 (BIA 1940), was issued on August 29, 1940, the day *before* the Board of Immigration Appeals came into existence.[2] Some background about the Board's early history is required to explain this.

From 1922 until 1940, a five-member Board of Review existed within the Department of Labor to review all immigration cases. The Board of Review had no decision-making authority of its own; it could only recommend action to the Secretary of Labor. In 1933, the Immigration and Naturalization Service (INS) was formed within the Department of Labor,[3] and from 1933 until 1939 the Board of Review made its recommendations to the Commissioner of Immigration and Naturalization.[4]

In 1939, the Board of Review returned to reporting directly to the Secretary of Labor after a study of administrative practices recommended separating the Board's adjudicatory role from the INS's investigative and advocacy functions.[5] Marshall Dimock, an academic who served as Assistant Secretary of Labor under Frances Perkins, chaired the committee that conducted an exhaustive 2-year study of administrative practices within the INS. It was pursuant to the Dimock Committee's recommendations that Ralph T. Seward was appointed chairman of the Board in 1939. According to Seward, Dimock "was heading up an effort to revise the Immigration and Naturalization procedures to give the aliens some form of due process. [He] asked me if I would come down and be Chairman of the Board of Immigration Appeals, [the] Board of Review they called it then, and supervise the change in rules and regulations."[6]

By 1940, World War II had commenced in Europe, causing a change in public opinion regarding immigration. According to Seward, "in the middle of all this, of course, the War had broken out, and the temperament of the times had changed from trying to help aliens to being suspicious of them, trying to guard against spies and all the rest of it. So, we had [a] tough going. We did put through at least a part of, a sound solid part of, our program, but not all of it by any means."[7]

President Roosevelt transferred the INS (and the Board of Review) to the Department of Justice in 1940.[8] This move coincided with security concerns elevated by the outbreak of war in Europe; that same year, Congress passed the Alien Registration Act of 1940 (also known as "the Smith Act"), which required foreign nationals to register with the INS and created severe penalties for subversive activities.[9]

The Board of Review's transfer to the Department of Justice became effective on June 15, 1940.[10] Just over 2 weeks later, on July 3, 1940, an order was published in the Federal Register delegating a degree of decision-making authority to the Board of Review, including the power to issue orders of deportation after proceedings and to consider and determine appeals from boards of special inquiry in exclusion cases.[11] It was pursuant to this authority that the Board of Review issued its decision in *Matter of L-*. Ironically, this first published decision under the Board's newly granted authority fell within a section of the July 3 order requiring its referral to Attorney General Robert H. Jackson as a "question of difficulty," rendering the Board's August 29, 1940, decision the equivalent of a recommendation that needed the Attorney General's approval.[12] A footnote in the decision recognized the Aug. 30, 1940, inception of the new Board of Immigration Appeals.[13]

Seward retained his title through the above-described changes, making him the first chairman of the Board. Seward departed in 1941 to become Executive Secretary of the National Defense Mediation Board. He was succeeded by Joseph A. Fanelli, who also served 1 year as chairman. Fanelli resigned in August 1942 to become Special Assistant to Petroleum Coordinator Harold C. Ickes.[14] Thomas G. Finucane then held the post of chairman for 26 years until his retirement in 1968. Finucane's lengthy tenure would seem to have brought an element of stability to a component that had seen a transfer in departments and three leadership changes in just 2 years' time.

In a 1945 internal report, the Board discussed its wartime activities. The outbreak of war was accompanied by a surge in foreign seamen deserting their vessels in an attempt to remain in the United States. According to the report, "[t]he burden of returning deserting seamen to their vessels and to the life line of supplies by orders of deportation has rested on the Board of Immigration Appeals and has substantially increased its work-load." The Board also realized, according to the report, that "an iron-bound rule requiring the deportation of every alien seaman who deserted his vessel would be unwise," and that some exceptions were warranted.[15] The report also discussed how the war's drain on manpower through service in the armed forces necessitated the importation of foreign workers to boost agricultural and industrial production in support of the war effort. The Board helped accomplish this through its orders exercising the discretion accorded the U.S. Attorney General by the ninth proviso to section 3 of the Immigration Act of Feb. 5, 1917.[16] According to the report, "As of August 1944 the Board had ordered the admission of 47,823 such laborers."[17]

Following the war, new procedures were enacted that impacted the Board's work. Between 1940 and 1945, the Board had issued the initial "final" decisions in deportation cases. As explained by Chairman Finucane in 1943, "Practically all records are received by the Board from the Central Office of the [INS], and in most instances with its recommendation as to the action it thinks appropriate."[18] In contrast, under the 1945 regulations, appeals from Special Inquiry Board decisions were initially reviewed by the INS Commissioner, and only then could the Commissioner's recommendation to exclude or deport be appealed to the Board.[19] Two years later, new regulations became effective that further refined the jurisdiction of the Board as a wholly appellate body, with finality afforded to the INS Commissioner's decision where no appeal was taken.[20]

In 1945, Patricia H. Collins became the first woman to serve as a Board member. Collins graduated second in her class at Emory University School of Law in 1931 (one of the school's first three women graduates) but was unable to find a paying job.[21] According to a senior partner at one law firm, "we couldn't possibly meet our clients and tell them that we were spending money out of the law firm to pay a woman law school graduate."[22] Collins began volunteering her services at the Atlanta Legal Aid Society, where she impressed the director enough for him to request the Board of Directors to reimburse Collins the amount of $40 per month to cover meals and travel. "The chairman of the Board was so appalled at the idea of paying a woman that he stood up, put on his hat, and walked out—never to return."[23] She finally found employment at the U.S. Department of Justice, where she was hired to put together the Department's antitrust library. Her work during the "New Deal" era made her one of the founders of the field of administrative law. She conducted classified research for the Department leading up to World War II, and was then called to the White House to research President Franklin D. Roosevelt's "court-packing" plan. In 1949, she became one of the first female lawyers to argue a case before the Supreme Court. At the invitation of Chief Justice Warren Burger, she founded the Supreme Court Historical Society in 1974.[24] Collins spent approximately a year and half of her Federal career as a Board member.

The second woman to serve as a Board member, Louisa Wilson, remained in that position significantly longer, serving some 27 years from her appointment in 1948 until her retirement in 1975. A former Board staff attorney remembered Wilson as being possessed of both kindness and an institutional knowledge based on her years of experience, as well as being skilled at mediating conflicts between other Board members.[25] The American Immigration Lawyers Association (AILA) presented Wilson with its Founders Award in 1978, which is awarded "to the person or entity who has had the most substantial impact on the field of immigration law or policy in the preceding period."[26]

The 1950s

The Immigration and Nationality Act of 1952[27] created new procedures that had an impact on the Board's caseload. Under the new procedures, decisions of the INS Special Inquiry Officers (now Immigration Judges) were given a measure of finality.[28] Furthermore, intermediate appeals to the INS Commissioner were eliminated, meaning that all appeals (including those by the INS) were now taken directly to the Board.[29] This change significantly increased the Board's caseload: a 1952 management study found that within a few months of the change the Board received some 4,000 cases that were either with or in transit to the Commissioner for appellate adjudication.[30]

An article in the July 1957 issue of the INS publication *I&N Reporter* offers a glimpse of the Board's caseload at that time. The article stated that, "During calendar year 1956, the Board acted upon 3,234 appeals and 902 motions."[31] By comparison, the Board completed 30,822 cases in FY 2014.[32] The INS article also mentioned that the Board heard oral arguments 5 days a week beginning at 2:00 p.m., with as many as six cases scheduled for a single afternoon.[33]

It was in connection with one such oral argument that Chairman Finucane's name was mentioned in a recent article on the Stanford Law School website about the Honorable Carlos Bea, a Stanford alumnus who is presently a judge on the U.S. Court of Appeals for the Ninth Circuit. A basketball player at Stanford, Judge Bea competed in the 1952 Olympics as a member of the Cuban basketball team. After the Olympics, his application for lawful status in the United States was denied and he was ordered deported. The article claims that Judge Bea "got lucky" while pursuing his appeal to the Board when Finucane "turned out to be an avid basketball fan and began quizzing him [during oral argument] on what position he had played at Stanford." The article states that the Board reinstated Bea's residency status, thus clearing the pathway to Bea's eventual citizenship.[34]

Finucane subsequently made a much less favorable impression on Congressman Francis Walter (co-sponsor of the Immigration Act of 1952, also known as the McCarran-Walter Act). According to a 1955 news article: "Rep. Walter (D-Pa) shouted to Chairman Thomas Finucane … that he was unfit to hold his job. 'I mean that,' Walter told Finucane, who was testifying across the table from him at a hearing before Walter's judiciary subcommittee … . 'It disturbs me that you should sit as chairman of this board.'"[35]

Walter's ire was in part a response to the Board's decision 3 months earlier staying the deportation of Frank Brancato, a reputed organized crime figure. Walter demanded to know why the Board had granted relief when Brancato had "a criminal record a mile long."[36] Walter added, "It was your duty to the citizens of the United States to look at the record."[37] When Finucane responded that the Board did look at the record, Walter retorted, "Well, you ought to have your glasses changed."[38]

1960s and 1970s

Finucane nevertheless remained chairman for another 13 years. He was succeeded in 1968 by Maury Roberts, who served as chairman until 1974. Roberts subsequently became editor of *Interpreter Releases*. He held the title of

Editor Emeritus until his death in 2001 at the age of 91.[39] Roberts served as a mentor to two future Board chairmen: Paul Schmidt, who began his career at the Executive Office for Immigration Review (EOIR) as an attorney advisor at the Board in 1973, and Juan Osuna, who succeeded Roberts as editor of *Interpreter Releases*. In a 1991 tribute to Roberts' 50 years in the field of immigration law, the late Senator Edward Kennedy referred to Roberts as "Mr. Immigration," noting that he and staff members of the Senate Subcommittee on Immigration and Refugee Affairs called on Roberts for advice for decades.[40]

During Roberts' tenure as chairman, the Board decided *Matter of Jolley*, 13 I&N Dec. 543 (BIA 1970), a case that received significant public attention at the time. Thomas Jolley fled to Canada to evade mandatory military service during the Vietnam War. After obtaining landed immigrant status there, he renounced his American citizenship at the U.S. Consulate in Toronto. He subsequently returned illegally to the U.S., where he was arrested and placed in deportation proceedings. The Board upheld the INS Special Inquiry Officer's order of deportation (with one lengthy dissent). The majority found that while Jolley's desire to avoid military service "may have been based on conscientious scruples," such motivation did not make his renunciation "any the less deliberate or voluntary."[41] The *Chicago Tribune* reported that the case was believed to be the first involving the deportation of an American-born citizen who evaded the Vietnam War-era draft.[42] The Board's decision was upheld by the Fifth Circuit the following year.[43] Although Jolley designated Canada for deportation, he was deemed to have abandoned his status there.[44] As no country agreed to accept him, Jolley lived the rest of his life in the U.S. without status. He died in 2014 in Asheville, North Carolina.[45]

In 1973, Roberts was responsible for hiring the first class of Department of Justice Honors Program graduates to work as attorneys at the Board. That first class included future chairman Paul Schmidt and future Board member Lauri Filppu (the two shared an office). At the time, the Board (which was located in the since-demolished International Safeway Building at 12th and F Streets in Washington, D.C.) consisted of 25 people in total, including 5 Board members and 9 attorneys.[46]

In 1974, the Board decided perhaps the most high profile case in its history, *Matter of Lennon*, 15 I&N Dec. 9 (BIA 1974). John Lennon (described in an April 1972 memo sent from the FBI to President Nixon's chief of staff, H.R. Haldeman, as "a British citizen and former member of the Beatles singing group") was one of the most iconic figures of the 1960s.[47] As background, the 1972 presidential election was the first in which 18-year-olds were able to vote; 21 had been the minimum voting age in prior elections. As a result of the "baby boom," 18- to 20-year-olds comprised a significant percentage of the population. In early 1972, the FBI believed that Lennon, an outspoken critic of the Vietnam War, planned on participating in an anti-war concert tour.[48] In a February 1972 memo forwarded by the late Senator Strom Thurmond to the Attorney General, it was suggested that Lennon be deported to prevent him from engaging in such political activity.[49]

An immigration judge in New York City ordered Lennon deported in 1973. Lennon was the beneficiary of an approved visa petition based on his extraordinary ability in the arts. The record contained letters written to the INS in support of his artistic merit from Bob Dylan (who wrote that Lennon and Ono's artistic contributions help "put an end to this mild, dull taste of petty commercialism which is being passed off as artist art by the overpowering mass media"), New York City mayor John Lindsay, Leonard Bernstein, Joyce Carol Oates, Jasper Johns, Joan Baez, Tony Curtis, John Updike (whose two-sentence letter concluded that Lennon and Ono "cannot do this great country any harm . . . and might do it some good"), and others.[50] However, the Immigration Judge ruled that Lennon was ineligible to adjust his status because of his 1968 British conviction for possession of cannabis.

On appeal, the Board affirmed the Immigration Judge's order. In response to the respondent's arguments, the Board found that: (1) the law under which Lennon pled guilty, as interpreted by the British courts, "contained a sufficient knowledge requirement to ensure that persons whose possession was entirely innocent would not be convicted"; (2) Lennon's claim to have pled guilty on counsel's advice that lack of knowledge was not a defense was not supported by the record; and (3) cannabis satisfied the Immigration and Nationality Act's definition of "marihuana." *Matter of Lennon*, 15 I&N Dec. at 23–26, *overruled by Matter of Esqueda*, 20 I&N Dec. 850 (BIA 1994). While stating that it was "not unsympathetic to the plight of the respondent and others ... who have committed only one marihuana violation for which a fine was imposed," the Board concluded that "arguments for a change in the law must be addressed to the legislative, rather than the executive, branch of government."[51] The *Washington Post* reported on the Board's decision in its "Style" section.[52]

The following year, the Board's decision was vacated by a panel of the U.S. Court of Appeals for the Second Circuit, which concluded (with one dissent) that Lennon "was convicted under a statute which made guilty knowledge irrelevant," and that the statute therefore did not satisfy the knowledge requirement of what was then section 212(a)(23) of the Act, 8 U.S.C. § 1182(a)(23) (1975).[53] While the court reversed for this reason only, Judge Irving R. Kaufman added that the court did not take lightly the petitioner's alternate constitutional argument that he was selectively prosecuted on account of secret political grounds (an argument that the Board had found itself without jurisdiction to address) and indicated that a lower court might properly consider such argument should the adjustment application be denied as a matter of discretion. By this time, the 1972 election was long concluded (which Nixon, ironically, won in a landslide) and Nixon had recently resigned from office following the Watergate scandal. Lennon was allowed to adjust his status to permanent residency without further opposition.

1980s

David Milhollan (who had been INS General Counsel) was appointed as Roberts' successor in February 1975, and he served as the Board's chairman throughout the 1980s. In 1983, the Board and the Office of the Chief Immigration Judge were moved to the newly created Executive Office for Immigration Review (EOIR). Milhollan was appointed director of the new agency while continuing to serve as Board chairman; he held both positions simultaneously until his retirement from Government service in 1993. Milhollan's dual role meant that the Chief Immigration Judge reported to the chairman of the component reviewing his charges' decisions.[54] Following Milhollan's retirement, Attorney General Janet Reno appointed two individuals to fill the posts of EOIR director and Board chairman.

Between 1983 and 1985, the Board issued three precedent decisions involving respondents accused of assisting the Nazis in the persecution of others during World War II. There was a reason that these cases first arose four decades after the war. In 1973, a mid-level INS official informed then Congresswoman Elizabeth Holtzman that the INS had a list of Nazi war criminals living in the United States and was "doing nothing about it."[55] When the INS commissioner testified before Holtzman and the House Subcommittee on Immigration, Citizenship, and International Law several months later, he acknowledged the list and agreed to allow Holtzman to review the files.[56]

It was ultimately discovered that thousands of Nazi war criminals had been admitted to the United States. The Office of Special Investigations ("OSI") determined that some were knowingly granted entry to this country, with government officials having knowledge of their past.[57] Holtzman subsequently sponsored legislation, often referred to as the Holtzman Amendment, which created a deportation ground for individuals involved in Nazi persecution. Holtzman was also a driving force in the creation of the OSI, which was charged with identifying and seeking the removal of persons who assisted the Nazis and their allies in the persecution of civilians, within the criminal division of the Department of Justice.

In *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983), the Board found the respondent, a Latvian native, deportable under the Holtzman Amendment based on his activities between 1941 and 1943 with the Latvian Political Police. However, the decision was overturned by the U.S. Court of Appeals for the Ninth Circuit.[58] The following year, the Board decided *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984), holding that a former prisoner of war forced to serve as a concentration camp guard was deportable even if his actions were coerced and he harbored no animosity towards Jews. Prior to his deportation hearing, Fedorenko had been subject to denaturalization on the grounds that his guard service would have made him ineligible for a visa under the Displaced Persons Act of 1948, which barred those who had assisted the Nazis in persecuting civilians. After a district court judge ruled in favor of Fedorenko, the U.S. Court of Appeals for the Fifth Circuit reversed and ordered his denaturalization.[59] The circuit court's order was upheld by the United States Supreme Court.[60] Fedorenko became the first Nazi war criminal deported to the former Union of Soviet Socialist Republics ("Soviet Union"), where he was executed in 1988 after being tried and convicted for his war crimes.[61]

In *Matter of Linnas*, 19 I&N Dec. 302 (BIA 1985), the issue of the respondent's deportability under the Holtzman Amendment was not contested; the issue concerned the country to which he would be deported. The respondent designated the "free and independent Republic of Estonia." He argued that the United States had never recognized the annexation of his native Republic of Estonia ("Estonia") by the former Soviet Union and that it would therefore violate United States' foreign policy to deport him there. He further argued that the appropriate place for deportation would be the offices maintained in New York City by Estonia. Holding that such offices did not satisfy the definition of "country" set forth in the Act, the Board upheld the Immigration Judge's designation of the Soviet Union. The Second Circuit denied the subsequent petition for review.[62]

The *Linnas* case played out during the Cold War and was further complicated by the fact that the Soviet Government had tried Linnas in absentia in 1962; his death sentence was reported by the Soviet press before the trial took place.[63] This combination of factors created discussion and disagreement as to whether Linnas should be deported to the Soviet Union. Linnas was eventually deported to Estonia in April 1987; he died less than 3 months later and was buried in Long Island, New York.[64]

1990s – Present

Chairman Milhollan retired in 1993. Soon thereafter, a series of headline-grabbing events, including a shooting at CIA headquarters and terrorist attack on the World Trade Center, led the Clinton Administration to undertake an immigration reform initiative. In addition to increasing the number of Immigration Judges nationwide, the number of Board members was increased for the first time from 5 to 12, with the new appointments taking place in 1995.[65] While many of the Board members continued to be career Federal Government employees,[66] some new appointees had varied experiences outside of Government. The new chairman, Paul W. Schmidt, had previously served as INS General Counsel but had also spent the 8 years immediately preceding his appointment practicing immigration law in the private sector. Another of the new Board members had been the director of the American Immigration Law Foundation's Legal Action Center, while another was a law professor. In addition, two of the new appointees had been Immigration Judges.

In 1996, the Board's decision in *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), drew international attention.[67] In the case, the Board granted asylum to a woman from Togo based on her fear of being forced to undergo female genital mutilation ("FGM") if returned there. The decision constituted the first precedent decision granting asylum based in part on gender (specifically, the particular social group was defined as "young women of the Tchamba-Kunsuntu Tribe who have

not had FGM ... and who oppose the practice"). It was a significant decision.

The following day, the Board published a precedent decision granting suspension of deportation to a young man who was found to have demonstrated "extreme hardship" based on factors including his integration into American society, his strong community ties, and "depressed economic conditions and the volatile political situation throughout Nicaragua." *Matter of O-J-O-*, 21 I&N Dec. 381, 384–87 (BIA 1996). The difficulty in achieving consensus in applying this hardship standard was reflected in the decision, which contained three separate concurrences, as well as a dissent that was joined by several Board members. While immigration advocates welcomed the decision, critics cited it as motivating illegal immigration by sending the message that "if they get in, they're going to be able to stay."[68]

Similar criticism of Board decisions led to strong reactions from enforcement-oriented members of Congress and later President Bush's Administration. In response to criticism of the suspension of deportation standard applied in *Matter of O-J-O-*, Congress in 1996 eliminated this form of relief entirely for new applicants and replaced it with the much stricter requirements for cancellation of removal. In 2002, Attorney General John Ashcroft twice issued precedent decisions reversing grants of relief by the Board. *See Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002); *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002). The Attorney General also oversaw a reduction in the size of the Board from 23 members to 11.[69] New regulations eliminated the Board's de novo review of factual issues; findings of fact would henceforth be reviewed for clear error.[70]

In 2003, Chairman Schmidt departed the Board to become an Immigration Judge in Arlington, Virginia, where he remains on the bench at present. His successor as chairman, Lori Scialabba, held that position until 2006, when she departed to join U.S. Citizenship and Immigration Services, where she currently serves as deputy director. She was succeeded as chairman by Juan Osuna, who is now the director of EOIR. The current chairman, David L. Neal, was appointed in 2012. Chairman Neal is the first Board chairman to have previously served as Chief Immigration Judge. In December 2006, regulations increased the size of the Board from 11 to 15 members.[71] An interim rule announcing the addition of two additional Board members was published in late 2015, increasing the Board to its current allocation of 17.[72]

The BIA today employs a total staff of 278, consisting of its 17 Board members, 147 staff attorneys, and 114 non-attorney support staff. The Board has much to draw on from its history as it addresses future challenges. ■

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Endnotes

[1]The author is greatly indebted to Karen Drumond, the Executive Office for Immigration Review (EOIR) Law Library's chief librarian, for her treasure trove of historical Board documents, and to Mark Cappello, management assistant at the Board of Immigration Appeals, whose exhaustive research was invaluable. The author also wishes to thank Immigration Judge Paul W. Schmidt, Margaret Perry of the Office of Immigration Litigation, and Board Member Neil P. Miller for their thoughts and reminiscences.

[2]*BIA Celebrates 50th Anniversary*, 67 Interpreter Releases 1221 (1990).

3Section 14 of Exec. Order 6166 (1933), *available at* www.archives.gov/federal-register/codification/executive-order/06166.html.

[4]*BIA Celebrates 50th Anniversary*, 67 Interpreter Releases 1221 (1990).

[5]From an untitled, uncredited report of the Board, circa 1945 (hereinafter "1945 Board Report"), at 4-5 (on file with author).

[6]Interview by Gladys Gruenberg with Ralph T. Seward, President, National Academy of Arbitrators, *available at* www.naarb.org/interviews/RalphSeward-undated.PDF.

[7]*Id*. (internal brackets omitted).

[8]Reorganization Plan No. V, 5 Fed. Reg. 2223 (June 14, 1940).

[9]Ch. 439, 54 Stat. 670 (June 28, 1940).

[10]Reorganization Plan No. V, 5 Fed. Reg. 2223 (June 14, 1940).

[11]Order No. 3888, 5 Fed. Reg. 2454 (July 3, 1940).

[12]*See id.*

[13]*Matter of L*, 1 I&N Dec. 1, 3 n.1 (BIA 1940).

[14]*Federal Diary*, Wash. Post, Aug. 19, 1942.

[15]1945 Board Report, *supra* note 5, at 22.

[16]*Id.* at 22–23. The ninth proviso to section 3 accorded the Attorney General and the Commissioner of Immigration authority to issue rules and prescribe conditions for the admission of otherwise inadmissible aliens for temporary admission when necessitated by emergent conditions. 39 Stat. 874, 878 (Feb. 5, 1917).

[17]1945 Board Report, *supra* note 5, at 23.

[18]Thomas G. Finucane, *The Board of Immigration Appeals*,

APPEALS continued on page 23

Children Cannot Represent Themselves

By Hon. Eliza Klein (Ret.)

In a deposition taken on Oct. 15, 2015, a witness on behalf of the Department of Justice Executive Office for Immigration Review stated under oath that he had:

...taught immigration law literally to 3-year-olds and 4-year-olds. It takes a lot of time. It takes a lot of patience. They get it. It's not the most efficient, but it can be done.

Since this testimony was reported by the Washington Post on March 4, 2016, the Department of Justice has responded by saying that the judge who made these remarks was speaking "in his personal capacity" and that judge himself has stated that the remarks do not reflect his actual thinking, and were taken out of context.

Who was the speaker? Assistant Chief Immigration Judge Jack Weil, who was a sitting immigration judge from 1994 until 2009 and who from 2009 to 2013, and again since 2015, has been responsible for training everyone - immigration judges, court administrators, interpreters, judicial law clerks and legal technicians - who make hearings before the immigration courts nationwide possible and whose responsibility it is to ensure that those hearings are fair.

What was the context? A deposition taken by an attorney who has filed a class action lawsuit to obtain legal representation for minors who are placed in removal proceedings. Judge Weil's remarks were taken during what has been reported as a four hour deposition, so perhaps he misspoke. But he confirmed the specific content of his remarks at least twice when the shocked attorney questioning him sought clarification.

The purpose of the remarks was to provide support for the federal government's opposition to the proposition that they should provide attorneys for unaccompanied children in removal proceedings, no matter how young, because providing them "fair hearings" and "due process" is possible, if you just take the time to explain the law to them. The fact that an intelligent, hard-working judge who had fourteen years of experience on the bench could find himself making such absurd statements to support such a ridiculous proposition is cause for genuine concern over what lengths the Executive Office for Immigration Review will go to abide by the President's political and economic agenda of prioritizing certain cases (people fleeing violence in Central America and Mexico who have recently arrived at our borders seeking protection, as they are legally entitled to do) over others (people whose case may have been pending for years before the immigration courts).

No rational person actually believes a three year old can understand immigration laws of the United States. The law itself is incredibly complex, sometimes contradictory, and in many respects incomprehensible. Judge Jack Weil is not only intelligent and well-versed in conducting immigration hearings, he has raised several children. So what could he have meant? In the context of the deposition, he must have meant that it is possible to provide a fair hearing to a three year old who does not have an adult to speak for her, and who does not have a lawyer. If that is what he meant, it is almost equally ludicrous.

Due process requires both fairness and impartiality. To actually benefit from due process, a person must have a *meaningful* opportunity to participate in the hearing—in a nutshell, to be heard. There must be an *understanding* of what information is operative, and an ability to convey that information in an understandable manner.

Immigration judges have a tough job no matter what the circumstances - respondents in removal proceedings are frequently traumatized, unable to understand English, unable to comprehend the legal terminology or evidentiary standards. Judges, attorneys for the government and the respondents all benefit from respondents having counsel. Children, without an adult who is familiar with their life and circumstances, must have an attorney to meaningfully participate in their proceedings and there can be no rational dispute over this.

Indeed, one of the most effective forms of relief for foreign-born children placed in immigration proceedings is Special Immigrant Juvenile Status (SIJS). This status, which requires specific findings from an appropriate state court and a petition approved by the United States Citizenship and Immigration Service, allows a minor to obtain lawful permanent residence. These claims require many continuances from an Immigration Judge to allow the appropriate adjudications. Many experienced attorneys are reluctant to take on these cases because of the overlapping state court and USCIS proceedings—a *child* acting on their own could not successfully pursue such an application.

The nonsensical remark made by Judge Weil, as a witness to a lawsuit filed to obtain appointed counsel for unaccompanied minors, belies one thing: the fact that the Executive Office for Immigration Review (EOIR) has lost sight of its mission: "fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws." Perhaps as disturbing, EOIR apparently has abandoned its noble "vision" of "through teamwork and innovation, being the world's best administrative tribunals, guaranteeing fairness and due process for all."

The agency's primary concern at this time is to comply with the President's mission of preventing people fleeing Central America from reaching the border of the U.S. and Mexico, by as rapidly as possible removing those that suc-

ceed in reaching the border in order to dissuade others from coming. This is not only immoral, it is most likely illegal since our laws allow each such individual to apply for asylum upon arrival. These children are frequently eligible for protection from persecution, but also other forms of relief, such as SIJS or "prosecutorial discretion," about which they have no way of knowing. Immigration Judges hearing their cases also have no way of knowing, unless an attorney or other responsible adult is able to investigate their lives. The attorneys representing the Department of Homeland Security cannot reasonably be expected to fulfill that function.

We need an immigration court that is free from the political and economic consideration of the Executive Branch. Immigration Judges need the authority to appoint counsel wherever necessary to ensure a fair opportunity to meaningfully participate in a hearing. When they have jurisdiction over children, they should be able to consider what is in "the best interests" of those children, instead of what is in the best interests of the agency which employs them.

I was an Immigration Judge for over 20 years, and retired in January of 2015. I am sincerely outraged by the extent to which this Administration is willing to go to deny fairness to a group of vulnerable individuals, whose "day in court" they are so happy to expedite. ■

News from the YOUNGER LAWYERS DIVISION

New Webinar Series Success!

The ILS-Younger Lawyers Division and Diversity Committee recently created a monthly webinar series designed for current and future immigration practitioners to learn from seasoned attorneys. Hosted on March 29, the first webinar on Immigration Relieve for Minors was a success! Panelists included Abbie Johnson of the Rocky Mountain Immigrant Advocacy Network, Karen Donoso-Stevens of the Office of Chief Counsel for the Department of Homeland Security, Immigration and Customs Enforcement, and Elizabeth Badger of Kids in Need of Defense in Boston. The second webinar was on April 27, and was on Basics of Family-Based Immigration. Panelists included Jeannie Kain, Managing Attorney at the Irish International Immigrant Center in Boston, MA, Reena Parikh, Associate Counsel with the Refugee & Asylum Law Division (RALD) within USCIS's Office of the Chief Counsel (OCC), and Kimberly Sutton, solo practitioner in Springdale, Arkansas.

NOLA Happy Hour! Host by ILS-Younger Lawyers Division on May 13, 2016

For the second year in a row, the ILS-Younger Lawyers Division will host a Happy Hour at the Annual Immigration Law Conference in New Orleans. Join many other practitioners to network while enjoying a free beverage in Salon E at the New Orleans Marriott on Friday, May 13 from 5:30-7:00 p.m. You can find additional details about the Happy Hour event on the FBA website: **www.fedbar.org/Sections/Immigration-Law-Section/Calendar/Immigration-Law-Section-Younger-Lawyers-Division-Happy-Hour-.aspx**.

For information about the Younger Lawyers Division, contact Robin Trangsrud at robin.trangsrud@gmail.com.

Mid-South Immigration Advocates Expands Programs for Unaccompanied Alien Children

By Allison Wannamaker

MEMPHIS, Tenn. – Mid-South Immigration Advocates, Inc. (MIA) announced in March that it has expanded its Children's Project, providing direct representation to approximately 80 unaccompanied children in 2016. MIA's Children's Project directly represents unaccompanied alien children in the Memphis Immigration Court, in state court guardianship proceedings, and before U.S. Citizenship and Immigration Services (USCIS). Eligible children may qualify for legal immigration status through programs including asylum and Special Immigrant Juvenile Status.

Photo (L-R): Sally Joyner, Veronica Virgen, Ivonne Cornejo, Steven Denton, Allison Wannamaker

MIA's Children's Project is part of the Vera Institute of Justice's Unaccompanied Children Program, a national effort to increase pro bono legal representation for immigrant children in removal proceedings without a parent or legal guardian. Vera staff oversee programs at about 26 nonprofit agencies that provide assistance to unaccompanied children throughout the United States.

In addition, on March 8, 2016 MIA began providing services at the Memphis Immigration Court as part of the Legal Orientation Programs for Custodians of Unaccompanied Children (LOPC). Each week, MIA attorneys and staff provide legal orientation presentations and pro bono referral services to the adult caregivers (custodians) of unaccompanied children in immigration court proceedings. Carried out under contract with the Vera Institute of Justice, the program helps the immigration court process function more efficiently and effectively by providing valuable information to the custodians of children who arrive in the United States without a parent or guardian.

MIA is a Memphis non-profit law firm whose core mission is to provide free and affordable immigration representation to low-income clients. MIA was founded by a group of experienced Memphis immigration attorneys who recognized a need in the community for such services. In addition to direct representation and legal consultations, MIA engages in community education and administrative advocacy in the Memphis area. ■

Allison Wannamaker and ILS Board member Dr. Alicia Triche are co-founders of the Mid-South Immigration Advocates, Inc.

From the Editor

Please send all news items to me at LBurman@aol.com. We really want to know what is happening in the Section, and in the professional lives of our members. We especially would appreciate photographs. Kindly send submissions in Word format.

Larry Burman, editor

EOIR Swears In Eight Immigration Judges

FALLS CHURCH, VA – March 14, 2016. The Executive Office for Immigration Review (EOIR) today announced the investiture of eight immigration judges. Acting Chief Immigration Judge Print Maggard presided over the investiture during a ceremony held March 11, at the U.S. Court of Appeals for the Armed Forces in Washington, D.C.

After a thorough application process, Attorney General Loretta E. Lynch appointed Raisa Cohen, Evalyn P. Douchy, D'Anna H. Freeman, Rebecca B. Jamil, Elise M. Manuel, R. Reid McKee, Vernon B. Miles, and Morris I. Onyewuchi to their new positions.

"We are pleased to welcome these appointees to the immigration judge corps," said Maggard. "We look forward to continuing to hire more qualified people to fill these important positions in public service."

Biographical information follows.

Raisa Cohen, Immigration Judge, New York City Immigration Court

Attorney General Loretta E. Lynch appointed Judge Raisa Cohen to begin hearing cases in March 2016. Judge Cohen earned a Bachelor of Business Administration in 2002 from Baruch College, City University of New York Zicklin School of Business, and a Juris Doctor in 2007 from St. John's University School of Law. From September 2015 to February 2016, and previously from April 2009 to September 2014, Judge Cohen served as assistant chief counsel for U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, in New York. From October 2014 to September 2015, Judge Cohen was an attorney at Cohen & Cohen Law Group PC, in New York. From 2007 through 2009, Judge Cohen was an immigration attorney at the Law Firm of Ted Sofer, in New York. Judge Cohen is a member of the New York State Bar.

Evalyn P. Douchy, Immigration Judge, New York City Immigration Court

Attorney General Loretta E. Lynch appointed Judge Evalyn P. Douchy to begin hearing cases in March 2016. Judge Douchy earned a Bachelor of Arts degree in 1992 from Binghamton University and a Juris Doctor in 1995 from New York Law School. From 1997 to February 2016, she served as assistant chief counsel for U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, in New York. From 1996 through 1997, she was an associate at the Law Offices of Anil Jethmalani & Timothy Herrick, in New York. From 1995 through 1996, she was a lawyer at the Law Office of Mark S. Drucker in Jackson Heights, N.Y. Judge Douchy is a member of the New York State Bar.

D'Anna H. Freeman, Immigration Judge, Pearsall Immigration Court

Attorney General Loretta E. Lynch appointed Judge D'Anna H. Freeman to begin hearing cases in March 2016. Judge Freeman earned a Bachelor of Science degree in 1988 from Baylor University, a Master of Public Health in 1995 from the University of Texas Health Science Center, and Juris Doctor in 2004 from the University of Houston Law Center. From 2007 to February 2016, Judge Freeman served in various capacities for U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, including: as assistant chief counsel from 2013 to 2016, in Dallas; as senior attorney from 2010 through 2013, in Livingston, Texas; and as assistant chief counsel from 2007 through 2010, in Eloy, Ariz. From 2006 through 2007, she was a partner at Forrest & Harrison LLC, in Houston. From 2005 through 2006, she served as an attorney at Dunbar, Harden & Benson LLP, in Houston. From 2004 through 2005, she operated the Law Office of D'Anna Harrison, in Houston. Judge Freeman is a member of the State Bar of Texas.

Rebecca B. Jamil, Immigration Judge, San Francisco Immigration Court

Attorney General Loretta E. Lynch appointed Judge Rebecca B. Jamil to begin hearing cases in March 2016. Judge Jamil earned a Bachelor of Arts degree in 1998 from Stanford University and a Juris Doctor in 2006 from the University of Washington Law School. From 2011 to February 2016, Judge Jamil served as assistant chief counsel for U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, in San Francisco. From 2006 to 2011, she served as staff attorney in the Research Unit, Ninth Circuit Court of Appeals, in San Francisco. Judge Jamil is a member of the Washington State Bar.

Elise M. Manuel, Immigration Judge, Newark Immigration Court

Attorney General Loretta E. Lynch appointed Judge Elise M. Manuel to begin hearing cases in March 2016. Judge Manuel earned a Bachelor of Arts degree in 1983 from Northwestern University and a Juris Doctor in 1987 from Georgetown University Law Center. From 1991 to February 2016, Judge Manuel served in various capacities on the Board of Immigration Appeals, Executive Office for Immigration Review, U.S. Department of Justice, including: as a temporary board member from 2012 to 2016; as an attorney-advisor from 2008 through 2012, from 1998 through 2005, and 1991 through 1995; as a team leader from 2005 through 2008; and as a senior panel attorney from 1995 through 1998. From 1987 through 1991, she was a staff attorney for the Legal Assistance Foundation of Chicago. Judge Manuel is a member of the Illinois State Bar.

R. Reid McKee, Immigration Judge, Pearsall Immigration Court

Attorney General Loretta E. Lynch appointed Judge R. Reid McKee to begin hearing cases in March 2016. Judge McKee earned a Bachelor of Arts degree in 1997 from the University of Alabama, a Master of Arts in Social Sciences in 1998 from the University of Chicago, and a Juris Doctor in 2003 from the University of Mississippi School of Law. From 2010 to February 2016, Judge McKee served as assistant chief counsel for U.S. Immigration and Customs Enforcement, U.S. Department of

Homeland Security. From 2009 through 2010, he was the manager of R. Reid McKee PLLC, in Madison, Miss. From 2003 through 2009, he was an associate at Watkins and Eager PLLC, in Jackson, Miss. Judge McKee is a member of the Mississippi and Tennessee Bars.

Vernon B. Miles, Immigration Judge, San Antonio Immigration Court

Attorney General Loretta E. Lynch appointed Judge Vernon B. Miles to begin hearing cases in March 2016. Judge Miles earned a Bachelor of Arts degree in 1980 from the University of Mississippi, a Juris Doctor in 1983 from Howard University School of Law, and a Master of Laws degree in 1992 from the U.S. Army Judge Advocate General's School. From 1995 to February 2016, Judge Miles served in various capacities for the U.S. Department of Justice, including: as a trial attorney in the Narcotic and Dangerous Drug Section, Criminal Division, from 2014 to February 2016, in Washington, D.C.; as an assistant U.S. attorney in the Office of the U.S. Attorney from 2003 through 2014, in San Juan, Puerto Rico; as an assistant U.S. attorney in the Office of the U.S. Attorney from 1998 through 2003, in Oxford, Miss.; and as a civil appellate trial attorney in the Office of Immigration Litigation from 1995 through 1998, in Washington, D.C. From 1985 through 1994, he served in various capacities in the U.S. Marine Corps, including: as assistant officer-in-charge, defense attorney and prosecuting attorney in the Naval Legal Service Office Detachment from 1992 through 1994, in Roosevelt Roads, Puerto Rico; as deputy staff judge advocate, chief defense counsel and chief legal assistance officer in the 3d Force Service Support Group from 1989 through 1991, in Okinawa, Japan; and as prosecuting attorney, defense attorney and chief legal assistance attorney in the 2d Force Service Support Group from 1985 through 1989, in Cherry Point, N.C. From 1983 to 1985, he served in various capacities for the North Mississippi Rural Legal Services, including as managing attorney and staff attorney. Judge Miles is a member of the Mississippi Bar.

Morris I. Onyewuchi, Immigration Judge, Port Isabel Immigration Court

Attorney General Loretta E. Lynch appointed Judge Morris I. Onyewuchi to begin hearing cases in March 2016. Judge Onyewuchi earned a Bachelor of Arts degree in 1990 from Georgia State University, a Juris Doctor in 2002 from the Thurgood Marshall School of Law, Texas Southern University, and a Master of Studies in International Human Rights Law in 2010 from the University of Oxford in Oxford, U.K. From 2002 to February 2016, Judge Onyewuchi served as assistant chief counsel and trial attorney for U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security. Judge Onyewuchi is a member of the State Bar of Texas. ■

Immigration Power Practice Tips

By Lory D. Rosenberg

Using an expert witness

Calling on an expert to serve as a witness, either in a removal hearing before an Immigration Judge, where s/he submits a sworn affidavit but also is likely to testify and be subject to cross-examination, or in an asylum application, waiver, visa petition or revocation (and any RFE) adjudicated by USCIS, where the evidence will be limited to written submissions, is a smart strategy.

An expert can provide valuable authority on subjects with which the IJ or USCIS may be uncomfortable or unfamiliar, and which have a bearing on persecution, torture, deprivation, deleterious effects of separation, relocation, rehabilitation, reformation, recidivism and other factors relevant to levels of hardship and the exercise of discretion.

- domestic violence, trauma and PTSD
- competency, youth, aging
- disability
- anti-social and/or deviant behavior
- medical conditions, both physical and mental
- educational needs and services
- religious and/or cultural practices
- country conditions

Section 702 of ARTICLE VII. OPINIONS AND EXPERT TESTIMONY of the Federal Rules of Evidence provides that a "witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise. Although the Federal Rules are not binding on either EOIR or USCIS adjudications, these provisions are essential guiedlines. See Matter of Y-S-L-C-, 26 I&N Dec. 688 (BIA 2015) (quoting Matter of D-R- , 25 I&N Dec. 445, 458, n.9 (BIA 2011) ("the fact that specific evidence would be admissible under the Federal Rules 'lends strong support to the conclusion that admission of the evidence comports with due process.'") (internal citation omitted)).

An expert witness may allow the IJ or adjudicator to feel more confident about making an exception to removal, or about relying on a favorable interpretation of events, or about exercising discretion favorably. An expert witness may offer an opinion on the "ultimate question." As the "ultimate question" sometimes may involve credibility, this puts the expert witness in a potentially very influential position. In short, explore this option.

Watch the NTA closely

Keep a close eye on the Notice To Appear (NTA) served on your client. If your client has been admitted at some point

and is not an "arriving alien," the burden of proof is on the government. *See* INA section 240 (c)(3)(A). Just because your client may have been convicted of a crime, that doesn't mean that she has to prove that the conviction does not subject her to removal. Rather, it is the job of DHS counsel to prove that the conviction constitutes the ground of deportability charged in the NTA.

If your client's conviction has been vacated, nullified or modified in any way, it may no longer exist for deportability purposes, meaning that it may be impossible for DHS counsel to prove the charges it has lodged in the NTA. A conviction that has been vacated for reasons of constitutional error or legal infirmity (and not because of rehabilitation), will not meet the government's burden of proof, even if a different conviction has been entered by the court as the result of a plea agreement. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

These circumstances will support a Motion To Terminate on behalf of the respondent in the removal proceedings. Yes, the government is able to amend the NTA at almost any point in the proceedings, but they may not have the information on the more recently entered conviction, may not have a copy of the judgment of conviction, or may need time to analyze it. Or, the new conviction may not constitute a ground of deportability. In any case, the Motion To Terminate, if granted, may open up an opportunity for further negotiation regarding prosecutorial discretion, or make it possible to establish jurisdiction with USCIS if adjustment of status is a possibility.

Retainer agreements

Let's get down to a few of the practicalities regarding your retainer agreement or engagement letter. Yes! boundaries again, and yes, this is related to transformation—both yours and your client's!

Having a detailed agreement between you and your client is essential to set shared expectations, set out individual responsibilities, and address the work that must be done and the compensation that is due. Even more importantly, it serves the purpose of educating your client about immigration law and the processes that affect that client, as well as the particular procedures followed in your office.

Attorney-client communication and education is key to a successful practice. I encourage a clear and specific written document, as well as an instructive in-person conversation between the attorney and the client. This is NOT a matter for an assistant or a receptionist to handle. Just as the initial consultation sets the tone of the attorney-client relationship and allows a critical bond to begin to form, review and acceptance of the various terms of the agreement is equally critical.

An informative agreement can include an addendum that is attached to each individual retainer or engagement letter. It might include information about particular office policies that will affect the client's representation, such as how the office will handle phone calls and emails; in-person appointments; document collection and compilation; post-filing adjudication time; what is not included; and so forth, as it happens to suit your office and case preparation practices. Clarify what the hourly or flat fee covers, what is included, and whether extra charges will be made and at what time intervals.

An addendum also may be created to include descriptions of the forms of relief from removal or benefits available to the client, and the evidence that is necessary to win the case. The client's responsibilities can be written out for future reference by the client. You may choose to also include a client-friendly FAQ designed by your office relating to legal terminology.

Go over each one of these addendum subtopics with the client, and allow the client to ask questions so you can be certain there is a mutual understanding. Space each of the paragraphs 2 lines apart and indent line 1 of each paragraph with a space to be initialed by the client as you go over each section. Not only is it true that knowledge is power, but client knowledge is empowering and clarifies the client's responsibilities, just as it assists the attorney in smoothly performing her duties in preparing the case.

Make a list

How many times have you raced through your to-do list, completed and checked off some items, and still felt as though you had an unproductive day. You got hardly anything done! The list is still there, nagging at you. We easily forget about the work we have completed once it's done. But it's counterproductive to discount our achievements.

Here are 2 Transformation Tips that not only will make you feel more accomplished, but help you get more done:

First, do not make a free-standing to-do list. Instead, transfer your to do list to your calendar and place each item in a time block. To-do list items that are assigned to a specific time will get done because you have actually fit them into your work schedule. You will have a more realistic expectations about what you can accomplish each day/week.

Second, begin keeping an Achievements Journal. I know, I know—it sounds as though I am adding to your list, but I'll follow my own recommendation and assign a time: take 10 minutes at the end of your work day, before you leave your computer or your office. In a small journal or any type of bound notebook with which you are comfortable, or online, write the date, and then write a list of each item you accomplished or achieved that day, e.g., got PD for client X, organized invoices for bookkeeper, conducted 4 consultations, outlined lecture, reviewed legal assistant's draft affidavits.

Whatever it is that you've accomplished, even if the client's case still is open, there are more calls to make, more meetings to attend, and more work remains to be done, give yourself credit, acknowledge what you accomplished and the progress you made. Whenever the inner critic in your head starts complaining that you didn't get anything done, take a look at your journal for perspective. Plus, it's a helpful back-up record of how you've spent your time for planning and billing purposes. ■

Lory D. Rosenberg is a former Member of the Board of Immigration Appeals. She is principal of IDEAS Consultation and Coaching, and will present the first ever conference for women immigration lawyers, in Las Vegas, June 22.

Article

Justice Scalia's Crimmigration Legacy

By Andrea Sáenz

Supreme Court Justice Antonin Scalia's recent passing has spurred a wealth of commentary about his career and legal philosophy, including the recognition that the legendary conservative jurist issued a number of rulings sympathetic to criminal defendants. What have attracted less notice so far are his consistent votes for noncitizens in cases involving the immigration consequences of criminal convictions, or for defendants in cases involving the sentencing consequences of prior convictions. In both types of cases, Scalia was an extremely reliable vote for the "categorical approach," analyzing a person's prior convictions by measuring the minimum conduct covered by that criminal offense and not by a re-litigation of the underlying facts of the prior conviction in a later removal or sentencing hearing.

As a result of his fidelity to strict categorical analysis of prior convictions and a demand that the immigration agencies stay faithful to the text of their own statutes, Scalia voted for the noncitizen over the government in nearly every landmark crimmigration victory in recent history, including in *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Judulang v. Holder*, 132 S. Ct. 476 (2011); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); and *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015). (In an interesting bit of trivia, current D.C. Circuit Judge Sri Srinivasan, a leading candidate for Scalia's seat, was lead counsel on *Carachuri-Rosendo*, giving him some genuine crimmigration chops.)

In *Moncrieffe*, Scalia might have easily joined the dissent of Justices Alito and Thomas, who he often agreed with on other issues, but instead joined in full the majority opinion of Justice Sotomayor, who rejected the classification of a low-level marijuana offense as a drug trafficking "aggravated felony," and along the way noted the difficulties faced by unrepresented detained immigrants facing deportation and the government's repeated overreaching in drug-related deportation cases. Scalia did the same in *Mellouli* last year, joining the majority opinion of Justice Ginsburg that affirmed that federal immigration consequences can only attach to drug offenses that necessarily involve federally controlled substances, rather than joining another Alito-Thomas dissent.

In addition, Scalia voted for the defendant in nearly every major sentencing case dealing with categorical analysis of prior criminal convictions, including *Taylor v. U.S.*, 495 U.S. 575 (1990); *Shepard v. U.S.*, 544 U.S. 13 (2005); *Descamps v. U.S.*, 133 S. Ct. 2276 (2013); and *Johnson v. U.S.*, 135 S. Ct. 2551 (2015). These votes are of equal importance because the Supreme Court, and now most lower courts, use the same categorical approach in both immigration and sentencing cases, such that one or more of these cases are cited in virtually every competent brief on criminal removability issues filed before an immigration judge or appeals court.

Notably, Scalia's majority opinion in *Johnson* last year, finding that part of the Armed Career Criminal Act's definition of a "violent felony" is void for vagueness, has proved to have seismic effects in the immigration world. Three circuit courts in the past four months have ruled that the similarly-worded "crime of violence" definition that is incorporated into multiple grounds of removability is also void for vagueness. *See Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015); *U.S. v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *U.S. v. Gonzales-Longoria*, --- F. 3d ---, 2016 WL 537612 (5th Cir. 2016).

This is not to say that Scalia's legacy on immigration issues generally is entirely positive. His angry and political dissent in *Arizona v. U.S.*, 132 S. Ct. 2492 (2012), is an inescapable part of his legacy, and Scalia will be remembered for oddly taking a shot at the Deferred Action for Childhood Arrivals program that had recently been announced by President Obama, which was unrelated to the Arizona law being challenged. Scalia also voted against the noncitizen in a number of other landmark cases, including *INS v. St. Cyr.*, 533 U.S. 289 (2001); *Demore v. Kim*, 538 U.S. 510 (2003); and *Padilla v. Kentucky*, 559 U.S. 356 (2010). What we can say, though, is that Scalia's legacy is far more complex even on the single issue of immigration than calling him conservative or liberal, pro-immigrant or anti-immigrant. As with many other issues, Scalia had firmly held principles, and would not hesitate to vote for the noncitizen if it meant his views on statutory construction would be upheld.

Scalia's majority opinion in *Clark v. Martinez*, 543 U.S. 371 (2005), is a particularly interesting example of these principles. Although Scalia had voted with the dissent in *Zadvydas v. Davis*, 533 U.S. 678 (2001) four years earlier, arguing that detained noncitizens who could not be deported were not entitled to release, by the time of the *Clark* decision *Zadvydas* was the law of the land. Rather than join Justices Rehnquist and Thomas in dissent, Scalia wrote a straightforward opinion holding that the due process holding of *Zadvydas* must be extended to detained Mariel Cuban men who could not be deported. As Scalia explained, there was no principled way to parse the post-removal order statute, INA § 241, 8 U.S.C. § 1231, to protect against indefinite detention for noncitizens found deportable, like the *Zadvydas* petitioners, but not those who had been found inadmissible and paroled into the country, as had the *Clark* petitioners.

If it seems strange that Scalia's votes were largely far more helpful to immigrants convicted of crimes than those whose are undocumented but lack criminal records – it is only strange to an observer trying to fit an entirely political frame on a justice who had many motivating principles,

with his political inclinations being only one. More broadly, Scalia's voting record is a reminder that good lawyers can win cases presenting criminal immigration issues even when our clients are not the most politically popular. Such cases can and have been won in front of "conservative" justices by presenting the best possible arguments about proper statutory construction and the most efficient and rigorous way for appellate courts to consider the immigration agencies' actions. Whoever replaces Justice Scalia, I hope it will be a judge willing to shut out the cries of partisan politics and vote for noncitizens and criminal defendants where justice requires it. That Justice Scalia often, if not always, did so, is worth remembering as we discuss his legacy. ■

Andrea Sáenz is a Clinical Teaching Fellow in the Immigration Justice Clinic at the Benjamin N. Cardozo School of Law.

Immigration News Flash

Paul W. Schmidt to Retire

Dear Colleagues:

I will retire on June 30, 2016, thus closing out 35 years of Government service, over a 43-year career, the last 21 years with EOIR.

I am extraordinarily grateful for all of the friendship, help, support, and camaraderie from my judicial colleagues, our terrific court clerks, our many amazing JLCs and interns, our great court interpreters, the talented attorneys on both sides, our guards, and all of the other members of our court's "due process team" who have kept me in business over the years.

I am honored to have shared the lives and hopes of so many determined, brave, and inspiring respondents who have trusted me and the other members of our team with their fates. I am gratified to have welcomed many of them into our society where they will continue to contribute to the success and greatness of our nation.

To paraphrase my late BIA colleague, Judge Fred Vacca, it's been a chance to do some good and save some lives with, of course, lots of help from my friends.

For those of you whom I have not had the pleasure of meeting personally, our professional careers are still linked in at least one important way: I am one of the "surviving members" of the "Executive Group" that established EOIR as a "spin-off" from the "Legacy INS" on January 9, 1983. (Among the other, now deceased, members of that Group were INS Commissioner Al Nelson, General Counsel Maurice C. "Iron Mike" Inman, Jr., and BIA Chair Dave Milhollan.) My list of recipients is by no means all-inclusive, so feel free to redistribute this e-mail or share my news with any others who might be interested.

Due process forever!

Thanks again for everything!
Best wishes, always,
Paul

Hon. Paul Wickham Schmidt is an Immigration Judge in Arlington, VA. He has served as Chairman of the BIA, and as Deputy General Counsel of the INS, among other posts. He is also a past chair of the Immigration Law Section. He will be greatly missed. --Editor

PUBLISH IN THE FEDERAL LAWYER!

The Federal Lawyer continues to accept submissions for feature articles of 3000 to 8000 words, as well as letters to the editor, book reviews and commentaries. Guidelines for submission can be found at the fedbar.org website under publications/federal lawyer. Deadlines fall on the first of each month from December 2015 through most of 2016. There is no immigration theme issue in 2016, but a general issue is scheduled for the end of the year, with article submissions due Aug. 1, 2016.

If authors wish to submit an article with the official endorsement of ILS, they can send their draft at least two weeks in advance of the FBA deadline to Dr. Alicia Triche at aliciatricheclc@gmail.com. She will consider whether ILS will endorse the submission and, if so, provide edits and submit on the author's behalf.

Dr. Alicia Triche is Chair of the Section's Publications Committee.

BLIND SPOT continued from page 4

of population makes far less income, and has significantly weaker social indicators, than the population in high-income countries... [and] lives on far less money–and often lacks basic public services–than the population in highly-industrialized countries." Library of Congress, Collections – Policy Statements – Developing Countries 1 (2008), *available at* www.loc.gov/acq/devpol/devcountry.pdf. Countries with a Gross National Income of US$ 11,905 and less are defined as developing. Countries with a Gross National Income of US$ 11,905 and less are defined as developing. *Developing Country Specifications*, World Bank, data.worldbank.org/indicator/NY.GNP.PCAP.CD (last visited Aug. 20, 2015).

[34]Haugen & Boutros at 82.

[35]Lombardo at 78-79.

[36]Leila Chirayath, Caroline Sage & Michael Woolcock, Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems 1 (World Bank 2005), *available at* siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf.

[37]Chirayath, et al., at 8.

[38]Haugen & Boutros at 174.

[39]Haugen & Boutros at 133.

[40]Lombardo at 80-81.

[41]Deepa Narayan, Robert Chambers, Meera K. Shah & Patti Petesch, World Bank, Voices of the Poor: Crying Out for Change 126 (Oxford University Press 2000), available at http://siteresources.worldbank.org/INTPOVERTY/Resources/335642-1124115102975/1555199-11241152013887/cry.pdf.

[42]Narayan, et al., at 126.

[43]Deepa Narayan and Patti Petesch, World Bank, Voices of the Poor: From Many Lands 471 (Oxford University Press 2002), *available at* siteresources.worldbank.org/INTPOVERTY/Resources/335642-1124115102975/1555199-1124115210798/full.pdf.

[44]Haugen & Boutros at 88. The vast majority of torture victims in our world today are common, everyday poor people in the developing world – and most of the torture takes place in pre-trial detention. *See* Alfred de Zayas, Human Rights and Indefinite Detention, 87 Int'l Rev. of the Red Cross, March 2005; Open Society Justice Initiative, Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk (Open Society Initiative 2011), *available at* www.unhcr.org/refworld/category,COI,OSI,,4e324fa22,0.html..

[45]Haugen & Boutros at 92.

[46]Haugen & Boutros at 182; S.E. Hendrix, *Innovation in Criminal Procedure in Latin America: Guatemala's Conversion to the Adversarial System*, 5 SW J.L. & Trade Am. 381 (1998).

[47]Haugen & Boutros at 114.

[48]Haugen & Boutros at 111.

[49]Martin, et al., at 8-9.

[50]Martin, et al., at 8-9.

[51]Martin, et al., at 5.

[52]Martin, et al., at 5; *see* Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. Rev. 999, 1011–12 (2007) (discussing the massive increase of limited English proficient immigrants among the clients served by poverty lawyers).

53 Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 Cardozo L. Rev. 1751, 1804 (2013).

[54]Chirayath, et al., at 5-6.

[55]Carnegie at 1.

[56]Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. Rev. 1417, 1441 (2011).

[57]Robert C. Davis and Edna Erez, *Immigrant Populations as Victims: Toward a Multicultural Criminal Justice System*, United States Department of Justice National Institute of Justice Research Brief, May 1998, at 4, *available at* www.ncdsv.org/images/NIJ_ImmigrantPopulationsAsVictimsTowardAmulticulturalCJsystem_5-1998.pdf.

[58]Katherine J. Rosich, Race, Ethnicity, and the Criminal Justice System 14 (American Sociological Association 2007), *available at* www.asanet.org/images/press/docs/pdf/ASARaceCrime.pdp.

[59]Rosich at 21.

[60]Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 Colum. L. Rev. 1655, 1660, 1704 (2010).

[61]Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. Rev. 1117, 1126-27 (2008).

[62]Cade at 1751.

[63]Cade at 1755.

[64]Cade at 1776.

[65]Cade at 1777.; *see* Human Rights Watch, The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City 1 (2010), *available at* www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf.

[66]Cade at 1779.

[67]Cade at 1780. Throughout the country, under-resourced public defender offices tackle overwhelming caseloads. Although national criminal justice standards recommend that defenders handle no more than 400 misdemeanor cases per year, actual representation numbers throughout the country far exceed that cap. Defenders in Chicago, Atlanta, Miami, Dallas, Arizona, Tennessee, and Utah carry misdemeanor caseloads numbering in the thousands 1786 See Robert C. Boruchowitz Et Al., Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts 11, 21 (2009), *available at* www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L.J. 1031, 1081–82 (2006) (explaining that an attorney with a large misdemeanor caseload "simply does not have the time or the resources to investigate, prepare, or communicate adequately with the client so that the client can make an informed decision and the attorney can advocate zealously for his client's best interests").

[68]Cade at 1804.

[69]Cade at 1805-06; *See* Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 Harv. J.L. & Pub. Pol'y 19, 22–26 (2003). 310 *See, e.g.,* Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 Mich. L. Rev. 1448, 1451 (1990) (reviewing Jeffrie G. Murphy and Jean Hampton, Forgiveness and Mercy (Cambridge University Press 1988)) ("[J]ust deserts is a necessary condition of punishment.").

[70]Cade at 1807; See *Wong Wing v. United States*, 163 U.S. 228 (1896) (holding that the government may not afford fewer criminal protections on the basis of alienage or race).

[71]Jane Harris Aiken, *Striving to Teach Justice, Fairness and Morality*, 4 Clinical L. Rev. 1, 11 (1997).

[72]Aiken at 45-46.

[73]Stephen Ellmann, *Empathy and Approval*, 43 Hastings L.J. 991 (1992); *see* David A. Binder, Paul Bergman & Susan C. Price, Lawyers as Counselors: A Client-Centered Approach 40, 53 (West 1991).

[74]Am. Bar Ass'n at 2.

[75]Culturally Competent Court at 7.

[76]Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 Wash. & Lee L. Rev. 961, 963 (2013).

[77]Bowers, Punishing the Innocent at 978.

[78]Bowers, Punishing the Innocent at 988.

[79]Rosich at 2.

[80]Cade at 1814.

[81]Cade at 1814.

[82]Cade at 1815.

[83]Cade at 1815.

[84]Shusta, et al., at 17.

[85]Shusta, et al., at 18.

[86]Am. Bar Ass'n at 2

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INS Monthly Rev. (Dep't of Justice, Washington, D.C.), Nov. 1943, at 3, *available at* www.uscis.gov/history-and-genealogy/historical-library/our-collection/periodicals (further link to U.S. Citizenship and Immigration Services History Office and Library site).

[19]10 Fed. Reg. 8096 (July 3, 1945); INS Monthly Rev., Aug. 1945, at 191; *see also* Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 San Diego L. Rev. 29, 35 (1977).

[20]12 Fed. Reg. 4781 (July 18, 1947); INS Monthly Review, Aug. 1947, at 17.

[21]Martha W. Fagan, *Paying Tribute to a Pioneering Spirit of the Law*, Like the Dew: A Journal of Southern Culture & Politics (June 13, 2009), *available at* likethedew.com/2009/06/13/paying-tribute-to-a-pioneering-spirit-of-the-law/#.Vt8wHDb2b3g.

[22]*Id.*

[23]*Id.*

[24]*Id.*

[25]Conversation with Paul W. Schmidt, former staff attorney and former Chairman of the Board of Immigration Appeals (Jan. 5, 2016).

[26]*The Founders Award*, American Immigration Lawyers Assoc., *available at* www.aila.org/about/annual-awards/the-founders (last visited Feb. 23, 2016).

[27]Ch. 477, 66 Stat. 163 (June 27, 1952).

[28]*Deportation and Due Process*, 5 Stan. L. Rev. 722, 730–31 (1953).

[29]Griffenhagen & Assoc., Report on a Management Study of the Board of Immigration Appeals, at 2 (Dec. 1952) (on file with author); Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 San Diego L. Rev. 29, 35 (1977).

[30]Griffenhagen & Assoc., Report on a Management Study of the Board of Immigration Appeals, at 3 (Dec. 1952) (on file with author).

[31]*Role of the Service Representative before the Board of Immigration Appeals*, I&N Reporter, July 1957, at 2.

[32]Office of Planning, Analysis, & Tech., EOIR, FY 2014 Statistics Yearbook Q-1 (2015).

[33]Herman Branse, *Role of the Service Representative Before the Board of Immigration Appeals*, I&N Reporter (Dep't of Justice, Washington, D.C.), July 1957, at 2, *available at* www.uscis.gov/history-and-genealogy/historical-library/our-collection/periodicals (further link to U.S. Citizenship and Immigration Services History Office and Library site).

[34]Terry Nagel, *U.S. Court of Appeals Judge Bea to Focus on Religion in Constitution Day Lecture on Monday* (Sept. 12, 2014), law.stanford.edu/press/u-s-court-of-appeals-judge-carlos-bea-to-focus-on-religion-in-constitution-day-lecture-on-monday/

[35]*Walter Lashes Immigration Appeals Head*, Jamestown Post J., June 7, 1955.

[36]*Id.*

[37]*Id.*

[38]*Id.*

[39]*Maurice A. Roberts, 1910-2001*, AILA Doc. No. 01110531 (Nov. 5, 2001), www.aila.org/about/announcements/in-memoriam/maurice-a-roberts.

[40]Hon. Edward M. Kennedy, *"Mr. Immigration": Maurice Roberts*, 5 Geo. Immigr. L.J. 199, 199–200 (1991).

[41]*Matter of Jolley*, 13 I&N Dec. at 545.

[42]*Draft Evader Gets Deportation Hearing*, Chi. Trib., Apr. 14, 1969, at 9.

[43]*Jolley v. INS*, 441 F.2d 1245 (5th Cir. 1971).

[44]Joan Zyda, *More Americans Shed Citizenship*, Sarasota Herald-Trib., Feb. 10, 1974; *see also Move to Escape Draft May Cost Him a Home*, Ottawa Citizen, May 9, 1971

[45]*Thomas Glenn Jolley Obituary*, Citizen-Times (Asheville, N.C.), Mar. 22, 2014, 2014 WLNR 7813028.

[46]Hon. Paul Wickham Schmidt, *Lauri Steven Filppu: A Recollection with Appreciation*, The Green Card (Fed. Bar Ass'n, VA), Feb. 2012, at 2.

[47]David Margolick, *Seeing F.B.I. Files on Lennon: A Hard Day's Night*, N.Y. Times, Sept. 6, 1991.

[48]*Id.*

[49]Bruce C. Pilato, *All You Need Is Litigation, The Beatles Play to Win*, 76-JUL A.B.A. J. 55, July 1990, at 55, 59.

[50]Jon Wiener, *Help from his friends*, L.A. Times, Oct. 8, 2010, 2010 WLNR 20105435. As an editorial aside, one is left to wonder what impact the letters from Dylan and other artists, e.g., beat poet Gregory Corso ("Artisans are universal and megagalactic entities; ergo, let my people go – stay – etc.") had on Department of Justice officials who felt the need to attach the descriptor "singing group" to "Beatles," and to include with another dispatch a photo of Lennon (one of the most recognizable figures of the time), which in fact was not a photo of Lennon, but of a New York City street busker who, aside from his round, wire-framed glasses and hair, did not bear much resemblance to Lennon.

[51]*Matter of Lennon*, 15 I&N Dec. at 23-27. While it may be well known that Lennon was represented by Leon Wildes, the INS was represented in the case by the late Vincent Schiano, whose other claim to immigration court fame is as the co-creator (with the first Chief Immigration Judge, William Fliegelman) of the Master Calendar hearing (a fact that the author was fond of announcing whenever Schiano appeared before him at a Master Calendar hearing).

[52]Judith Martin, *Lennon: 'Get Back to Where . . . ,'* Wash. Post, July 18, 1973, at B3. The author, Judith Martin, later created and wrote the "Miss Manners" column on etiquette.

[53]*Lennon v. INS*, 527 F.2d 187, 192–95 (2d Cir. 1975).

[54]*See* Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 Cath. U. L. Rev. 923, 937 n.86 (2006).

[55]While a 2008 Department of Justice report stated that Holtzman could not remember the name of the INS official who alerted her, the report stated that it might have been Vincent Schiano and INS investigator Tony De Vito. Judy Feigin, Dep't of Justice, Crim. Div., *The Office of Special Investigations: Striving for Accountability in the Aftermath of the Holocaust* 15 n.7 (Mark M. Richard ed., Dec. 2008) [hereinafter "OSI Report"], *available at* www.justice.gov/sites/default/files/criminal/legacy/2011/03/14/12-2008osu-accountability.pdf.

[56]Elizabeth Holtzman, *Who Said it Would be Easy?* 90–92 (Arcade Publ'g 1996). The author also moderated a panel on Nazi deportation issues at the 2002 EOIR Law Conference, on which Ms. Holtzman and Eli Rosenbaum, director of the Department of Justice's Office of Special Investigations, were speakers.

[57]Eric Lichtblau, *Nazis Were Given 'Safe Haven' in U.S., Report Says*, N.Y. Times, Nov. 13, 2010, *available at* www.nytimes.com/2010/11/14/us/14nazis.html?_r=0; OSI Report, *supra* note 55, at 330; Holtzman, *supra* note 60, at 94.

[58]*Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985).

[59]*United States v. Fedorenko*, 597 F.2d 946 (5th Cir. 1979).

[60]*Fedorenko v. United States*, 449 U.S. 490 (1981).

[61]OSI Report, *supra* note 55, at 59.

[62]*Linnas v. INS*, 790 F.2d 1024 (2d Cir. 1986).

[63]OSI Report, *supra* note 55, at 274.

[64]OSI Report, *supra* note 55, at 285–87.

[65]60 Fed. Reg. 29,469 (June 5, 1995).

[66]*See, e.g.*, Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. Rev. 413, 448 n.156 (1993).

[67]The author was made aware of the international reach of the decision while attending a January 1997 conference of the International Association of Refugee Law Judges in Nijmegen, the Netherlands.

[68]Patrick J. McDonnell, *Man Ruled Too Americanized to Deport*, L.A. Times, July 12, 1996, at 1 (quoting Ira Mehlman, Federation for American Immigration Reform); *see also* James P. Pinkerton, *Terrorism Demographics*, Balt. Sun, Aug. 13, 1997.

[69]Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

[70]*See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878 (Aug. 26, 2002); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); 8 C.F.R. § 1003.1(d)(3).

[71]71 Fed. Reg. 70,855 (Dec. 7, 2006) (interim rule amending 8 C.F.R. § 1003.1(a)(1)); 73 Fed. Reg. 33,875 (June 16, 2008) (final rule).

[72]8 C.F.R. § 1003.1(a)(1); 80 Fed. Reg. 31,461 (June 3, 2015).

The Green Card

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