**EXISTENTIALISM AND THE MEANING OF LIFE IN THE U.S. IMMIGRATION COURT: FROM LAWRENCE TO THE WORLD BEYOND**

**By**

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**I. INTRODUCTION**

**Good evening. Thank you so much for inviting me. Cathy and I are particularly happy to be back at our alma mater. Some things, like the world-famous Viking Room, which opened while I was here, remain largely the same. Of course, some things have changed in the intervening nearly five decades since we graduated.**

**For example, the food service. Gone are the days when our fraternity house kitchen was shut down by the Appleton Health Department after our esteemed “student cook,” known as “The Owl” painted it purple and dayglow orange. Incidentally, “The Owl” went on to UW Law and became a formidable trial lawyer, noted equestrian, and author of action thrillers featuring a man and his trusty horse. But, however much some things have changed, the feel of being back in the “community of scholars” is still much the same. If you see us walking across campus with Luna, our dog, please stop to say “hi.”**

**I am indebted to Scarff Family and your amazing Scarff Professor Jason Brozek for giving me this opportunity. Thanks also to the wonderful Sharon Marks for her flawless handling of all the logistics. I also appreciate your outstanding President Mark Burstein (“Burr-steen”) for the high profile he has given to immigration and other social justice issues during his tenure.**

**In that respect, September 13, 2018 was a highly significant day in Lawrence history. For, on that day President Burstein delivered his Commencement address posing the question “Can We Stand With The Statue of Liberty?” This wasn’t your usual “namby-pamby “welcome to college and life in the big time” sleeper. By comparison, one of the introductory speeches at another institution attended by one of our children focused on the protocols for “stomach pumping” in the emergency detoxification ward of the local hospital. Important information to be sure, but *not* very inspirational or reassuring.**

**President Burstein made an *urgent* call to *value* knowledge and learning, *improve* our national dialogue, *recognize* our undeniable immigrant heritage and culture, and *use* the learning and skills developed at Lawrence and other great institutions to *create* a better and more socially just future for all of mankind. Never, in the nearly 50 years since I left Lawrence have I seen those basic, common-sense concepts and universal values of Western liberal democracy under greater attack and daily ridicule by those for whom facts and human decency *simply don’t matter*!**

**Now, this is when I used to give my comprehensive disclaimer providing “plausible deniability” for everyone in the Immigration Court System if I happened to say anything inconvenient or controversial – in other words, if I spoke too much truth. But, now that I’m retired, we can skip that part.**

**Nevertheless, I do want to hold Lawrence, the Scarff Family, Professor Brozek, President Burstein, the faculty, and anyone else of any importance harmless for my remarks, for which I take full responsibility. No party line, no bureaucratic doublespeak, no BS. Just the truth, the whole truth, and nothing but the truth, of course as I see it, which isn’t necessarily the way everyone sees it. But, “different strokes” is, and always has been, an integral part of the “liberal arts experience” here at Lawrence.**

**Additionally, because *today* is *Thursday*, and *you* are such a great audience, I’m giving you my *absolute, unconditional, money-back guarantee* that *this* talk will be *completely free* from computer-generated slides, power points, or any other type of distracting modern technology that might interfere with your total comprehension or listening enjoyment. In other words, *I* am the “power point” of this presentation.**

**My speech is entitled: “Existentialism and the Meaning of Life in the U.S. Immigration Court: From Lawrence to the World Beyond.” Some have asked whether I will be talking about Sartre, Camus, Thoreau, and other existential philosophers. No; One thing I’ve learned in life is that it’s always best to stick with what you know.**

**But, I did have a running line of jokes based on Samuel Beckett’s classic *Waiting for Godot* that ran in Immigration Court while I was waiting for some habitually late attorneys. You really didn’t want to be on my “Godot list.“ And, sadly, today’s U.S. Immigration Courtrooms resemble a repertory company playing endless performances in the “Theater of The Absurd.”**

**I will start by introducing myself to you. Then, I will “briefly” address five things: 1) the U.S. Immigration Court System, which I helped establish in 1983 and where I spent the last 21 years of my career as a judge at both the appellate and trial levels; 2) the judge’s role; 3) my judicial philosophy; 4) what needs to be done to reclaim the now sadly lost “due process vision” of the Immigration Courts, and 5) how *you* can get involved. That should leave time for questions.**

**Folks, unknown to most of you in this room there is an existential crisis going on in our U.S. Immigration Courts, one of America’s largest, most important, little known, and least understood court systems. It threatens the very foundations of our legal system, our Constitution, and our republic. In the words of country singing superstar Toby Keith, tonight “It’s me, baby, with your wake-up call!”**

**II. CAREER SUMMARY**

**I graduated from Lawrence in 1970 with a history major. Most important, Lawrence is where I met my wife Cathy and we began our partnership that has now lasted nearly 50 years. Our daughter, Anna, is a Lawrence “double degree” graduate. She also met her husband Daniel while here.**

**Lawrence taught the humane practical values of fairness, scholarship, timeliness, respect, and teamwork which have guided me in life. Lawrence emphasized critical thinking -- how to examine a problem from all angles and to appreciate differing perspectives.**

**I was introduced to informed dialogue and spirited debate as keys to problem solving, techniques I have continued to use. I also learned how to organize and write clearly and persuasively, skills I have used in all phases of my life.**

**I found that my broad liberal arts education, ability to deal with inevitable ups and downs, including, of course, learning from mistakes and failures, and the intensive writing and intellectual dialogue involved were the *best possible preparation for all that followed*.**

**The history, religion, German, art history, literature, anthropology, and science courses that I took taught me the importance of “global thinking” – considering everything in context and incorporating political, philosophical, social, demographic, and religious developments into an understanding of a particular past event in a foreign country. This was extremely valuable and relevant because many of my most difficult cases involved the validity of claims of persecution based on politics, race, religion, or membership in a particular social group.**

**Indeed, probably the most notable case decision I wrote, the Board of Immigration Appeals precedent setting decision in *Matter of Kasinga* dealt with the controversial and important issue of Female Genital Mutilation or “FGM.” It involved more details about human biology than I wanted to know, as well as history, language, demography, geography, anthropology, religion, logic, journalism, and rhetoric, to name just some “liberal artsy” areas that came into play in reaching and drafting that decision.**

**The small, liberal arts environment, and particularly my two semesters with the group at the overseas campus then in Boennigheim, Germany, demonstrated the overriding importance of dealing with people on a sensitive, individualized basis. That’s the way the professors treated us at Lawrence, particularly Boennigheim Semester Professors Charles Breunig (my advisor), Jack Stanley, and Dorrit Friedlander. I often thought of my courtroom in Arlington, Virginia as an extension of the liberal arts classroom and the positive, yet challenging, and occasionally frustrating, intellectual atmosphere I first experienced at Lawrence. I always have been grateful to Lawrence for preparing me so well for life beyond the campus.**

**I then attended the University of Wisconsin School of Law in Madison, Wisconsin, graduating in 1973. Go Badgers! I discovered that the intensive research, writing, and presentation skills that I learned at Lawrence spelled success in law school.**

**I began my legal career in 1973 as an Attorney Advisor at the Board of Immigration Appeals (“BIA”) at the U.S. Department of Justice (“DOJ”) under the Attorney General’s Honors Program. Admittedly, however, the BIA’s Executive Assistant culled my resume from the “Honors Program reject pile.” But, what caught his eye was my extensive research and writing experience – I had written a law review article involving both academic research and “field interviews” – a very “Lawrence” thing -- containing hundreds of footnotes and citations.**

**At that time, before the creation of the Executive Office for Immigration Review – affectionately known as “EOIR” for you *Winnie the Pooh* fans -- the Board had only five members and nine staff attorneys, as compared to today’s “cast of thousands.”**

**Among other things, I worked on the famous, or infamous, John Lennon case. The Board’s decision deporting Lennon eventually was reversed by the Second Circuit in an opinion by the late Chief Judge Irving Kaufman.[[1]](#footnote-2) Lennon got to stay in Americas where, sadly, he was gunned down on the streets of New York several years later. As an interesting historical footnote, that case was argued in the Circuit Court by then INS Special Assistant U.S. Attorney Mary Maguire Dunne, who went on to become a distinguished Member of the BIA and served as one of my Vice Chairs during my tenure as Chairman.**

**I also shared an office with my good friend, the late Lauri Steven Filppu, who later became a Deputy Director of the Office of Immigration Litigation (“OIL”) in the DOJ’s Civil Division and subsequently served with me on the BIA. The Chairman of the BIA at that time was the legendary “immigration guru” Maurice A. “Maury” Roberts, who could easily have been a Lawrence professor or a law professor.**

**Chairman Roberts took Lauri and me under this wing, He shared with us his love of immigration law, his focus on sound scholarship, his affinity for clear, effective legal writing, and his humane sense of fairness and justice for the individuals coming before the BIA.**

**In 1976, I moved to the Office of General Counsel at the “Legacy” Immigration and Naturalization Service (“INS”). There, I worked for another legendary figure in immigration law, then General Counsel Sam Bernsen. Sam was a naturalized citizen who started his career as a 17-year-old messenger at Ellis Island and worked his way to the top of the Civil Service ranks. Perhaps not incidentally, he was also a good friend of Chairman Roberts.**

**At that time, the Office of General Counsel was very small, with a staff of only three attorneys in addition to the General Counsel and his Deputy, another mentor and immigration guru, Ralph Farb. At one time, all three of us on the staff sat in the same office and had to share two phones – long before the days of cellphones! In 1978, Ralph was appointed to the BIA, and I succeeded him as Deputy General Counsel. I also served as the Acting General Counsel for several very lengthy periods in both the Carter and Reagan Administrations.**

**Not long after I arrived, the General Counsel position became political. The incoming Administration encouraged Sam to retire, and he went on to become a name and Managing Partner of the Washington, D.C. office of the powerhouse immigration boutique Fragomen, Del Rey, and Bernsen. He was replaced by my good friend and colleague David Crosland, now an Immigration Judge in Baltimore, who selected me as his Deputy. Dave was also the Acting Commissioner of Immigration during the second half of the Carter Administration, one of the two periods when I was the Acting General Counsel.**

**It was during this period that I first met and worked with two brilliant young lawyers, Alex Aleinikoff, who was then at the Office of Legal Counsel at the DOJ, and David Martin, who was serving as Special Assistant to the late Patt Derian, who was then the Secretary of Human Rights and Humanitarian Affairs at the Department of State. We worked together on the enactment of the Refugee Act of 1980.**

**At the time, we thought we had “nailed it.” In retrospect, perhaps if we had done a better job, we would have avoided some of the problems that followed. David and Alex went on to become famous professors, scholars, casebook authors, and distinguished Government Senior Executives. Alex later became Dean of Georgetown Law and served as the Deputy U.N. High Commissioner for Refugees, based in Geneva.**

**The third General Counsel that I served under was one of my most “unforgettable characters:” the late, great Maurice C. “Mike” Inman, Jr. He was known, not *always* affectionately, as “Iron Mike.”**

**His management style was something of a cross between the famous coach of the Green Bay Packers, Vince Lombardi, and the fictional Mafia chieftain, Don Corleone. As one of my colleagues said “Mike consistently and unreasonably demanded that we do the impossible, and most of the time we succeeded.” Although we were totally different personalities, Mike and I made a good team, and we accomplished amazing things. It was more or less a “good cop, bad cop” routine. I’ll let you guess who played which role.**

**Among other things, I worked on the Iranian Hostage Crisis, the Cuban Boatlift, the Refugee Act of 1980, the Immigration Reform and Control Act of 1986 (“IRCA”), the creation of the Office of Immigration Litigation (“OIL”), and establishing what has evolved into the modern Chief Counsel system at Department of Homeland Security (“DHS”).**

**I also worked on the creation of EOIR, which combined the Immigration Courts, which had previously been part of the INS, with the BIA to improve judicial independence. Interestingly, and perhaps ironically, the leadership and impetus for getting the Immigration Judges into a separate organization came from Iron Mike and the late Al Nelson, who was then the Commissioner of Immigration. Tough prosecutors by position and litigators by trade, *they* saw the inherent conflicts and overall undesirability, from a due process and credibility standpoint, of having immigration enforcement and impartial court adjudication in the same division. I find it troubling that officials at today’s DOJ aren’t able to understand and act appropriately on the glaring conflict of interest currently staring them in their collective faces.**

**By the time I left in 1987, the General Counsel’s Office, largely as a result of the enactment of IRCA and new employer sanctions provisions, had dozens of attorneys, organized into divisions, and approximately 600 attorneys in the field program, the vast majority of whom had been hired during my tenure.**

**In 1987, I left INS and joined Jones Day’s DC Office, a job that I got largely because of my wife Cathy and her “old girl network.” One thing I knew in law school was that I never wanted to work in so-called “Big Law.“ But, here I was working for one of the world’s largest law firms, with thousands of lawyers and hundreds of partners around the globe.**

**I became a partner specializing in business immigration, multinational executives, and religious workers. Among my most interesting clients, I represented the Christian Science Church and at one point could “pinpoint quote” its founder Mary Baker Eddy on almost any topic**

**Among my major legislative projects on behalf of our clients were the special religious worker provisions added to the law by the Immigration Act of 1990 and the “Special Immigrant Juvenile” provisions of the INA which are very actively used today to assist unaccompanied minors who come to our borders to obtain legal status.**

**Following my time at Jones Day, I succeeded my former boss and mentor Sam Bernsen as the Managing Partner of the DC Office of Fragomen, Del Rey & Bernsen, the leading national immigration boutique, where I continued to concentrate on business immigration. Immigration is a small community; the old adage proved true: I was very nice to everyone on my way up the ladder because I kept running into the same folks on the way down.**

**While at Fragomen, I also assisted the American Immigration Lawyers Association (“AILA”) on a number of projects and was an adviser to the Lawyers’ Committee, now known as Human Rights First.**

**In 1995, then Attorney General Janet Reno appointed me Chairman of the BIA. Not surprisingly, Janet Reno, who died in 2016, was my favorite among all of the Attorneys General I worked under. I felt that she supported me personally, and she favored the concept of an independent judiciary, even though she didn’t always agree with our decisions and vice versa.**

**She was the *only* Attorney General who consistently came to our Investitures and Immigration Judge Conferences *in person* and mixed and mingled with the group. She was also kind to our clerical staff and invited them to her office to meet personally with her. She had a saying “equal justice for all” that she worked into almost all of her speeches, and which I found quite inspirational. She was also hands down the funniest former Attorney General to appear on “Saturday Night Live,” doing her famous “Janet Reno Dance Party” routine with Will Farrell immediately following the end of her lengthy tenure at the DOJ. I can’t quite imagine former Attorney General Jeff Sessions or current Attorney General Bill Barr in that role.**

**Among other things, I oversaw an expansion of the Board from the historical five members to more than 20 members, a more open selection system that gave some outside experts a chance to serve as appellate judges on the Board, the creation of a supervisory structure for the expanding staff, the establishment of a unified Clerk’s Office to process appeals, implementation of a true judicial format for published opinions, institution of bar coding for the tens of thousands of files, the establishment of a pro bono program to assist unrepresented respondents on appeal, the founding of the Virtual Law Library, electronic en banc voting and e-distribution of decisions to Immigration Judges, and the publication of the first *BIA Practice Manual*, which actually won a “Plain Language Award” from then Vice President Gore.**

**I also wrote the majority opinion in my favorite case, *Matter of Kasinga*, establishing for the first time that the practice of female genital mutilation (“FGM”) is “persecution” for asylum purposes.[[2]](#footnote-3) We’ve had a seminar on that topic this week. As another historical footnote, the “losing” attorney in that case was none other than my old friend, then INS General Counsel David A. Martin, who personally argued before the Board.**

**In reality, however, by nominally “losing” the case, David actually *won* the war for both of us, and more important, for the cause of suffering women throughout the world. We really were on the same side in *Kasinga*. Without David’s help, who knows if I would have been able to get an almost-united Board to make such a strong statement on protection of vulnerable women.**

**During my tenure as Chairman, then Chief Immigration Judge (now BIA Member) Michael J. Creppy and I were founding members of the International Association of Refugee and Migration Judges (“IARMJ”). This organization, today headquartered in The Hague, promotes open dialogue and exchange of information among judges from many different countries adjudicating claims under the Geneva Convention on Refugees.**

**In 2001, at the beginning of the Bush Administration, I stepped down as BIA Chairman, but remained as a Board Member until April 2003. At that time, then Attorney General John Ashcroft, who was not a fan of my opinions, particularly my dissenting opinions, invited me to vacate the Board and finish my career at the Arlington Immigration Court, where I remained until my retirement on June 30, 2016.**

**So, I’m one of the few ever to become an Immigration Judge without applying for the job. Or, maybe my opinions, particularly my dissents, were my application and I just didn’t recognize it at the time. But, it turned out to be a great fit, and I truly enjoyed my time at the Arlington Immigration Court.**

**I also taught Immigration Law at George Mason School of Law in 1989 and “Refugee Law and Policy” at Georgetown Law from 2012 through 2014. After leaving the bench, I resumed my Adjunct position with Georgetown Law for a “compressed summer course” in “Immigration Law & Policy.”**

**Please keep in mind that if *everyone* agreed with me, my career wouldn’t have turned out the way it did. On the other hand, if *nobody* agreed with me, my career wouldn’t have turned out the way it did. In bureaucratic terms, I was a “survivor.” I have also, at some point in my career, probably been on *both* sides of many of the important issues in U.S. immigration law.**

**One of the challenges that lawyers face in Immigration Court is that different judges have distinct styles, philosophies, and preferences. I always felt that although we might differ in personality and approach, at least in Arlington we all *shared* a commitment to achieving fairness and justice.**

**As a sitting judge, I encouraged meticulous preparation and advance consultation with the DHS Assistant Chief Counsel to stipulate or otherwise narrow issues. In Arlington, for example, even with a new high of approximately 20 Immigration Judges, the average docket is still well over 1,000 cases per judge. There currently are more than 30,000 pending cases at the Arlington Immigration Court. Because of this overwhelming workload, efficiency and focusing on the disputed issues in court are particularly critical.**

**I also urged everyone appearing in court to speak up and *project her or his voice*. Immigration courtrooms, in addition to being cramped, tend to be “dead” in acoustic terms. Mumbling or speaking into notes results in constant requests for repetition, which in turn detracts from the coherency of the presentation, particularly when working in foreign languages through a court interpreter. For those of you studying foreign languages interpretation is certainly one of the fastest growing and most important career fields driven by immigration.**

**III. THE DUE PROCESS VISION**

**Now, let’s move on to the other topics: First, vision. The “EOIR Vision” was: “Through teamwork and innovation, be the world’s best administrative tribunals, guaranteeing fairness and due process for all.” In one of my prior incarnations, I was part of the group that developed that vision statement. Perhaps not surprisingly given the timing, that vision echoed the late Janet Reno’s “equal justice for all” theme.**

**Sadly, the Immigration Court System now is moving *further* away from that due process vision. Instead, years of neglect, misunderstanding, mismanagement, and misguided political priorities imposed by the U.S. Department of Justice (“DOJ”) have created judicial chaos with an expanding backlog now exceeding an astounding one million cases and, perhaps most disturbingly, no clear plan for resolving them in the foreseeable future. There are now more pending cases in Immigration Court than in the entire U.S. District Court System, including both Civil and Criminal dockets, with fewer U.S. Immigration Judges currently on board than U.S. District Judges.**

**This Administration has added hundreds of thousands of new cases to the Immigration Court docket, again without any transparent plan for completing the already pending cases consistent with due process and fairness. Indeed, over the past several years, the addition of *more judges* has actually meant *more backlog*. In fact, notably, and most troubling, concern for fairness and due process in the immigration hearing process has not appeared to be a priority or a major objective in the Administration’s many pronouncements on immigration.**

**Nobody has been hit harder by this preventable disaster than asylum seekers, particularly scared women, children, and families fleeing for their lives from the Northern Triangle of Central America.**

**In Immigration Court, notwithstanding the life or death issues at stake, unlike criminal court there is *no right to an appointed lawyer*. Individuals who can’t afford a lawyer must rely on practicing lawyers who donate their time or on nonprofit community organizations to find free or low-cost legal representation. Although the Government stubbornly resists the notion that all asylum seekers should be represented, studies show that represented asylum seekers are four to five times more likely to succeed than those who must represent themselves. For recently arrived women with children, the success differential can be an astounding fourteen times![[3]](#footnote-4)**

**At one point, an Assistant Chief Judge for Training astoundingly claimed that he could teach immigration law to unrepresented toddlers appearing in Immigration Court. Issues concerning representation of so-called “vulnerable populations” continue to challenge the Immigration Court System. Even with law school clinics and Non-Governmental Organizations pitching in, there simply are not enough free or low-cost lawyers available to handle the overwhelming need. In fact, as far back as 2015 then EOIR Director Juan Osuna declared in a TV interview that the system was *“broken.”[[4]](#footnote-5)***

**Notwithstanding the admitted problems, I still believe in the EOIR vision. Later, I’m going to share with you some of my ideas for reclaiming this noble due process vision.**

**IV. THE ROLE OF THE IMMIGRATON JUDGE**

**Changing subjects, to the role of the Immigration Judge: What’s it like to be an Immigration Judge? As an Immigration Judge, I was an administrative judge. I was *not* part of the Judicial Branch established under Article III of the Constitution. The Attorney General, part of the Executive Branch, appointed me, and my authority was subject to her regulations.**

**We should all be concerned that the U.S. Immigration Court system is now *totally* under the control of Attorney General Bill Barr, who shares many of the hard-line enforcement views of his predecessor, Jeff Sessions. Sessions was the architect of the ill-advised “zero tolerance policy” at the border that not only failed to stem the tide of asylum seekers, but also resulted in the illegal and inhumane intentional separation of families as a so-called “deterrent.”**

**Perhaps ironically, the late Judge Terence T. Evans of the Seventh Circuit Court of Appeals offered one of the best descriptions of what it’s like to be an Immigration Judge. Judge Evans was not one of us, but saw plenty of our work during his lifetime. Judge Evans said:**

**Because 100 percent of asylum petitioners want to stay in this country, but less than 100 percent are entitled to asylum, an immigration judge must be alert to the fact that some petitioners will embellish their claims to increase their chances of success. On the other hand, an immigration judge must be sensitive to the suffering and fears of petitioners who are genuinely entitled to asylum in this country. A healthy balance of sympathy and skepticism is a job requirement for a good immigration judge. Attaining that balance is what makes the job of an immigration judge, in my view, excruciatingly difficult**.[[5]](#footnote-6)

**My Arlington Immigration Court colleague Judge Thomas G. Snow also gives a very moving and accurate glimpse of an Immigration Judge’s life in a 2016 article in *USA Today*:**

**Immigration judges make these decisions alone. Many are made following distraught or shame-filled testimony covering almost unimaginable acts of inhumanity. And we make them several times a day, day after day, year after year.**

**We take every decision we make very seriously. We do our best to be fair to every person who comes before us. We judge each case on its own merits, no matter how many times we’ve seen similar fact patterns before.**

**We are not policymakers. We are not legislators. We are judges. Although we are employees of the U.S. Department of Justice who act under the delegated authority of the attorney general, no one tells us how to decide a case. I have been an immigration judge for more than 11 years, and nobody has ever tried to influence a single one of my thousands of decisions**

**And finally, because we are judges, we do our best to follow the law and apply it impartially to the people who appear before us. I know I do so, even when it breaks my heart.[[6]](#footnote-7)**

**My good friend and colleague, Judge Dana Leigh Marks of the San Francisco Immigration Court, who is the President of the National Association of Immigration Judges, offers a somewhat pithier description: “[I]mmigration judges often feel asylum hearings are ‘like holding death penalty cases in traffic court.’”[[7]](#footnote-8)**

**Another historical footnote: as a young lawyer, then known as Dana Marks Keener, Judge Marks successfully argued the landmark Supreme Court case *INS v. Cardoza Fonseca*, establishing the generous “well-founded fear” standard for asylum, while I helped the Solicitor General’s office develop the unsuccessful opposing arguments for INS.[[8]](#footnote-9) Therefore, I sometimes refer to Judge Marks as one of the “founding mothers” of U.S. asylum law.**

**From *my* perspective, as an Immigration Judge I was half scholar, half performing artist. An Immigration Judge is *always* on public display, particularly in this “age of the Internet.” His or her words, actions, attitudes, and even body language, send powerful messages, positive or negative, about our court system and our national values. Perhaps not surprisingly, the majority of those who fail at the job do so because they do not recognize and master the “performing artist” aspect, rather than from a lack of pertinent legal knowledge.**

**One of the keys to the Immigration Judge’s job is issuing scholarly, practical, well-written opinions in the most difficult cases. That ties directly into the job of the Immigration Court’s amazing Judicial Law Clerks (“JLCs”) assisted by all-star legal interns from law schools. I always said that the JLC’s job was, of course, “to make me look smart,” no matter how difficult or challenging that might be in a particular case. There have been former Lawrentians among the ranks of the JLCs. Perhaps, some of *you* will have the opportunity to serve as a JLC or an intern at an Immigration Court.**

**It is a direct, “hands on” way of improving the system while taking advantage of a unique learning environment. Unfortunately, however, current attitudes at the DOJ, particularly the imposition of, in my view, unnecessary “production quotas” on judges, actually serve to *discourage* rather than encourage the best scholarship and writing.**

**V. MY JUDICIAL PHILOSOPHY**

**Next, I’ll say a few words about *my* judicial philosophy. In all aspects of my career, I have found five essential elements for success that go back to my time at Lawrence: fairness, scholarship, timeliness, respect, and teamwork.**

**Obviously, *fairness* to the parties is an essential element of judging. *Scholarship* in the law is what allows us to fairly apply the rules in particular cases. However, sometimes attempts to be fair or scholarly can be *ineffective* unless *timely*. In some cases, untimeliness can amount to unfairness no matter how smart or knowledgeable you are.**

***Respect* for the parties, the public, colleagues, and appellate courts is absolutely necessary for our system to function. Finally, I view the whole judging process as a *team* exercise that involves a coordinated and cooperative effort among judges, respondents, counsel, interpreters, court clerks, security officers, administrators, law clerks and interns working behind the scenes, to get the job done correctly. Notwithstanding different roles, we all shared a *common* interest in seeing that our justice system *works*.**

**Are the five elements that I just mentioned limited to Immigration Court? They are not only essential *legal* skills, they are also necessary *life* skills, whether you are running a courtroom, a law firm, a family, a PTA meeting, a book club, or a soccer team.**

**As you might imagine, I am a *huge* fan of clinical experience as an essential part of the law school curriculum. Not only do clinical programs make important actual contributions to our justice system – due process in action – but they teach *exactly* the type of intellectual and practical values and skills that I have just described.**

**VI. RECLAIMING THE VISION**

**Our Immigration Courts are going through an existential crisis that threatens the very foundations of our American Justice System. Earlier, I told you about my *dismay* that the noble due process vision of our Immigration Courts has been *derailed*. What can be done to get it back on track?**

**First, and foremost, the Immigration Courts must *return* to the focus on due process as the *one and only mission*. The improper use of our due process court system by political officials to advance enforcement priorities and/or send “don’t come” messages to asylum seekers, which are highly ineffective in any event, must *end*. That’s unlikely to happen under the DOJ – as proved by over three decades of history, particularly recent history. It will take some type of independent court. I advocate an independent Article I Immigration Court, which has been supported by groups such as the American Bar Association, the Federal Bar Association, the American Immigration Lawyers Association, and the National Association of Immigration Judges.**

**Clearly, the due process focus was lost even during the last Administration when officials outside EOIR forced ill-advised “prioritization” and attempts to “expedite” the cases of frightened women and children from the Northern Triangle who require lawyers to gain the protection that most of them need and deserve. Putting these cases in front of other pending cases was not only unfair to all, but created what I call “aimless docket reshuffling” that has thrown the Immigration Court system into chaos and dramatically increased the backlogs.**

**Although those misguided priorities have been rescinded, the current Administration has greatly expanded the “priority” targets for removal to include essentially anyone who is here without documentation. We had an old saying in the bureaucracy that “when everything becomes a priority, nothing is a priority.” Moreover, Attorney General Sessions stripped Immigration Judges of their authority to “administratively close” low priority cases and those that could be referred to DHS for possible legal status. Incredibly, he also directed that more than 300,000 previously “administratively closed” low-priority cases be “restored” to dockets already backlogged for many years.**

**This Administration also greatly expanded the “immigration detention empire,” – I call it the “New American Gulag.” Immigration detention centers are likely to be situated in remote locations near the Southern Border, relying largely on discredited private “for profit” prisons. Have you heard of places like Jena, Louisiana or Dilley, Texas?**

**Individuals detained in such out of the way places are often unable to obtain legal assistance or get the documentation necessary to present a successful asylum case. So-called “civil immigration detention” is used to coerce individuals out of making or appealing claims for protection in Immigration Court and also inhibits the ability of an individual to put on his or her “life or death” case.**

**This Administration also wants to make it more difficult for individuals to get full Immigration Court hearings on asylum claims and to expand the use of so-called “expedited removal,” thereby seeking to completely avoid the Immigration Court process.**

**They also have created and recently expanded what is known as the “Remain in Mexico Program.” Under that program, which is being challenged in Federal Court, even those who pass initial screening and are determined by an Asylum Officer to have a “credible fear” of persecution are forced to remain in questionable conditions in Mexico while their cases are pending in Immigration Court.**

**Before he was fired, Attorney General Sessions imposed new “production quotas” on Immigration Judges, over their objection and that of almost all experts in the field. That insures that judges will be focused on churning out “numbers” to keep their jobs, rather than on making fair, impartial, scholarly, and just decisions.**

**But even these harsh measures aren’t enough. As you have no doubt read or heard, the President is threatening to “close the Mexican border” notwithstanding that Mexico is our third leading trading partner. Just Monday, he said that the solution was to *eliminate Immigration Judges* rather than provide fair hearings in a timely manner.**

**Evidently, the idea is to remove without full due process those who arrive at our border to seek protection under our laws and international conventions to which we are party. According to the Administration, this will send a powerful “don’t come, we don’t want you” message to asylum seekers.**

**But, as a deterrent, the Administration’s harsh enforcement program, parts of which have been ruled illegal by the Federal Courts, has been *spectacularly* unsuccessful. Not surprisingly to me, individuals fleeing for their lives from the Northern Triangle have continued to seek refuge in the United States in large numbers. Immigration Court backlogs have continued to grow *across the board*, notwithstanding an actual decrease in overall case receipts and an increase in the number of authorized Immigration Judges.**

***Second*, there must be structural changes so that the Immigration Courts are organized and run like a *real* court system, *not* a highly bureaucratic agency. This means that *sitting Immigration Judges*, like in all other court systems, must control their dockets. The practice of having bureaucrats in Falls Church and politicos in Washington, D.C., none of whom are sitting judges responsible for daily court hearings, manipulate and rearrange local dockets in a vain attempt to achieve policy goals unrelated to fairness and due process for individuals coming before the Immigration Courts must *end*.**

**If there are to be nationwide policies and practices, they should be developed by an “Immigration Judicial Conference,” patterned along the lines of the Federal Judicial Conference. That would be composed of sitting Immigration Judges representing a cross-section of the country, and several Appellate Immigration Judges from the BIA.**

***Third*, there must be a new administrative organization to serve the courts, much like the Administrative Office of the U.S. Courts. This office would naturally be subordinate to the Immigration Judicial Conference. Currently, the glacial hiring process, inadequate courtroom space planning and acquisition, and unreliable, often-outdated technology are simply not up to the needs of a rapidly expanding court system.**

**In particular, the judicial hiring process over the past 18 years has failed to produce the necessary balance because judicial selectees from private sector backgrounds – particularly those with expertise in asylum and refugee law – have been so few and far between.**

**Also, after nearly two decades of failed efforts and wasted time and money, the Immigration Courts need e-filing NOW! Without it, the courts are condemned to “files in the aisles,” misplaced filings, lost exhibits, and exorbitant courier charges.**

**Because of the absence of e-filing, the public receives a level of service disturbingly below that of any other major court system. That gives the Immigration Courts an “amateur night at the Bijou” aura totally inconsistent with the dignity of the process, the critical importance of the mission, and the expertise, hard work, and dedication of the judges and court staff who make up the court.**

**Fourth, I would repeal all of the so-called “Ashcroft reforms” at the BIA and put the BIA back on track to being a *real* appellate court. A properly comprised and well-functioning BIA should transparently debate and decide important, potentially controversial, issues, publishing dissenting opinions when appropriate. *All* BIA Appellate Judges should be *required* to vote and take a public position on *all* important precedent decisions. The BIA must also “rein in” those Immigration Courts with asylum grant rates so incredibly low as to make it clear that the generous dictates of the Supreme Court in *Cardoza-Fonseca[[9]](#footnote-10)* and the BIA itself in a case called *Matter of Mogharrabi[[10]](#footnote-11)* are not being followed.**

**More than a decade has passed since my Georgetown Law colleagues Professors Andy Schoenholtz, Phil Shrag, and Jaya Ramji-Nogales published their seminal work *Refugee Roulette*, documenting the large disparities among Immigration Judges in asylum grant rates.[[11]](#footnote-12) While there was some improvement for a time, the BIA, the *only* body that can effectively establish and enforce due process within the Immigration Court system, has not adequately addressed this situation.**

**For example, in Fiscal Year 2015, asylum grant rates ranged from an average of 84% in New York to an astounding 2% in Atlanta, even though judges in both locations are supposed to be applying the same statute.[[12]](#footnote-13)**

**In other words, by lunchtime some days, the Immigration Judges sitting in New York granted more than the five asylum cases granted in Atlanta during the *entire Fiscal Year 2015*! An 84% to 2% differential in fewer than 900 miles! There is no reasonable explanation for such incredible variances. Another study found that Immigration Judges in Atlanta neither followed established legal principles of asylum law nor treated asylum applicants and their attorneys with courtesy and respect.[[13]](#footnote-14)**

**This is hardly “through teamwork and innovation being the world’s best administrative tribunals guaranteeing fairness and due process for all!” These unusually low asylum grant rates are *impossible* to justify in light of the generous standard for well-founded fear established by the Supreme Court in *Cardoza-Fonseca* and the BIA in *Mogharrabi*, and the regulatory presumption of future fear arising out of past persecution that applies in many asylum cases.[[14]](#footnote-15) Yet, the BIA has only fairly timidly addressed the manifest lack of respect for asylum seekers and failure to guarantee fairness and due process for such vulnerable individuals in some cases arising in Atlanta and other courts with unrealistically low grant rates.[[15]](#footnote-16) And, former Attorney General Sessions actively worked to disempower the BIA and reduce it to a “rubber stamp” of DHS enforcement policies.**

**Over the past 19 years, the BIA’s inability or unwillingness to aggressively stand up for the due process rights of asylum seekers and to enforce the fair and generous standards required by American asylum law have robbed our Immigration Court System of credibility and public support, as well as ruined the lives of many who were denied protection that should have been granted. We need an appellate body that functions like a Federal Appellate Court and whose overriding mission is to ensure that the *due process visio*n of the Immigration Courts becomes a *reality r*ather than a cruel, unfulfilled promise.**

**In fact, just this week, the American Immigration Lawyers Association (“AILKOA”) and the American Immigration Council (“AIC”) filed a formal complaint about the alleged unprofessional conduct and anti-asylum bias of the Immigration Judges in El Paso, Texas. That court essentially has become an “asylum free zone,” where just 4% of asylum applications are granted as compared with 35% in the rest of the nation.**

**It’s also important to know that the 35% grant rate is achieved in a system that has intentionally been “gamed” by this Administration against asylum seekers, particularly those from the so-called “Northern Triangle” of Central America. Indeed, just a few years ago the nationwide asylum grant rate in Immigration court was well-over 50%. Although conditions for refugees are continuing to get worse throughout the world, the asylum grant rate inexplicably has been dropping steadily since that “high point.”**

**VII. GETTING INVOLVED**

**Keep these thoughts in mind. Sadly, based on actions to date, I have little hope that Attorney General Barr will support due process reforms or an independent U.S. Immigration Court, although it would be in his best interests as well as those of our country if he did. However, eventually the opportunity *will come*. When it *does*, those of us who believe in the primary importance of constitutional due process *must* be ready with concrete reforms.**

**So, do we abandon all hope? *No, of course not!* Because there are hundreds of newer lawyers out there who are former Arlington JLCs, interns, my former students, those who have practiced before me, and others who have an overriding commitment to fair and impartial administration of immigration laws and social justice in America.**

**They form what I call the “New Due Process Army!” And, while *my* time on the battlefield is winding down, *they are just beginning the fight!* They will keep at it for years, decades, or generations -- whatever it takes to force the U.S. immigration judicial system to live up to its promise of “guaranteeing fairness and due process for all!”**

**What can *you* do to get involved *now*? The overriding due process need is for *competent representation* of individuals claiming asylum and/or facing removal from the United States. Currently, there are not nearly enough pro bono lawyers to insure that everyone in Immigration Court gets represented.**

**And the situation is getting worse. With the Administration’s expansion of so-called “expedited removal” and “Remain in Mexico,“ lawyers are needed at even *earlier* points in the process to insure that those with defenses or plausible claims for relief *even get into* the Immigration Court process, rather than being summarily removed with little, if any, recourse.**

**Additionally, given the pressure that the Administration exerts through the Department of Justice to “move” cases quickly through the Immigration Court system with little regard for due process and fundamental fairness, resort to the Article III Courts to require fair proceedings and an unbiased application of the laws becomes even more essential. Litigation in the U.S. District and Appellate Courts has turned out to be effective in forcing systemic change. However, virtually no unrepresented individual is going to be capable of getting to the Court of Appeals, let alone prevailing on a claim.**

**I have been working with groups looking for ways to expand the “accredited representative” program, which allows properly trained and certified individuals who are not lawyers to handle cases before the DHS and the Immigration Courts while working for certain nonprofit community organizations, on either a staff or volunteer basis. The “accredited representative” program is also an *outstanding opportunity,* not only for students and recent graduates, but alsofor retired individuals, and other professionals like professors and other teachers who are not lawyers to qualify to provide pro bono representation in Immigration Court to needy migrants thorough properly recognized religious and community organizations.**

**I have provided information to your placement office about an innovative, low-cost, online certificate program put together by one of the best minds in the business – my good friend Professor Michele Pistone of Villanova Law. Professor Pistone and her program are seeking “to change the future of access to justice in the immigration system.” This is a highly ambitious, yet in my view ultimately achievable, goal.**

**Even if you are not practicing or do not intend to practice immigration law, there are many outstanding opportunities for those of you who are or do become lawyers to contribute by taking pro bono cases. Indeed, in my experience, corporate law firms, along with law school clinics, were some of the major contributors to highly effective pro bono representation. It was also great “hands on” experience for those seeking to hone their litigation skills.**

**Those of you with language and teaching skills can help out in English Language Learning programs for migrants. I have observed first hand that the better that individuals understand the language and culture of the US, the more successful they are in navigating our Immigration Court system and both assisting, and when necessary, challenging their representatives to perform at the highest levels. In other words, they are in a better position to be “informed consumers” of legal services. Also, as I mentioned earlier, careers for professional foreign language interpreters in the courts, medicine, social work, education, and business are rapidly expanding.**

**Another critical area for focus is *funding* of nonprofit community-based organizations and religious groups that assist migrants for little or no charge. *Never* has the need for such services been greater.**

**But, many of these organizations receive at least some government funding for outreach efforts. This Administration has sought to “defund” or reduce funding for essential community-based outreach efforts.**

**Undoubtedly, with the huge emphases on military expansion, “wall building,” increased detention, and other immigration enforcement, to the exclusion of other important programs, virtually all forms of U.S. Government funding for outreach efforts to migrants are likely to disappear in the very near future. Those who care about helping others will have to make up the deficit. So, at giving time, remember your community nonprofit organizations that are assisting foreign nationals.**

**Here at Lawrence, you have a truly amazing resource in Kristi Hill, the Director of Lawrence’s Community Engagement and Social Change Program. Kristi and her wonderful staff are happy to work with any student in finding the right community involvement opportunity. Kristi has told me that one of her most exciting prospects is arranging internships with nonprofit community organizations during school breaks. I know that students at all levels have learned and been moved by participating in programs such as helping individuals to understand their legal rights and obligations at the border and at detention facilities in the United States.**

**Kristi and I have discussed an innovative program started by faith groups in New York but seeking to expand to other areas. For 10 years, the New Sanctuary Coalition (“NSC”), a group in which my good friend, colleague, and fellow “social justice blogger,” retired Immigration Judge Jeffrey S. Chase, has been involved, led by and for immigrants, has worked tirelessly to stop the inhumane system of deportations and detentions in this country. NSC’s “small but scrappy” team works with an army of over 500 volunteers to provide person-to-person support to many hundreds of immigrants — the people they call “friends,” not clients — facing detention and deportation.**

**NSC springs from New York’s faith-based and social justice communities and forms a unique family of citizens and immigrants, bound by a love of humanity and mutual respect. Operating for a decade on less-than-shoestring budgets, NSC has done enormous good for the NY City community.**

**NSC has stopped the forced isolation of many undocumented people by building a large accompaniment program in which citizens go with immigrants to mandatory ICE check-ins and Immigration Court hearings. Accompaniment provides citizen-witnesses of ICE’s behavior, emotional support for immigrants and also establishes that our friends have strong ties to the local community, a fact appreciated by Immigration Judges. Accompaniment has proven to sometimes prevent deportations and detention through use of the legal system.**

**No speech at a great liberal arts institution like Lawrence would be complete without a timely reminder of the essential role played by the performing arts in the battle for social justice. Music has long been a unifying, comforting, and inspiring force for those seeking recognition of their human rights.**

**As those of you who took Professor Deena Skran’s Refugees and Forced Migration with me today know, we had an instructional visit from the next world by the late Tom Petty and his Heartbreakers who educated us with their hit song “Refugee.”**

**I’ve also introduced some of you to the work of my good friend and retired colleague Judge Polly Webber who has combined her brilliance as a jurist, teacher, and role model with her passion for fiber arts. I think you would find her three-part hooked rug display “Refugee Dilemma” describing in her art the refugee journey to and across the border as moving and inspirational as I did. I urge you to work with your Art Department here at Lawrence to bring Polly and some of her artwork, passion for justice, deep self-expression, and humanity to your campus at some future point.**

**Another great “arts and social justice” project that I hope you will pursue is a performance of a new play entitled “The Courtroom.” It’s a dramatization of the verbatim transcript of an immigration hearing. Produced by the social action group Waterwell in New York with a professional cast, *The NY Times* said: “As the piece follows her from one courtroom . . . to another . . . , what is most palpable is the suspense — how deeply invested the audience becomes in the future of this gentle woman.”**

**I’ve spoken with the producers and they expressed a willingness to provide the script for performance to student and nonprofit groups, perhaps with some “directory assurance” from the original cast in New York.**

**I also urge you to go on the net and watch a great set of documentary videos about contemporary immigration issues produced by The Marshall Project entitled “We Are Witnesses: Becoming An American” in which I play a role.**

**Additionally, I encourage you to read my blog** [**immigrationcourtside.com**](http://immigrationcourtside.com)**, “the voice of the New Due Process Army” for the latest developments and commentary on immigration and the Immigration Courts.**

**Finally, as an informed voter and participant in our political process, *you* can advance the cause of Immigration Court reform and due process. For the last two decades politicians of *both parties* have largely stood by and watched the unfolding due process disaster in the U.S. Immigration Courts without doing anything about it, and in some cases actually making it worse.**

**The notion that Immigration Court reform must be part of so-called “comprehensive immigration reform” is simply *wrong.* The Immigration Courts *can* and *must* be fixed *sooner* rather than later, regardless of what happens with overall immigration reform. It’s time to let your Senators and Representatives know that we need *due process reforms* in the Immigration Courts as one of our *highest national priorities*.**

**Folks, the U.S Immigration Court system is on the verge of collapse. And, there is every reason to believe that the misguided “enforce and detain to the max” policies being pursued by this Administration will drive the Immigration Courts over the edge. When that happens, a large chunk of the entire American justice system and the due process guarantees that make American great and different from most of the rest of the world will go down with it. As the late Dr. Martin Luther King, Jr., said in his *Letter from a Birmingham Jail*, “injustice anywhere is a threat to justice everywhere.”**

**VIII. CONCLUSION**

**In conclusion, I have introduced you to one of America’s largest and most important, yet least understood, court systems: the United States Immigration Court. I have shared with you that Court’s noble due process vision and my view that it is not currently being fulfilled. I have also shared with you my ideas for effective court reform that would achieve the due process vision and how *you* can become involved in improving the process.**

***Now is the time to take a stand for fundamental fairness and social justice under law! Join the New Due Process Army and fight for a just future for everyone in America! Due process forever!***

**Thanks again for inviting me, for coming out tonight, and for listening. I’d be happy to take questions.**

**(04/12/19)**

1. *Matter of Lennon*, 15 I&N Dec. 9 (BIA 1974), *rev’d Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975). [↑](#footnote-ref-2)
2. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996). [↑](#footnote-ref-3)
3. TRAC Immigration, “Representation is Key in Immigration Proceedings Involving Women with Children,” Feb. 18, 2015, available online at <http://trac.syr.edu/immigration/reports/377/>. [↑](#footnote-ref-4)
4. “Immigration Director Calls for Overhaul of Broken System,” NBC Bay Area News, May 27, 2015, available online. [↑](#footnote-ref-5)
5. *Guchshenkov v. Ashcroft*, 366 F.3d 554 (7th Cir. 2004) (Evans, J., concurring).  
    [↑](#footnote-ref-6)
6. Hon. Thomas G. Snow, “The gut-wrenching life of an immigration judge,” USA Today, Dec. 12, 2106, available online at http://www.usatoday.com/story/opinion/2016/12/12/immigration-judge-gut-wrenching-decisions-column/95308118/ [↑](#footnote-ref-7)
7. Julia Preston, “Lawyers Back Creating New Immigration Courts,” *NY Times*, Feb. 6, 2010. [↑](#footnote-ref-8)
8. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). [↑](#footnote-ref-9)
9. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). [↑](#footnote-ref-10)
10. *Matter of Mogharrabi*, 19 I&N Dec. 4379(BIA 1987). [↑](#footnote-ref-11)
11. Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, [Refugee Roulette: Disparities in Asylum Adjudication](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983946), 60 Stan. L. Rev. 295 (2007); [↑](#footnote-ref-12)
12. All statistics are from the EOIR FY 2015 Statistics Yearbook, available online at <https://www.justice.gov/eoir/page/file/fysb15/download>, [↑](#footnote-ref-13)
13. See Emory Law/SPLC Observation Study Rips Due Process Violations At Atlanta Immigration Court — Why Is The BIA “Asleep At The Switch” In Enforcing Due Process? What Happened To The EOIR’s “Due Process Vision?” in immigrationcourtside.com, available online at <http://immigrationcourtside.com/2017/03/02/emory-lawsplc-observation-study-rips-due-process-violations-at-atlanta-immigration-court-why-is-the-bia-asleep-at-the-switch-in-enforcing-due-process-what-happened-to-the-eoirs-due-proces/> [↑](#footnote-ref-14)
14. See 8 C.F.R. § 1208.13(b)(1). [↑](#footnote-ref-15)
15. See, e.g., Matter of Y-S-L-C-, 26 I&N Dec. 688 (BIA 2015) (denial of due process where IJ tried to bar the testimony of minor respondent by disqualifying him as an expert witness under the Federal Rules of Evidence). While the BIA finally stepped in with this precedent, the behavior of this Judge shows a system where some Judges have abandoned any discernable concept of “guaranteeing fairness and due process.” The BIA’s “permissive” attitude toward Judges who consistently deny nearly all asylum applications has allowed this to happen. Indeed the Washington Post recently carried a poignant story of a young immigration lawyer who was driven out of the practice by the negative attitudes and treatment by the Immigration Judges at the Atlanta Immigration Court. Harlan, Chico, “In an Immigration Court that nearly always says no, a lawyer’s spirit is broken,” Washington Post, Oct. 11, 2016, available online at <https://www.washingtonpost.com/business/economy/in-an-immigration-court-that-nearly-always-says-no-a-lawyers-spirit-is-broken/2016/10/11/05f43a8e-8eee-11e6-a6a3-d50061aa9fae_story.html>

    How does this live up to the EOIR Vision of “through teamwork and innovation being the world’s best administrative tribunals guaranteeing fairness and due process for all?” Does this represent the best that American justice has to offer? [↑](#footnote-ref-16)