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M. DALE PALMER LECTURE

THE POETIC JUSTICE OF IMMIGRATION

LINDA KELLY HILL*

INTRODUCTION

Amnesty. The Rule of Law. Sanctuary Cities. Anchor Babies. The Path to Citizenship. These words and phrases evoke powerful emotions. They create vivid, perhaps blinding images which may be so provocative, so incendiary, that once such terms are introduced and attached to one position or another in the immigration debate, the discourse is over. There is neither the room nor the patience for any further dialogue. My comments today focus on this use of rhetoric as a weapon or a tool in our ongoing immigration debate.

Oftentimes, rhetoric, like these rhetorical terms used in the immigration context, receives a negative stigma, a bum rap. Rhetoric may readily be described as “the undue use of exaggeration or display; bombast.”¹ Yet this fifth definition of rhetoric set out by *Random House Dictionary* is preceded by a more positive definition of rhetoric as “the ability to use language effectively.”² However, this definition simply begs the question: what does it mean to use language effectively?

I would like to focus on the United States Court of Appeals for the Seventh Circuit (Seventh Circuit), and, in particular, on Judge Richard Posner’s use of rhetoric in the immigration context. Why study the Seventh Circuit and Judge Posner’s use of rhetoric in the immigration context? Three immediate, albeit somewhat superficial explanations can be offered. For one, it’s fun. Judge Posner is highly regarded for his judicial opinions. He is also well known for his academic writings³ and has written specifically on the use of rhetoric.⁴ Wouldn’t

* M. Dale Palmer Professor of Law, Indiana University School of Law, Indianapolis. This Article is based on my M. Dale Palmer Lecture, Indiana University School of Law, Indianapolis, March 27, 2008. Many thanks to Elizabeth Allington, the Executive Committee of the Indiana University School of Law, Indianapolis (2005-2006), the *Indiana Law Review*, Jonna Kane MacDougall, former Interim Dean Susanah Mead, Dean Gary Roberts, and the Trustees of Indiana University for making this possible.

¹RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE: THE UNABRIDGED EDITION 1229 (1967).

²*Id.*

³Judge Posner has contributed extensively to the legal literature. The Library of Congress Catalog lists over sixty titles authored or co-authored by Judge

it be fun to see whether Judge Posner puts his judicial pen where his scholarly mouth is? A second reason is more practical: to the extent lawyers are practicing within the Seventh Circuit, perhaps some valuable insights can be gleaned from considering how judges on the Seventh Circuit rely upon rhetoric in crafting their opinions relating to immigration law.⁵ This utilitarian rationale

Posner. See <http://catalog.loc.gov/> (last visited Feb. 9, 2009). Lexis/Nexis lists over one hundred articles, essays and book reviews authored or co-authored by Judge Posner. See <http://lexis.com> (last visited Feb. 9, 2009). While Judge Posner may be best known for his law and economics literature, he writes on a broad range of subjects.

Some of his books include: RICHARD A. POSNER, *BREAKING THE LAW* (1996); RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* (2004); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007); RICHARD A. POSNER, *HOW JUDGES THINK* (2008); RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006); RICHARD A. POSNER, *SEX AND REASON* (1992).

For a broad sampling of his sole-written law review contributions, see, e.g., Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990); Richard A. Posner, *Bush v. Gore: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719 (2001); Richard A. Posner, *Clinical and Theoretical Approaches to the Teaching of Evidence and Trial Advocacy*, 21 QUINNIPIAC L. REV. 731 (2003); Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735 (2006); Richard A. Posner, *The Depiction of Law in The Bonfire of the Vanities*, 98 YALE L.J. 1653 (1989); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311 (1989); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988); Richard A. Posner, *Law School Rankings*, 81 IND. L.J. 13 (2006); Richard A. Posner, *Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433 (1992); Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1 (1993); Richard A. Posner, *Ms. Aristotle*, 70 TEX. L. REV. 1013 (1992); Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

⁴See generally Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995) [hereinafter Posner, *Judges' Writing Styles*]

⁵The U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit") has

is well supported by a third consideration: within the last several years, the Seventh Circuit has been amongst the most active circuits in the immigration field. In 2005, Judge Posner disclosed that the Seventh Circuit had reversed administrative immigration decisions in whole or in part in a “staggering” 40% of the petitions for review filed in the preceding year.⁶ In a five-month period during the same year, the Seventh Circuit granted two-thirds of the petitions for review filed by aliens seeking asylum.⁷ Consequently, the third reason for studying the Seventh Circuit’s use of rhetoric in the immigration context is that it provides a terrific database of decisions.

Yet these three preliminary reasons are easily overshadowed by a far more compelling concern. In recent years, significant attention has been paid to the problems plaguing our immigration courts. While administrative efforts at reform are ongoing, judicial frustration with the immigration courts is palpable.⁸ The judiciary has limited ability to address the inherent problems plaguing these administrative courts.⁹ Rhetoric, however, presents an opportunity that has yet to be fully explored. Used properly, rhetoric is a tool the judiciary can wield not simply to effectively draft opinions in isolated cases, but also to bring drastically needed reform.

I. THE STATE OF U.S. IMMIGRATION COURTS

Before discussing how rhetoric can be a powerful tool of immigration

jurisdiction over Illinois, Indiana and Wisconsin. See U.S. Courts, <http://www.uscourts.gov/courtlinks/> (last visited Nov. 17, 2008).

⁶*Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). By comparison, during the same period the Seventh Circuit reversed 18% of the civil cases in which the United States was the appellee. *Id.* For further discussion of efforts to gather data on reversal rates nationally and the Department of Justice’s (DOJ) dispute with Posner’s statistics, see Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 13-17 (2006).

⁷John R. Floss, *Seeking Asylum in a Hostile System: The Seventh Circuit Reverses to Confront a Broken Process*, 1 SEVENTH CIR. REV. 216, 217-18 (2006), available at <http://www.Kentlaw.edu/7cr/v1-1/floss.pdf>. The five-month period studied was between June 15, 2005 and December 15, 2005. *Id.*

⁸As the *Benslimane* court noted,

[T]he adjudication of these [immigration] cases at the administrative level has fallen below the minimum standards of legal justice
[T]he power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice, which adjudicates them in its Immigration Court and Board of Immigration Appeals.

Benslimane, 430 F.3d at 830.

⁹THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1149-90 (6th ed. 2008).

reform, it is necessary to outline in some detail both the problems facing our immigration courts and the various meanings of rhetoric. Turning first to consider the state of our immigration courts, one must initially recognize the critical role they play in U.S. immigration law. Before any person within the United States may be physically removed by the Department of Homeland Security, such person has the right to a “removal hearing.”¹⁰ It is through this hearing that an alien is provided the right to challenge the grounds for her removal and assert any claims she may have for relief from removal.¹¹

Removal hearings begin before an immigration judge (IJ) within the immigration court that has jurisdiction over the alien’s residence.¹² These hearings are an administrative matter.¹³ United States immigration courts are a division within the Executive Office of Immigration Review (EOIR) of the Department of Justice.¹⁴ When an IJ makes a decision, it may be directly appealed to the Board of Immigration Appeals (BIA), another administrative division of the EOIR.¹⁵ Consequently, both the IJs and the BIA members are accountable to the U.S. Attorney General.¹⁶ The Department of Homeland Security (DHS) prosecutes the alien’s removal and is ultimately responsible for the physical deportation of any alien who is ordered removed.¹⁷ If either the alien or DHS disagrees with the final administrative decision, judicial review typically begins in the U.S. Court of Appeals for the circuit in which the immigration court hearing was held.¹⁸

Despite the key role played by our federally administered immigration courts, their failings are pervasive and profound. The problems can broadly be divided into two sorts: incompetence and problems of intemperance.¹⁹

¹⁰See Immigration and Naturalization Act § 240, 8 U.S.C. § 1229a (2006).

¹¹STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 639-41 (4th ed. 2005).

¹²There are approximately fifty-five immigration courts. For a complete listing, see U.S. Dep’t of Justice, Executive Office for Immigration Review, <http://www.usdoj.gov/eoir/sibpages/ICadr.htm#IL> (last visited Nov. 17, 2008).

¹³LEGOMSKY, *supra* note 11, at 639-41.

¹⁴*Id.* at 639.

¹⁵*Id.* at 641-42.

¹⁶*Id.*

¹⁷*Id.* at 635-39. For an overview of the administrative removal process, see *id.* at 633-42.

¹⁸As Legomsky succinctly states, judicial review of removal orders is a “technical minefield.” *Id.* at 642. For a densely detailed overview of the limits imposed on judicial review of immigration matters, see *id.* at 642-43, 727-61.

¹⁹For my more detailed discussion of the incompetence and intemperance of the immigration courts and the BIA, see Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 HOFSTRA L. REV. 85, 100-109 (2007).

A. Incompetence

Quite simply, IJs in many instances do not understand the law.²⁰ Extreme examples of such incompetence are not hard to find.²¹ In the Ninth Circuit, an IJ's opinion is found so devoid of reason that it is described as "literally incomprehensible."²² The Seventh Circuit likewise repeatedly attacks the competence of the local, Chicago-based IJs.²³ An IJ's decision is deemed "hard to take seriously."²⁴ Credibility determinations are repeatedly found baseless;²⁵

²⁰*Id.* at 103.

²¹*See, e.g.,* Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391, 406 (2d Cir. 2005) ("[T]he IJ [Immigration Judge] relied on speculation, failed to consider all of the significant evidence, and appeared to place undue reliance on the fact that [respondent's] documents were not authenticated. . . ."); Chen v. U.S. Dep't of Justice, 426 F.3d 104, 115 (2d Cir. 2005) (the IJ's finding was "grounded solely on speculation and conjecture"); Korytnyuk v. Ashcroft, 396 F.3d 272, 292 (3d Cir. 2005) ("[I]t is the IJ's conclusion, not [the petitioner's] testimony, that 'strains credulity.'"); Elzour v. Ashcroft, 378 F.3d 1143, 1154 (10th Cir. 2004) ("[T]he IJ's reasoning fell short of his obligation to 'provide a foundation for his disbelief of [Petitioner's] testimony on these points.'" (citing Gao v. Ashcroft, 299 F.3d 266, 278 (3d Cir. 2002))); *Gao*, 299 F.3d at 279 ("At least on the record it does not appear that the IJ's conclusions are supported.").

²²*Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1187 (9th Cir. 2005); *see also* Kelly Hill, *supra* note 19, at 103. For further discussions of the problems besetting immigration courts nationwide, *see* Alexander, *supra* note 6, at 11-36; Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372-79 (2006).

²³The immigration courts of Chicago are the only immigration courts within the Seventh Circuit's jurisdiction of Illinois, Indiana, and Wisconsin. For a listing of the immigration courts nationwide, *see* U.S. Dep't of Justice, Executive Office for Immigration Review, www.usdoj.gov/eoir/sibpages/ICadr.htm (last visited Nov. 17, 2008). On the jurisdiction of the U.S. Circuit Courts of Appeals, *see supra* note 5.

²⁴*Grupee v. Gonzales*, 400 F.3d 1026, 1028 (7th Cir. 2005). For other examples of poorly reasoned opinions by the Chicago immigration courts, *see, e.g.,* *Banks v. Gonzales*, 453 F.3d 449, 452 (7th Cir. 2006) (finding IJ's treatment of the evidence as "hard to fathom" and reminding the court that the correct legal standard for asylum "must be followed whether or not an alien draws it to the agency's attention"); *Gjerazi v. Gonzales*, 435 F.3d 800, 813 (7th Cir. 2006) ("Like all asylum applicants, [respondent] is entitled to a well-reasoned, documented, and complete analysis that engages the evidence The IJ's decision falls far short of this standard, and we hold that his conclusions are not supported by substantial evidence in the record."); *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) ("The IJ's opinion is riddled with inappropriate and extraneous comments"); *Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005) ("The [IJ's] opinion cannot be regarded as reasoned"); *Kourski v. Ashcroft*,

Judge Posner curtly describing one as a product of “factual error, bootless speculation, and errors of logic.”²⁶

The BIA, the administrative appellate unit of our immigration courts, is also roundly criticized for its incompetence. While the Seventh Circuit ridicules the BIA as “not aware of the most basic facts,”²⁷ the Third Circuit charges it as “simply ignor[ing the factual] findings and replac[ing] them with [their] own version.”²⁸

355 F.3d 1038, 1039 (7th Cir. 2004) (“There is a gaping hole in the reasoning of the [BIA] and the [IJ].”). For extensive review of the Seventh Circuit’s immigration decisions, see generally Floss, *supra* note 7.

²⁵For examples of irrational credibility determinations by the Chicago-based IJs, see *Hanaj v. Gonzales*, 446 F.3d 694, 700 (7th Cir. 2006) (“An IJ must analyze inconsistencies against the backdrop of the whole record No such examination occurred here”) (citation omitted); *Tabaku v. Gonzales*, 425 F.3d 417, 423 (7th Cir. 2005) (“[W]e will not uphold an IJ’s speculative alternative if it has no basis in the record.”); *Hor v. Gonzales*, 421 F.3d 497, 500 (7th Cir. 2005) (stating that the IJ’s credibility assessment was based on “unsubstantiated conjectures”); *Lin v. Ashcroft*, 385 F.3d 748, 755-56 (7th Cir. 2004) (“The IJ’s skepticism—utterly unsupported by any facts in the record—with respect to [one] detail of her story does not form a valid basis for a negative credibility determination, in the face of the other corroborating information”).

For examples of poorly reasoned credibility determinations in other jurisdictions, see *Cao He Lin*, 428 F.3d at 404 (determining that the “IJ’s principal reasons for generally discounting [petitioner’s] credibility are seriously flawed”); *Elzour*, 378 F.3d at 1153 (IJ “failed to substantiate his skepticism with any record support”); *Dia v. Ashcroft*, 353 F.3d 228, 250 (3d Cir. 2003) (en banc) (stating that the IJ’s “opinion consists not of the normal drawing of intuitive references from a set of facts, but, rather, of a progression of flawed sound bites that gives the impression that she was looking for ways to find fault with [petitioner’s] testimony”); *Gao*, 299 F.3d at 279 (“IJ rested his decision on a credibility determination that is not supported by substantial evidence in the record.”).

²⁶*Pramatarov v. Gonzales*, 454 F.3d 764, 765 (7th Cir. 2006).

²⁷*Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005). For additional Seventh Circuit criticism of the BIA, see *Sepulveda v. Gonzales*, 464 F.3d 770, 772 (7th Cir. 2006) (“In the cases we’ve cited—as in this case—the Board ha[s] failed to explain how its rejection of the claimed social group squared with the test the Board had adopted in [*In re Acosta*, 19 I & N. Dec. 211 (BIA 1995)].”) For the recent Department of Justice efforts to improve the BIA, see *infra* notes 36-38 and accompanying text.

²⁸*Forteau v. U.S. Att’y Gen.*, 240 F. App’x 531, 534 (3d Cir. 2007). For the recent Department of Justice efforts to improve the BIA, see *infra* notes 36-38 and accompanying text.

B. Intemperance

As a somewhat related matter, the immigration courts' incivility is also frequently and widely recognized. Sadly, instances of such intemperance are not hard to find. Intemperance can take the form of extreme nitpicking, with an IJ crossing over the line of impartial adjudicator and fact-finder and effectively becoming an aggressive prosecutor.²⁹ Intemperance is clear when an asylum applicant is "ground to bits" by the relentless questioning of an IJ³⁰ or when an IJ asks more questions and insists upon more detail than the DHS trial attorney who is present and charged with prosecuting the removal.³¹ In many instances, the judge's courtroom demeanor openly betrays his partiality. One IJ takes the time to tell an asylum applicant: "You have no right to be here. All of the applicants that are applying for asylum have no right to be here."³² In perhaps my favorite example of intemperance, the Third Circuit describes "[t]he tone, the tenor, the disparagement, and the sarcasm of the IJ [as] more appropriate to a court television show than a federal court proceeding."³³

C. System Failure

Unfortunately, these examples of incompetence and intemperance are neither isolated nor trivial. As mentioned earlier, the Seventh Circuit's high rates of reversal in immigration cases reflect serious problems.³⁴ As Judge Posner remarks in the opening lines of one reversal: "At the risk of sounding like a broken record, we reiterate our oft-expressed concern[s] The performance of [our] federal [immigration] agencies is too often inadequate. This case presents another depressing example."³⁵

The circuits are not alone in recognizing the incompetence and intemperance of our immigration courts. The problems are so systemic that in January 2006, then Attorney General Alberto Gonzales readily admitted to what he described

²⁹For further discussion of the IJ's unique role, see Kelly Hill, *supra* note 19, nn.57-62 and accompanying text.

³⁰*Cham v. U.S. Att'y Gen.*, 445 F.3d 683, 691 (3d Cir. 2006). For further discussion of such intemperate behavior, see Margaret Graham Tebo, *Asylum Ordeals: Some Immigrants Are 'Ground to Bits' in a System that Leaves Immigration Judges Impatient, Appellate Courts Irritated and Lawyers Frustrated*, A.B.A. J., Nov. 2006, at 36.

³¹In *Giday v. Gonzales*, the IJ asks seventy-three questions, the petitioner's attorney asks eighty-seven, while the DHS prosecuting attorney asks only four. 434 F.3d 543, 548 (7th Cir. 2006). In remanding the IJ's negative credibility finding, the Seventh Circuit urged: "[T]he volume of case law addressing the issue of the intemperate, impatient, and abrasive [IJs] should sound a warning bell to the Department of Justice that something is amiss." *Id.* at 549-50.

³²*Sukwanputra v. Gonzales*, 434 F.3d 627, 638 (3d Cir. 2006).

³³*Wang v. U.S. Att'y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005).

³⁴See *supra* notes 6-7 and accompanying text.

³⁵*Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2005).

as the “intemperate” and “abusive” conduct of our federal IJs.³⁶ In making this announcement, Gonzales initiated a national review of U.S. immigration courts.³⁷ Since the completion of such review, numerous administrative measures have been introduced to improve the quality and training of U.S. IJs.³⁸

³⁶In relevant part, Attorney General Gonzales said:

I have watched with concern the reports of [IJs] who fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work that I expect from employees of the Department of Justice. While I remain convinced that most [IJs] ably and professionally discharge their difficult duties, I believe there are some whose conduct can aptly be described as intemperate or even abusive and whose work must improve.

To better assess the scope and nature of the problem, I have asked the Deputy Attorney General and the Associate Attorney General to develop a comprehensive review of the immigration courts

In the meantime, I urge you always to bear in mind the significance of your cases and the lives they affect. To the aliens who stand before you, you are the face of American justice. Not all will be entitled to the relief they seek. But I insist that each be treated with courtesy and respect. Anything less would demean the office that you hold and the Department in which you serve.

Memorandum from U.S. Att’y Gen. Alberto Gonzales to Immigration Judges (Jan. 9, 2006), *available at* <http://www.immigration.com/newsletter1/attgenimmjudge.pdf> [hereinafter Gonzales Memorandum]. For significant quotation of such memorandum, see *Cham v. Attorney General*, 445 F.3d 683, 686 (3d Cir. 2006).

³⁷Gonzales Memorandum, *supra* note 36 (“I have asked the Deputy Attorney General and the Associate Attorney General to develop a comprehensive review of the immigration courts.”).

³⁸When the review was completed in August, 2006, the details and findings were not publicly disclosed. However, at that time Attorney General Gonzales announced twenty-two measures aimed at reforming the immigration courts and the BIA. Press Release, U.S. Dep’t of Justice, Att’y Gen. Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html. Such initial directives included performance evaluations for sitting judges, competence exams for newly appointed judges, a standard disciplinary system, personnel increases, and other technological and support system improvements. *Id.* For further discussion of the initial review and reform efforts, see Kelly Hill, *supra* note 19, at 86-89.

In March 2008, Chief Immigration Judge David A. Neal announced the issuance of a nationwide practice manual for parties appearing before the immigration courts. Cover Letter for the Immigration Court Practice Manual, David L. Neal, Chief Immigration Judge, U.S. Dep’t of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge, The

Given such developments, an optimist might suggest that efforts at reform are still in their infancy and more time should be afforded to see what administrative improvements take hold. However, the overall broken nature of our federal immigration system, in combination with the institutional problems besetting the Department of Justice, necessitate that reform be initiated in other forums.³⁹ It is this desire that leads to advocating the judicial use of rhetoric and appreciating its various meanings.

II. RHETORIC DEFINED

An understanding of rhetoric in its truest, most complete definition is broader than simply casting about inflammatory terms like “amnesty” or “the rule of law.” In his book *Classical Rhetoric for Modern Discourse*, John Mackin breaks rhetoric into three forms: truth-seeking, persuasion, and speaking well.⁴⁰

A. Truth-Seeking

Rhetoric as truth-seeking is rhetoric in its purest form. Envisioned by Socrates, rhetoric is “the art of influencing the soul through words.”⁴¹ For Socrates, “the soul” is limited to one’s ability to reason.⁴² Consequently, to the extent law professors use the “Socratic” method in their classrooms, the goal is

Immigration Court Practice Manual (Mar. 2008), *available at* <http://www.usdoj.gov/eoir/vll/OCIJPracManual/cover%20letter%20rev.pdf>. The manual is recognized to be in response to the Attorney General’s 2006 directive which “arose out of the public’s desire for greater uniformity in Immigration Court procedures and a call for the Immigration Courts to implement their ‘best practices’ nationwide.” *Id.*

In May 2008, Attorney General Michael Mukasey announced the appointment of five new members to the BIA. Press Release, U.S. Dep’t of Justice, Attorney General Mukasey Appoints Five New Members to the Board of Immigration Appeals (May 30, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/May/08-ag-483.html>. Such announcement, in combination with some earlier hirings, restores the BIA to the number of members it had prior to the massive “streamlining” measures begun by former Attorney General John Ashcroft in 2002. For an extensive discussion and criticism of the BIA firings and earlier re-hirings, see Kelly Hill, *supra* note 19, at 110 n.103.

³⁹For a discussion of the 2007 congressional investigation of the Department of Justice, Alberto Gonzales’s resignation as Attorney General, and the politically-charged practices of the Department of Justice during the Bush administration, see Kelly Hill, *supra* note 19, at 86-91.

⁴⁰JOHN H. MACKIN, *CLASSICAL RHETORIC FOR MODERN DISCOURSE: AN ART OF INVENTION, ARRANGEMENT, AND STYLE FOR READERS, SPEAKERS, AND WRITERS* 6-7 (1969).

⁴¹*Id.* at 6. Socrates’ definition is reported by Plato in *Phaedrus*.

⁴²*Id.*

to appeal to students' reasoning abilities and thereby reach the truth. In this Socratic way, the teacher and students engage in a discourse, searching for truth together as part of a common effort.⁴³ In reaching the truth, the Socratic rhetorician and his audience are ultimately swept away by the depth of their conviction and are physically moved to action.⁴⁴

However, even within a law school's confines, Socrates' truth-seeking dictates do not constrain rhetoric's use. As Frederic Gale proudly admits, many professors believe they have the "responsibility to teach not only how to think but even what to think about."⁴⁵ What we see in this alternative view of law school teaching is that unlike Socrates' effort to use rhetoric in a search for truth, rhetoric may be seen as a legitimate tool of persuasion. Rhetoric as persuasion brings us to a second, classical definition of "rhetoric."

B. Persuasion

Unlike Socrates, Aristotle endorses rhetoric's persuasive powers.⁴⁶ For Aristotle, rhetoric is to be used in a search for meaning, not truth. Rhetoric thereby becomes "an invaluable constituent of argumentation in circumstances in which the meaning rather than the truth of an event [is] at issue."⁴⁷ Following this course, the appeal is not simply to one's rationale but also to one's morals and emotions.⁴⁸ In short, it is persuasion by *any* "available means."⁴⁹

Judge Posner also views the judicial use of rhetoric from this perspective. Likening judges to poets, Judge Posner recognizes that the poet-judge may legitimately appeal to emotion. Paraphrasing the work of Robert Penn Warren on poetry, Judge Posner declares that for the poet-judge, "nothing that is available in human experience is to be legislated out of [law]."⁵⁰

Joining Posner in imagining the poet-judge, Martha Nussbaum argues that the appeal to an audience's emotions naturally allows the poet-judge to recognize

⁴³*Id.* at 42-44 (discussing the Socratic dialectic and its purpose to enlighten all involved).

⁴⁴*Id.* at 44.

⁴⁵FREDRIC G. GALE, *POLITICAL LITERACY: RHETORIC, IDEOLOGY, AND THE POSSIBILITY OF JUSTICE* 163 (1994).

⁴⁶MACKIN, *supra* note 40, at 6 ("Aristotle . . . defined rhetoric as a faculty of observing in any given case the available means of persuasion."). Aristotle defines rhetoric in his work, *Rhetoric*.

⁴⁷Lawrence Douglas, *Constitutional Discourse and Its Discontents: An Essay on the Rhetoric of Judicial Review*, in *THE RHETORIC OF LAW* 225, 226 (Austin Sarat & Thomas R. Kearns eds., 1994).

⁴⁸MACKIN, *supra* note 40, at 6.

⁴⁹*Id.*

⁵⁰Posner, *Judges' Writing Styles*, *supra* note 4, at 1448 (substituting the word "law" for "poetry" but otherwise quoting Robert Penn Warren, *Pure and Impure Poetry*, in ROBERT PENN WARREN, *SELECTED ESSAYS* 3 (Random House 1958)).

her own emotional responses.⁵¹ Yet as Nussbaum cautions, the poet-judge nevertheless remains a “judicious spectator.”⁵² The poet-judge engages in “detached evaluation” but still displays empathy for the disadvantaged and a full understanding of history.⁵³ Likening the poet-judge to the reader of a novel, the poet-judge maintains a type of “[l]iterary neutrality, . . . like the reading of a novel, gets close to the people and their actual experience. That is how it is able to be fair.”⁵⁴

Within the rubric of rhetoric as persuasion and an appeal to emotions, one should take care to make a critical distinction between positive persuasion—which Lawrence Douglas characterizes as a “forceful and meaningful” use of words—and the more “crass” art of manipulation.⁵⁵ When rhetoric manipulates, it devolves. It is no longer a pure appeal to rationality nor a legitimate appeal to the emotions. Instead, as Plato describes, when rhetoric manipulates, it degenerates into “a knack of convincing the ignorant that [the speaker] knows more than the experts.”⁵⁶

C. *Speaking Well*

Finally, distinguishing rhetoric’s use to seek truth, to persuade, or even to manipulate is the recognition of rhetoric simply as the “science of speaking well.”⁵⁷ Quintilian, a lawyer and professor of rhetoric in imperial Rome, is often associated with appreciating this more aesthetic aspect of rhetoric.⁵⁸ Judge Posner shares such an appreciation of the art. Borrowing again from Robert Penn Warren’s thoughts on poetry, Judge Posner distinguishes between “pure” and “impure” judicial writing styles.⁵⁹

1. *“Pure” Writing.*—Whereas in poetry, “pure” writing is equated with Tennyson and the nineteenth-century Victorian style, “pure” judicial writing is equated with the overuse of form.⁶⁰ For Posner, the “pure” poet-judge’s writing

⁵¹Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477, 1481-82 (1995).

⁵²*Id.* at 1486.

⁵³*Id.*

⁵⁴*Id.*

⁵⁵Douglas, *supra* note 47, at 226.

⁵⁶*Id.* at 225 (quoting PLATO, GORGIAS 38 (Walter Hamilton trans., 1960)).

⁵⁷MACKIN, *supra* note 40, at 6-7; *see also* MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 69 (2005) (discussing Quintilian’s approach to rhetoric).

⁵⁸*See* FROST, *supra* note 57, at 86 (discussing 3 QUINTILIAN, INSTITUTIO ORATORIA 185 (H.E. Butler trans., 1954)); *see also* MACKIN, *supra* note 40, at 6-7.

⁵⁹Posner, *Judges’ Writing Styles*, *supra* note 4, at 1426-32 (relying on WARREN, *supra* note 50).

⁶⁰*Id.* at 1428-29.

is too “solemn [and] highly polished.”⁶¹ The “pure” poet-judge fails because he is “far removed from the tone of conversation—impersonal.”⁶² Posner cites Justice Blackmun’s writings as exemplifying the “pure” judicial writing style.⁶³ Blackmun is the “arch-sentimentalist, . . . arch-egoist.”⁶⁴ Deriding important Blackmun decisions, Posner characterizes *Deshaney v. Winnebago County Department of Social Security*⁶⁵ as “maudlin,”⁶⁶ *Planned Parenthood of South Eastern Pennsylvania v. Casey*⁶⁷ as “narcissistic”⁶⁸ and *Roe v. Wade*⁶⁹ as “unreasoned [and] sophomoric.”⁷⁰

2. “Impure” Writing.—By contrast, the “impure” judicial writers are equated with such “impure” but respected poets as Shakespeare.⁷¹ The “impure” are committed to creating a dialogue with life.⁷² They write not simply for the “legal insiders” but for all laypeople, in an effort to truly communicate.⁷³ Judge Posner celebrates such pragmatists as Justice Holmes and Justice Black as models of the “impure” judicial writing style.⁷⁴ Posner’s suggestion seems to be that it is impure, rather than pure writing that should be advanced.⁷⁵

Recognizing each valid use of rhetoric, a lawyer must speak truth, persuade, and do so with style. Or, as Quintilian pleads, a lawyer must “instruct, move, and

⁶¹*Id.* at 1429.

⁶²*Id.*

⁶³*Id.* at 1433-35.

⁶⁴*Id.* at 1433.

⁶⁵489 U.S. 189 (1989).

⁶⁶Posner, *Judges’ Writing Styles*, *supra* note 4, at 1433-34 (finding Blackmun’s “Poor Joshua!” comment to imply that Joshua’s irreversible brain damage inflicted by his father might have been reversible. *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting)).

⁶⁷505 U.S. 833 (1992).

⁶⁸Posner, *Judges’ Writing Styles*, *supra* note 4, at 1434 & n.28 (noting Blackmun’s self-aggrandizement in the abortion debate in *Casey*, 505 U.S. at 923, 943 (Blackmun, J., concurring in part and dissenting in part)).

⁶⁹410 U.S. 113 (1973).

⁷⁰Posner, *Judges’ Writing Styles*, *supra* note 4, at 1434-35 & nn.26, 29 (pointing to Blackmun’s lengthy history of abortion in *Roe*, 410 U.S. at 130-47 and pointing to Judge Posner’s more lengthy discussion of the “rhetorical ineptitude of the opinion” in RICHARD A. POSNER, *SEX AND REASON* 237 (1992)).

⁷¹*Id.* at 1428.

⁷²*Id.* at 1428 n.13. Posner quotes Samuel Johnson as remarking that Shakespeare’s “dialogue is level with life.” *Id.* (quoting Samuel Johnson, *Preface to the Plays of William Shakespeare*, in SAMUEL JOHNSON’S LITERARY CRITICISM 139, 143 (R.D. Stock ed., 1974)).

⁷³*Id.* at 1431.

⁷⁴*Id.* at 1432.

⁷⁵*Id.* at 1431 (noting that “the impure judicial stylist may have a larger audience than the pure”).

charm his hearers.’”⁷⁶

III. RHETORIC APPLIED: *KADIA V. GONZALES*

A. Case History

In this quest, let us turn to the Seventh Circuit’s use of rhetoric in the immigration context. While the Seventh Circuit is unusually prolific in the immigration area,⁷⁷ the query now becomes not only whether the Circuit’s rhetoric “moves, instructs and charms” the reader in any particular case but also whether its use may have a more powerful impact upon our immigration courts as a whole.

In September, 2007, Judge Posner issued the sole opinion in *Kadia v. Gonzales*.⁷⁸ Mr. Henry Kadia came to the United States seeking asylum from his native country of Cameroon.⁷⁹ In Cameroon, Kadia had been politically active, supporting a secessionist movement in southern Cameroon and political parties which advocated the south’s secession by peaceful means.⁸⁰ Appearing pro se, Kadia testified that he had been arrested, detained, “often beaten,” and tortured in Cameroon.⁸¹ In his written affidavit, and ultimately in his testimony, he further explained that this torture included having hot rubber poured down his back.⁸²

While Cameroon may seem far away and remote to those who are in Indianapolis, even this law school is connected. Several students in the LL.M. program are from Cameroon. At least one of these Cameroonian students was awarded political asylum due to persecution for similarly supporting the secessionist movement of southern Cameroon. Yet at Mr. Kadia’s immigration hearing in Chicago, IJ Robert D. Vinikoor denied asylum, finding that his story

⁷⁶FROST, *supra* note 57, at 58 (quoting 1 QUINTILIAN, *supra* note 58, at 397).

⁷⁷See *supra* notes 6-7 and accompanying text.

⁷⁸501 F.3d 817 (7th Cir. 2007). While *Kadia* was argued before a three judge panel of the Seventh Circuit, Judge Ripple recused himself after oral argument, leaving only Judges Posner and Wood to decide the case. *Id.* at 819 n.*. Admittedly, it is impossible to confidently attribute any written opinion solely to the acknowledged author when it is supported by other panel members. However, given that only two judges participated in the deliberations of *Kadia*, Posner’s “true” authorship bears greater certainty.

Struggling with the attribution difficulty in his examination of Justice Antonin Scalia’s use of rhetoric, Michael Frost limits his examination to Scalia’s dissenting opinions as they are less likely to be collaborative efforts. FROST, *supra* note 57, at 120-22.

⁷⁹*Kadia*, 501 F.3d at 819.

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.* at 822.

of persecution was not credible.⁸³ Affirming the IJ's findings, the BIA upheld the IJ's negative credibility determination.⁸⁴

Issuing the Seventh Circuit opinion, Judge Posner remarks at the outset that had Mr. Kadia been found credible, his account of persecution would have established a well-founded fear of persecution on account of his political opinion.⁸⁵ Judge Posner also immediately acknowledges the terrific deference that must be given to the fact-finder, particularly on matters of credibility.⁸⁶ Despite such deference, Judge Posner effectively employs numerous rhetorical tools to persuade the reader of Kadia's credibility and, conversely, the IJ's incompetence and intemperance.

B. Emotional Persuasion

Strategically, Posner begins his opinion with an emotional appeal that lets the reader identify with both underdogs in the case: the asylum applicant and the IJ. Posner immediately extends sympathy toward the IJ. He recognizes the immigration courts' tremendous workload, sees the "avalanche of asylum claims" under which they toil, and understands they are "grossly understaffed."⁸⁷ Such sympathy for the immigration courts is a common theme of the Seventh Circuit. In an earlier opinion, Judge Easterbrook, describes Chicago's IJs as "overworked . . . Midwest" lawyers.⁸⁸ Nevertheless, Seventh Circuit sympathy does not yield forgiveness.

C. Exaggerated Style

Indeed, in *Kadia*, any sympathy one initially feels for the IJ is quickly extinguished as Posner reminds readers that nationwide the circuits' rate of reversing negative credibility determinations in asylum matters is extraordinarily high.⁸⁹ "Deference is earned; it is not a birthright."⁹⁰ "[E]gregious failures" may

⁸³*Id.* at 819. While *Kadia* does not disclose the identity of the IJ, I was initially introduced to the *Kadia* decision by Judge Vinikoor who identified himself as the deciding IJ.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.* at 819-20. In reviewing credibility determinations based on inconsistencies or falsehoods in testimony, Posner framed the standard "as whether the determination of credibility was reasonable, not whether it was correct." *Id.* at 820.

⁸⁷*Id.*

⁸⁸*Banks v. Gonzales*, 453 F.3d 449, 454 (7th Cir. 2006). In referring to these administrative, IJs as "lawyers," perhaps a slight was also intended.

⁸⁹*Kadia*, 501 F.3d at 820. In the first two months of 2006, two-thirds of reversals in asylum matters involved credibility determinations. *Id.* (relying on 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, 959 (2006)). For the Seventh Circuit's own reported reversal rates, see

be understood “but not excused.”⁹¹ Such admonishments set the tone and foretell the outcome. As readers we are now prepared to hear numerous mistakes and are conditioned to view them as egregious. We are set up.

One such egregious mistake lays in Posner’s charge that the IJ employs “the discredited doctrine of *falsus in uno, falsas in omnibus* (false in one thing, false in all things).”⁹² Posner now turns the sympathy toward Kadia, bringing one to understand why any petitioner might exaggerate or stretch the truth. He gets readers to believe that it is the judge’s job, not the witness’, to overcome this problem. Specifically Posner says: “Anyone who has ever tried a case or presided as a judge at a trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness’s entire testimony, few trials would get all the way to judgment.”⁹³ Note what has happened here: while we can understand the mistakes of IJs and the mistakes of witnesses, it is only the mistakes of witnesses which the law may excuse.

Posner then systematically reviews IJ Vinikoor’s negative credibility determination, isolating and discrediting the discrete incredibility findings which relate to various bits of Kadia’s story.⁹⁴ Having completed this task, Posner concludes by discrediting the IJ’s overall finding of lack of credibility. Posner’s tactic can itself be criticized as a variation on the discredited maxim of “false in one thing, false in all things.” As some courts have observed, Posner’s systematic approach is its own type of “nitpicking” in which the various inconsistencies become seemingly unconnected and can then be characterized as “minor” or “incidental.”⁹⁵

Unlike his rapid dismissal of numerous aspects of the IJ’s incredibility finding, Posner takes particular care to review the IJ’s findings surrounding Mr. Kadia’s use of the word “die-hard.”⁹⁶ To help establish his political activity, Mr.

supra notes 6-7 and accompanying text.

⁹⁰*Kadia*, 501 F.3d at 821.

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.*

⁹⁴Posner deems some of the factual basis for the IJ’s incredibility determination to be “trivial” and finds that other “inconsistencies” were not inconsistencies at all.” *Id.* at 822.

⁹⁵*Kumar v. Gonzales*, 444 F.3d 1043, 1056, 1060-61 (9th Cir. 2006) (Kozinski, J., dissenting). Similar judicial opposition to such micro-management may have contributed to Congress’ success in amending the relevant statutory credibility standard through the Real ID Act of 2005, 8 U.S.C. § 1778 (2006). Pursuant to the Real ID Act, IJs arguably may now make adverse credibility determinations without regard to whether the inconsistencies “[go] to the heart of the . . . claim.” *Kumar*, 444 F.3d at 1056 (Kosnski, J., dissenting); *see also Kadia*, 501 F.3d at 822. For further discussion of the Real ID Act and judicial reactions, see Kelly Hill, *supra* note 19, at 113-18.

⁹⁶*Kadia*, 501 F.3d at 823.

Kadia had supplied a third party's affidavit in which he is described as a "die-heart supporter" of his political party.⁹⁷ It is this arguable misspelling of die-heart, as opposed to the common American spelling, die-hard, which becomes so critical. The IJ points to Kadia's own affidavit.⁹⁸ Kadia also used the word "diehard" and similarly spelled it as "dieheart."⁹⁹ As a result of the identical believed misspelling of diehard, the IJ suggests the petitioner may have forged the third party supporting affidavit.¹⁰⁰

Certainly, the forgery of an affidavit is no minor inconsistency. To salvage Kadia's credibility, Posner must spend significant time discrediting the IJ's assessment.¹⁰¹ Posner then relies on his own stylistic use of exaggeration: "[t]he [IJ] seems not to have realized—what is obvious even to a generalist judge—that conventions regarding spelling and vocabulary differ among the world's English-speaking populations."¹⁰² In short order, Posner implies that as a specialist, the IJ should have been more familiar with such cultural differences. To further his point, Posner proceeds to act as his own expert. He ventures onto his own internet research expedition and reports back that "diehard" is often spelled "dieheart" in Cameroonian English (as well as English spoken in Jamaica and Pakistan).¹⁰³ Ironically, in resuscitating Kadia, Posner damages his own image. After all, assuming the "role of country specialist" is a routine criticism the Seventh Circuit levies against IJs who engage in comparable research efforts.¹⁰⁴

⁹⁷*Id.*

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴*Banks v. Gonzales*, 453 F.3d 449, 454 (7th Cir. 2006) (stating that as "an overworked lawyer who spends his life in the Midwest," an IJ cannot "play the role of country specialist"); *see also* *Shtaro v. Gonzales*, 435 F.3d 711, 715 (7th Cir. 2006); *Kllokoqi v. Gonzales*, 439 F.3d 336, 344 (7th Cir. 2005); *Huang v. Gonzales*, 403 F.3d 945, 949-51 (7th Cir. 2005); *Uwase v. Ashcroft*, 349 F.3d 1039, 1042 (7th Cir. 2003). In making these remarks in *Banks*, Judge Posner begins by noting:

An IJ is not an expert on conditions in any given country, and *a priori* views about how authoritarian regimes conduct themselves are no substitute for evidence—a point that we have made repeatedly, but which has yet to sink in. *See, e.g., Kllokoqi v. Gonzales*, 439 F.3d 336, 344 (7th Cir. 2005); *Shtaro v. Gonzales*, 435 F.3d 711, 715 (7th Cir. 2006); *Huang v. Gonzales*, 403 F.3d 945, 949-51 (7th Cir. 2005); *Uwase v. Ashcroft*, 349 F.3d 1039, 1042 (7th Cir. 2003).

Banks, 453 U.S. at 453-454

D. Charm and Connection

Posner's opinion ends with the stylistic flourish he uses so well to charm his audiences. Just when we are getting tired of reading a laundry list of dry, unrelated mistakes and are starting to feel somewhat detached from the petitioner, Posner interjects: "Remember the burning rubber?"¹⁰⁵ And at once we are connected to Kadia again, imagining that hot rubber burning down our own backs. Posner then transports us into the courtroom, providing a portion of the IJ's questions and the petitioner's answers to reflect how difficult it is to testify, particularly when one is unrepresented:

[Q. (IJ):] "[D]id they just punch your [sic] or kick you or what happened?"

[A. (Petitioner):] "They used to take you like this and put your foot on door."

[Q. (IJ):] "They hit your feet?"

[A. (Petitioner):] "Hit your feet, yes."

[Q. (IJ):] "And then, they put you back in the regular warehouse."

[A. (Petitioner):] "In the warehouse, yes."¹⁰⁶

Later in the hearing, the IJ returned to the detention:

[Q. (IJ):] "You didn't mention that [the melted rubber]. Was that some other incident or is that this incident?"

[A. (Petitioner):] "Well, that's the incident, Your Honor."

[Q. (IJ):] "But you didn't tell me that when you said that. I asked you what harm you suffered. You didn't tell me anything."¹⁰⁷

"[G]otcha!" Posner concludes.¹⁰⁸ With this one word and his characteristic dry wit, Posner convincingly critiques the IJ for drawing a negative inference from this limited line of questioning. It is not Kadia but the IJ who is at fault, for denying the unrepresented petitioner an opportunity to describe being subjected to the burning rubber.¹⁰⁹

Posner emotionally connects the reader with the asylee. He brings us into the courtroom, letting us feel the hot rubber as well as the fatigue and confusion that Kadia, an unrepresented individual in a foreign court, must feel. We are convinced. It is the IJ, not the petitioner, who lacks credibility.

*IV. FINAL OBSERVATIONS**A. Judicial Options*

Apart from the victory enjoyed by individual appellants such as Mr. Kadia,

¹⁰⁵ *Kadia*, 501 F.3d at 823.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 824.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

what value lies in such a rhetorical discrediting of an IJ? As noted at the outset, the circuits' ability to correct the deficiencies of our immigration courts is limited.¹¹⁰ Such frustration is exacerbated by the systemic nature of the problem. Reversing yet another negative asylum decision, Posner wearily begins: "At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals The performance of these federal agencies is too often inadequate. This case presents another depressing example."¹¹¹

In an earlier article, I argue that the circuits may be able to reform our immigration agencies through such means as directly addressing all due process violations and openly pressuring the Attorney General to rely more heavily on his sanctioning capabilities.¹¹² In extreme cases, the Seventh Circuit already follows such prescriptions.¹¹³

Mr. and Mrs. Floroiu fled their native Romania on account of religious persecution.¹¹⁴ As Seventh-Day Adventists, Mr. Floroiu's efforts to spread his faith in Romania were met with anger and threats of death from townspeople and clergy within the Romanian Orthodox church.¹¹⁵ Denying their claims for withholding of removal and other relief, Chicago-based IJ Craig M. Zerbe justified his decision by finding that the respondents were "essentially zealots [who were] contributorily negligent" for their "aggressive proselytizing."¹¹⁶

¹¹⁰See *supra* notes 8-9 and accompanying text.

¹¹¹*Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2005) (citation omitted).

¹¹²Kelly Hill, *supra* note 19, at 118-23.

¹¹³I should hasten to add that these Seventh Circuit "reform" efforts began well before the publication of my article, Kelly Hill, *supra* note 19, which advocates such actions.

¹¹⁴*Floroiu v. Gonzales (Floroiu I)*, 481 F.3d 970 (7th Cir.), *costs and att'y fees granted*, 498 F.3d 746 (7th Cir. 2007).

¹¹⁵*Id.* at 971. Citing the Orthodox church's control in Romania, the police offered no protection. *Id.* at 971-72. In fact, the police briefly detained and questioned Mr. Floroiu after he reported the final incident when an Orthodox priest engaged him in a physical altercation and threatened to kill him in front of an angry crowd. *Id.*

¹¹⁶*Id.* at 973 (also denying their claim of asylum because their application was filed after the one-year statutory deadline); *see also* 8 U.S.C. § 1158(a)(2)(B) (2006).

While the Seventh Circuit does not identify IJ Zerbe by name, the decision is attributed to him in an online legal journal. Pamela A. MacLean, *Immigration Judges Behaving Badly Again*, NAT'L L.J., Apr. 6, 2007, available at <http://www.nlj.com> (on file with author).

For academic advocacy of "naming" the immigration judge within the body of the judicial opinion, see Alexander, *supra* note 6, at 31-32; Recent Cases, *Immigration Law—Administrative Adjudication—Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts.*—Wang v. Attorney General, 423 F.3d 260 (3d Cir. 2005), and Benslimane v. Gonzales, 430 F.3d 828 (7th

Affirming IJ Zerbe's decision, the BIA characterized his intemperate comments as nothing more than harmless error.¹¹⁷

In stark contrast, the Seventh Circuit determined IJ Zerbe's lack of impartiality to be so extreme as to violate due process and to necessitate review by the Attorney General for possible disciplinary action.¹¹⁸ In a subsequent action, the Seventh Circuit also took the further, unusual step of awarding attorneys fees and costs against the Department of Justice for defending Zerbe's decision.¹¹⁹ IJ Zerbe's negative treatment of Mr. and Mrs. Floroiu was remedied.¹²⁰ Indeed, IJ Zerbe has been overturned numerous times and similarly chastised by the Seventh Circuit.¹²¹ However, at the time of this lecture, IJ Zerbe remains on the bench.¹²²

B. *The Power of Rhetoric*

And so, with limited judicial alternatives, we return to the potential of rhetoric for immigration reform. Used judiciously, rhetoric is a powerful tool. Judicial opinions become accessible to laypeople and are more likely to be cited by the media. Rhetoric brings the public to empathetically face the challenges our immigration courts pose for an asylum seeker. Beyond simply convincing us of abuses in an isolated case, rhetoric allows us to recognize the breadth and systemic nature of the problem. As the Seventh Circuit urges, "the volume of caselaw" detailing the problems besetting our immigration courts must sound the "warning bell . . . that something is amiss."¹²³ Laid in the proper judicial hands, rhetoric sounds the bell loud enough that we can all hear it.

Cir. 2005), 119 HARV. L. REV. 2596, 2603 (2006) (student note written by Sydenham Alexander which was later developed into the full article, Alexander, *supra* note 6); see also Kelly Hill, *supra* note 19, at 119-20.

As of June 2008, a review of immigration decisions by circuit courts of appeal reflects that only the Second and Third Circuits consistently identify the deciding immigration judge. Alexander reports that the Second Circuit consistent identification of immigration judges began in the summer of 2006. Alexander, *supra* note 6, at 31 n.161.

¹¹⁷*Floriou I*, 481 F.3d at 973.

¹¹⁸*Id.* at 973, 976.

¹¹⁹*Floriou v. Gonzales (Floriou II)*, 498 F.3d 746, 748-50 (7th Cir. 2007) (finding that the government's opposition to the due process claim not only failed to meet the statutory standard of "substantial justification" but that its was also simply "unreasonable").

¹²⁰*Floriou I*, 481 F.3d at 976-77 (reversing IJ Zerbe's decision and calling for a different IJ upon remand).

¹²¹For further discussion of IJ Zerbe and the negative treatment of his decisions by the Seventh Circuit, see Kelly Hill, *supra* note 19, at 120-21.

¹²²U.S. Dep't of Justice, Executive Office for Immigration Review, <http://www.usdj.gov/eoir/sibpages/ICadr.htm#IL>.

¹²³*Giday v. Gonzales*, 434 F.3d 543, 549-50 (7th Cir. 2006).