

REVISED REMARKS TO THE SYMPOSIUM ON
INNOVATIVE APPROACHES TO IMMIGRANT
REPRESENTATION AT THE BENJAMIN N.
CARDOZO SCHOOL OF LAW

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Thank you for your warm welcome. The first of the two broad subjects on which I shall comment today is the importance generally of pro bono work. I feel a little bit like I am preaching to the choir when I speak to this group because you are clearly well motivated and fully understand the importance of the work you are doing. I would add one thought: Throughout my years in private practice, I was involved in various types of pro bono activity through the bar association and as appointed counsel in situations that crossed quite a spectrum of activities. This work was especially rewarding because it provided me with learning experiences often not available when performing a service for a paying client. The psychic benefits that a lawyer receives when helping people who are in need and who are confronted with problems they cannot solve themselves are difficult to describe yet very real. I often thought about the advice that John Adams gave to a younger lawyer when he wrote: “Now, to what higher object, to what greater character, can any mortal aspire than to be possessed of all this knowledge well digested, and ready at command to assist the feeble and friendless . . . ?”¹

I share John Adams’s sentiment and believe that this group has the opportunity to carry it into practice. Beyond a general concern for helping others, the need for legal representation for immigrants is especially acute, as Judge Katzmann has pointed out,² and that need is one of on-

* Associate Justice, U.S. Supreme Court (retired). A version of these remarks was given on May 3, 2011, at the Benjamin N. Cardozo School of Law Symposium, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*.

¹ Letter from John Adams to Jonathan Sewall (Oct. 1759), in 2 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 79 (Charles Francis Adams ed., 1850).

² See, e.g., Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 4 (2008) (“The importance of quality representation [in immigration proceedings], be it paid or pro bono, is especially acute for immigrants, not only because the stakes are often so high—whether individuals will be able to stay in this country or reunite their families or be employed—but also because there is a wide disparity in the success rate of those who have lawyers and those who proceed pro se.”).

going importance. In considering the case of *Padilla v. Kentucky* during my final year on the Court,³ it occurred to me that there is not only a need for lawyers to advocate on behalf of immigrants in individual cases, but also a need for their broader advocacy in the legislative policy-making area. For example, in preparing the *Padilla* opinion, I learned some of the history of immigration laws over the past century, and I came to understand how unfortunate it was that Congress removed the authority of both state and federal judges in criminal cases to prevent an automatic order of deportation.⁴

As the *Padilla* opinion explains, formerly a state or federal judge was permitted, at or shortly after the time of sentencing, to review whether or not deportation was an appropriate consequence for a particular immigrant's criminal conviction.⁵ If the judge decided deportation was not appropriate, he could issue a "judicial recommendation against deportation," which bound the Executive not to deport the defendant.⁶ But Congress narrowed, and eventually eliminated, the availability of this procedure in the latter half of the twentieth century.⁷ Thus, it was no longer a relevant part of our immigration law when *Padilla* was prosecuted. *Padilla* himself had been in the United States for over forty years.⁸ While he had committed a drug offense,⁹ which thousands of others also had done, the consequences of deportation are so drastic that one would expect, if there had been room for the judge's discretion, that something might have been worked out. Of course, that may still be possible, because the case has not entirely concluded.

It struck me in considering *Padilla*'s case that a group like yours should not overlook the importance of reminding Congress that there is room for change, and that some of the very harsh immigration laws we have should be reexamined. In essence, the congressional determination that deportation is absolutely required in a whole host of cases is the counterpart of mandatory minimum sentencing in the general criminal law. Such rules produce results that in many cases may be unduly severe, and leave no room for judges, who have knowledge of the defendant's particular circumstances and conduct, to adjust the remedy to match those facts. Thus, the elimination of judicial discretion in this context is really something that people should rethink. Lawyers' attention should be focused not only on the case-by-case problems that arise

³ 130 S. Ct. 1473 (2010).

⁴ *Id.* at 1479–80.

⁵ *Id.* at 1479 (citing Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874, 889–90).

⁶ *Id.*

⁷ *Id.* at 1480 (citing Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 241, 66 Stat. 163, 204, 206; Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050).

⁸ *Id.* at 1477.

⁹ *Id.*

for individual immigrants, but also on broader policy and procedural problems.

The second basis for my interest in coming today is that I wanted to visit the Cardozo School of Law. Justice Cardozo has always been one of my heroes, not only for his eloquent writing, but also for his good judgment, which pervaded his work throughout his judicial career. Of course, much of his important work was from his time on the New York Court of Appeals, rather than on the U.S. Supreme Court. While on the New York Court of Appeals, Justice Cardozo delivered a set of lectures—later published as a book—that contains one of the best statements of the reasons for *stare decisis* that I have read.¹⁰ Justice Cardozo stated that, in his view, *stare decisis* “should be the rule and not the exception.”¹¹ He explained that “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”¹² But

when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . If judges have wo[e]fully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.¹³

I have quoted these words of Justice Cardozo in a half a dozen opinions, I’m sure. For instance, in my first year on the Court, I quoted them in my concurrence in *Runyon v. McCrary*.¹⁴ In that opinion, I concluded that the Court should adhere to a prior decision that held that the Civil Rights Act of 1866 prohibits private racial discrimination, and should apply that decision to hold that the Act prohibited private schools from denying admission to qualified students because they were black.¹⁵ *Runyon* represented the culmination of a progression of judicial decisions that had reached a conclusion that, in my judgment, was different from that which the draftsmen of the statute likely intended. Notwithstanding the original legislators’ preferences, the law had developed and was consistent with modern understandings of what the rules should be. Thus, it was appropriate, in my view, to follow Justice Cardozo’s admonitions by adhering to the developed line of precedent.

¹⁰ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 142–67 (1921).

¹¹ *Id.* at 149.

¹² *Id.*

¹³ *Id.* at 150, 152.

¹⁴ 427 U.S. 160, 190–91 (1976) (Stevens, J., concurring).

¹⁵ *Id.* at 189–92 (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)).

Visiting the Cardozo School of Law is also an opportunity to thank my former law clerk, Sara Klein, for the work she did. Sara was a law graduate of Cardozo in 2005 and my law clerk two or three years ago. I was reminded recently of one case on which we worked together, *Baze v. Rees*, in which the Court held that a particular procedure used in administering the death penalty—lethal injection of a certain combination of drugs—did not violate the Eighth Amendment.¹⁶ When I read the Chief Justice’s draft opinion, which was thoughtful and well written, it dawned on me—and I think Sara and I talked about this—that if his opinion effectively establishes that the Constitution requires a virtually painless administration of the penalty, the whole process of administering the death penalty as it has developed in this country must also violate the Eighth Amendment. I concurred in the judgment in *Baze*, but wrote separately to explain that it was adherence to precedent, and not belief in the constitutionality of the death penalty, that accounted for my concurrence.¹⁷ I noted that “I am now convinced that this case will generate debate not only about the constitutionality of [this particular drug] protocol, . . . but also about the justification for the death penalty itself.”¹⁸ As to that justification, I concluded, quoting Justice White’s earlier opinion, “that the imposition of the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.’”¹⁹

Baze drove home my realization that several of the features of the administration of the death penalty that have been developed to render it a more civilized form of punishment render its primary justification obsolete. In *Baze*, the Chief Justice very accurately and elegantly explained that the procedure that the State selects, when applied as designed, should not cause extensive pain to the defendant.²⁰ Instead, the State must adopt, from among the feasible alternatives, a procedure that “significantly reduce[s] a substantial risk of severe pain.”²¹ In effect, then, the State must design the administration of the penalty to be about as painless as administering anesthesia in a hospital.²² Yet this attempt to avoid infliction of pain upon the defendant is at odds with the most oft-invoked justification of the death penalty: the need for revenge—that the penalty must provide retribution for the terrible wrong commit-

¹⁶ 553 U.S. 35, 43–44, 47 (2008).

¹⁷ *Id.* at 86 (Stevens, J., concurring in the judgment).

¹⁸ *Id.* at 71.

¹⁹ *Id.* at 86 (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

²⁰ *Id.* at 49, 52 (majority opinion).

²¹ *Id.* at 52.

²² *See id.* at 44 (explaining that the first of the three drugs in the lethal injection protocol induces unconsciousness, and that its “proper administration . . . ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs”).

ted by the defendant.²³ Such an impulse permeated death penalty jurisprudence and activity for years and years before the Court decided that it must be more civilized. The Chief Justice's opinion persuaded me that if one is going to make the penalty civilized, it really obviates the only potentially persuasive argument for the death penalty itself—namely, that the defendant should experience suffering that parallels the victim's suffering, because he is a terrible person and his suffering will provide healing and closure to others.²⁴

As to this lattermost point, closure may elude many victims' families and close friends. News coverage of Osama bin Laden's recent death provides an illustration. Yesterday, I watched a television news program in which a reporter spoke to two or three relatives of people who had lost their lives in the attack on the World Trade Center. The reporter asked them something like, "Doesn't it give you closure to know that Osama bin Laden has been killed?" The interviewees basically answered, "No, it doesn't at all." They still felt the same sense of loss as a result of what happened on 9/11. As I have written in a recent book review, executing a defendant "cannot reverse or adequately compensate any survivor's loss."²⁵ The argument that the death penalty is justified because it will bring closure to the victims' families and relatives is not valid and should be put to one side. The justification for the killing of Osama bin Laden is not to provide closure. It is to eliminate a potential enemy of real significance. Unlike a criminal defendant who faces execution but could be incapacitated by life imprisonment without the possibility of parole,²⁶ Osama bin Laden remained at large, as yet uncaptured, with the capacity to commit future heinous acts resembling his past ones. His killing was fully justified by the interest in eliminating an enemy actively involved in hostilities against our country.

These reminiscences reinforce my opinion of Sara as an excellent law clerk. Indeed, Cardozo must be a fine law school to have produced a lawyer of her quality. I thank you for the opportunity to speak to you and for listening to me.

²³ See *id.* at 79–80 & n.14 (Stevens, J., concurring in the judgment) (“[I]t is the retribution rationale that animates much of the remaining enthusiasm for the death penalty. . . . Retribution is the most common basis of support for the death penalty.” (citing Department of Justice statistics)).

²⁴ See *id.* at 80–81 (“[B]y requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim. This trend . . . actually undermines the very premise on which public approval of the retribution rationale is based.”).

²⁵ John Paul Stevens, *On the Death Sentence*, N.Y. REV. BOOKS, Dec. 23, 2010, at 8, 14 (reviewing DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* (2010)).

²⁶ See *Baze*, 553 U.S. at 78 (Stevens, J., concurring in the judgment) (“While incapacitation may have been a legitimate rationale in 1976, the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty.”).