

Letter to the Administrator of Visas in Bogota

This is a letter written by David and Johanna Zapp to the person in charge of Visas at the U.S. Embassy in Bogota, Colombia.

Dear Ms. Fairman,

I saw a video segment regarding a glitch in the processing of visas and in it you mention that priority will be given for humanitarian petitions.

We are criminal defense lawyers and from time to time I represent defendants who have been extradited from other countries (usually Colombia) and are imprisoned in the United States. These defendants will no doubt be sentenced to lengthy periods of incarceration and what I have noticed is that many family members having nothing to do with criminal activity, (children, grandmothers, parents and spouses) who just want to see and hug their loved one, have their visas canceled. I am not excusing the criminality of any defendant. It seems to me there is this humanitarian basis to grant visas to these family members presuming there is no suspicion that these folks will not overstay their visits. I would say the vast majority want to return to their homes. Many are poor and could hardly hope to live in the U.S. It appears that these family members are automatically rejected if they have a relative (spouse, child, parent) incarcerated.

I would think it would be a priority to permit these folks to see their relatives. The extradited defendant does harder time than a non-extradited defendant simply because often he has no one in our country to visit him.

I just wanted to put my two cents in on this issue. I am not sure thought has been given to it. I appreciate that the thought of someone seeking to see someone in jail is fraught with suspicion and it really shouldn't be. It happens often and the ties of family should not be broken because of it.

Thanks for your attention,

David S. Zapp, Esq.
Johanna S. Zapp, Esq.

Cautionary Tales

Two things happened recently of note. The United States took on FIFA, an association not particularly known for its U.S. involvement or

interest and indicted officials from all over the world. It exercised its jurisdiction because the bribe money was deposited in some cases in U.S. banks. Just that gave the U.S. jurisdiction. It wouldn't have surprised me if the U.S. claimed it had jurisdiction because the bribe money was brought on a plane that flew over us airspace. It has happened many times before in drug cases. Rare is the occasion when a federal prosecutor cannot show venue. (The right to prosecute in a particular district because "something happened" in that district.

While there has been a lot of criticism of the United States' reach into corruption in the FIFA, it tells you is just how much Americans hate, hate, hate corruption of any kind, and their willingness to go to the ends of the earth, literally, to find it and extradite those responsible for it.

The other big news was that one of the most powerful men in government during the Clinton administration; a republican congressman was indicted for lying to government agents who questioned him about withdrawals of several million dollars from his bank account more than 15 years ago! The withdrawals, tied to a sexual encounter, were not the accusations levelled at the congressman. It was the lying. I cannot stress it enough. And I do so because it could change your life. If you lie to the U.S. government, there is an overwhelming chance that you will be found out.

– David Zapp, Esq

“It’s All About Playing By The Rules”

I’ve written about this before but it is worthwhile to do so again to new people know about this golden truth and to remind others in case they have forgotten or been led astray:

“Daniel Richman, a Southern District alumnus who teaches at Columbia Law School, told a reporter, “When you hear about a former Assistant U.S. Attorney coming back to the office to talk about an investigation, one could say, ‘It’s the old-boy network.’ But those who are closer to the situation see that it’s a much more beneficent system. The defendant chose a former Assistant U.S. Attorney. That shows it’s committed to playing by the rules. And that’s rewarded.”

No truer words were ever said. As I have told my own lawyer-daughter, “you tell the truth

and the government will give you even more than you are entitled to.” “Beneficent” is the right word. It means kindly, an act of kindness, and that is exactly what you will receive. But if you lie, “hell hath no fury like a prosecutor lied to.”

– David Zapp, Esq.

Federal Judge Bemoans State of Mass Incarceration and Sentencing in General

Jed S. Rakoff, a U.S. District Judge in the Southern District of New York spoke to a Harvard Law School’s conference that examined the responsibilities and roles that lawyers play as professionals and as citizens. This article is taken from what he said. It has been edited, reformatted and added to make it as easy as possible for the people truly affected to read his valuable message.

Judge Rakoff:

“What attracted so many of us to the law [was] a desire to promote justice. Lawyers should feel a professional responsibility to speak out about [injustice]. One such issue is the issue of mass incarceration.

“The relative failure of lawyers in general to speak out on this issue pales in comparison to the silence of the judges, who, I submit, have a special duty to be heard on this issue. Indeed, the commentary to Canon Four of the Code of Conduct for United States judges expressly encourages federal judges to speak out on issues relating to the administration of justice in general and criminal justice in particular. Yet, for too long, too many judges (including me) have been too quiet about an evil of which we are ourselves a part: the mass incarceration of people in the United States today.

“The basic facts are not in dispute. More than 2.2 million people are currently incarcerated in U.S. jails and prisons, a 500 percent increase over the past 40 years. Although the United States accounts for about 5 percent of the world’s population, it houses nearly 25 percent of the world’s prison population. The per capita incarceration rate in the U.S. is one-and-a-half times that of second-place Rwanda and third-place Russia, and more than six times the rate of neighboring Canada. Another 4.8 million Americans are subject to the state supervision imposed by probation or parole.

“Even though crime rates in the United States have declined consistently over the last 24 years, the number of incarcerated persons has continued to increase. [O]ne in nine persons in prison is now serving a life sentence.

“And whom are we locking up? Mostly young men of color. Over 840,000, or nearly 40 percent, of the 2.2 million U.S. prisoners are

young African-American males. Put another way, one in nine African-American males between the ages of 20 and 34 is currently in prison, and, if current rates hold, one third of all black men will be imprisoned at some point in their lifetimes. Another 440,000, or 20 percent, of the 2.2 million U.S. prisoners are Hispanic males.

"The simple but powerful argument [against doing] anything about this situation is that by locking up defendants for extended periods, the people who are most likely to commit crimes, we have both incapacitated those who would otherwise be recidivists and deterred still others from committing crimes in the first place. But is this true? The honest answer is that we don't know. It is at best, premised on a hunch.

"[A]nd the price we pay for acting on this hunch is enormous. [It] costs more than \$80 billion a year to run our jails and prisons. [B]y locking up so many young men and women we contribute to the erosion of family and community life in ways that harm generations of children, while creating a future cadre of unemployable ex-cons. If this keeps up, one out of every three African-American males will be locked up, sending a message that our society has no better cure for racial disparities than brute force.

"This mass incarceration is the product of statutes that were enacted, beginning in the 1970s. These laws imposed Mandatory Minimum Sentences and Federal Sentencing Guidelines that recommend substantial prison terms. The Mandatory Minimum Imprisonment laws also have substantially deprived judges of sentencing discretion and effectively guaranteed imprisonment for many offenders who would have previously received probation or deferred prosecution, or who would have been sent to drug treatment or mental health programs rather than prison.

"[M]andatory minimum terms of imprisonment also [mean] that, no matter how minor the offender's participation may have been, and no matter what mitigating circumstances might be present, the judge is required to send a defendant to prison often for a substantial number of years if he does not qualify for the "safety valve exception."

(Editor's note: Federal Sentencing Guidelines became more a vehicle for greatly increased sentences rather than the uniformity in sentencing it was intended to establish. Federal judges who grew up in the Guideline era follow the Guidelines as if they were the norm. And these judges' numbers will increase as the pre-guideline judges used to unlimited sentencing discretion fade from view through death or resignation.

(Coincidentally and sadly one of the great judges who "hated the guidelines," as one of his former law clerk said, died this past Wednesday on April 23, 2015. Judge Robert Patterson was age of 92. He sat in the Southern District of New York, a great "old school" judge that contributed to that district's gold plated reputation. A sentencing scheme, he said, that did not give a first offender a second chance or did not take into account

all of an offender's life circumstances was repellent to him.

(In a notable case Judge Patterson had before him a South Korean immigrant, a postal worker, who protested the regime in North Korea in front of the UN by shooting a pistol up into the air at an angle of 80 degrees, practically straight up. He remarked how vexed he was that the Federal Sentencing Guidelines forced him to impose a sentence of two years and three months on this man who, the judge said was merely making a political statement rather than intending to inflict injury. In that case Judge Patterson took the opportunity to criticize Congress' "sustained effort to limit the trial judge's traditional role in sentencing as an independent dispenser of fair and just sentences based on the facts and circumstances of each case." At one point, a frustrated Judge Patterson told the prosecution in open court: "you make it so cut and dried. Things aren't so cut and dried." See article in *NYTmes*, Oct. 21, 2003 by Susan Saulny)

"Recently there have been some small signs of progress. In 2013, Attorney General Holder finally did away with the decades-old requirement that federal prosecutors must charge offenders with those offenses carrying the highest prison terms. And in the last Congress, a bill to eliminate Mandatory Minimum Sentences for non-violent drug offenders was endorsed by the Department of Justice and prominent right-wing Republican Senators. On the other hand, prosecutors still have discretion to charge offenders with the most serious offenses available, and they usually do. And the aforementioned bill to modify the applicability of mandatory minimum sentences never reached a vote that reflects the resistance to reform.

"What is called for is leadership: the capacity of those whom the public does respect to point out why statutes prescribing mandatory minimums, draconian guidelines, and the like, are not the key to controlling crime, and why, in any case, the long-term price of mass incarceration is too high to pay, not just in economic terms, but also in terms of societal values.

"Except for the American Bar Association, no other bar association so far as I am aware, has openly denounced mass incarceration, called for outright repeal of Mandatory Minimum laws, supported across-the-board reductions of statutory and guideline imprisonment levels, or otherwise taken the kind of forceful positions that would cause the public to sit up and notice.

"And where in all this stands the judiciary? In some ways, this should be our issue, not just because sentencing has historically been the prerogative of judges, but also because it is we who are forced to impose these sentences. The federal judiciary [is] protected by lifetime tenure from political retaliation and, according to most polls, generally well regarded by the public as a whole.

"On one issue – opposition to mandatory minimum laws – the federal judiciary has been consistent in its opposition: 'For 60 years, the Judicial Conference has consistently and

vigorously opposed mandatory minimums and has supported measures for their repeal or to ameliorate their effects.' But nowhere in the nine single-spaced pages that follow is any reference made to the evils of mass incarceration; and, indeed, most federal judges continue to be supportive of the federal sentencing guidelines. And Congress has much more often required the Sentencing Commission to increase the prison time reflected in those guidelines, thereby further supporting mass incarceration.

"Several brave federal district judges – such as Lynn Adelman of Wisconsin, Mark Bennett of Iowa, Paul Friedman of the District of Columbia, and Michael Ponsor of Massachusetts, as well as former federal judges Paul Cassell and Nancy Gertner [and Judge Patterson] – have for some time openly denounced the policy of mass incarceration. More recently, a federal appellate judge, Gerard Lynch of New York, expressed his agreement that "The United States has a vastly overinflated system of incarceration that is excessively punitive, disproportionate in its impact on the poor and minorities, exceedingly expensive, and largely irrelevant to reducing predatory crime." Justice Anthony Kennedy of the Supreme Court of the U.S. told a House subcommittee that 'this idea of total incarceration just isn't working.'

"While in many respects, [we] can be proud of the progress we have made in promoting civil rights. The big, glaring exception, [however] is how we treat those guilty of crimes. Basically, we treat them like dirt. Unless we judges make more effort to speak out against this inhumanity, how can we call ourselves instruments of justice?"

- Hon. Jed Rakoff

It would not be a bad idea if we lawyers also spoke out at every sentence we are involved in. We know from personal experience that it's never been about guilt or innocence. It's been about "time."

- David Zapp, Esq.

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