

Campbell Law Review

Volume 29
Issue 2 *Winter* 2007

Article 9

2007

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John L. Pinnix

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Recommended Citation

John L. Pinnix, *Foreword and Commentary on the Impact of Immigration on the Legal Community in North Carolina*, 29 CAMPBELL L. REV. i (2007).

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Foreword and Commentary on the Impact of Immigration on the Legal Community in North Carolina

JOHN L. PINNIX*

“Foreigners living among you will be like your own people.
Love them as you love yourself, because you were
foreigners living in Egypt.”
Leviticus 19:34

OUR WORLD AND WELCOME TO IT

The *Campbell Law Review* is to be commended for sponsoring a Symposium entitled: “Immigration Law: A Practical Guide for North Carolina Practitioners.” The topic is timely, the subject is critical. And the emphasis on North Carolina practitioners is significant. Throughout most of this author’s professional career, attorneys concerned with immigration issues turned to the American Immigration Lawyers Association (AILA), the national affinity bar of immigration and nationality attorneys. AILA’s local chapter has existed for nearly three decades and currently serves almost 200 members in North and South Carolina.¹

In today’s world, legal issues involving immigrants extend beyond AILA’s traditional niche areas involving obtaining lawful status through family reunification; business sponsorship and asylee/refugee programs; issues involving naturalization or employment authorization; and defense in the context of removal/deportation proceedings.

Some of these issues that go beyond AILA’s historic portfolio have long existed, yet were not routinely encountered by local practitioners.

* Jack Pinnix is a past President of the American Immigration Lawyers Association (2002-03) and a founding member of AILA’s Carolinas Chapter. He attained B.A. and M.A. degrees in History at the University of North Carolina at Greensboro and his J.D. at the Wake Forest University School of Law. He has served as an Adjunct Professor at North Carolina Central University School of Law and as a Senior Lecturing Fellow at Duke University School of Law. Pinnix is a principal in the Raleigh law firm, Allen and Pinnix, P.A., and is a North Carolina Board Certified Immigration Specialist.

1. The American Immigration Lawyers Association (AILA) is a national bar association of over 10,000 attorneys who practice immigration law. AILA is a nonpartisan, nonprofit organization that provides its members with continuing legal education, information, professional services, and expertise through its 35 chapters and over 75 national committees.

But North Carolina's immigrant growth - both legal and undocumented - has changed the odds.

Twenty-four years ago, I noted in a speech in Raleigh that South Carolina ranked second and North Carolina ranked fourth in the nation in the growth of legal immigration from 1940 to 1979. Back then, the leading sources for immigrants to North Carolina were the British Isles, Germany, Canada, Korea, India, Japan, the Philippines, Greece, China and Taiwan. Admissions to North Carolina rose from 4,207 in 1940 to 22,878 in 1979. Today these figures seem quaint, even parochial.

Between 1990 and 2000, the foreign-born population grew by 200 percent or more in North Carolina, Georgia, and Nevada. According to the 2000 Census, North Carolina's foreign-born population is 430,000, with 14 percent immigrating from Europe, 21.7 percent from Asia, 4.7 percent from Africa, 3.4 percent from North America (excluding Mexico), and 55.8 percent from Latin America (40 percent of the Latin American population was born in Mexico). In 2000, the leading sources for immigrants to North Carolina were Mexico, India, Germany, Canada, Vietnam, and China. According to the Center for Immigration Studies, North Carolina's immigrant population (whether in or out of status) increased from 170,000 in 1995 to 590,000 in 2005. The Pew Hispanic Center's *Estimates of the Size and Characteristics of the Undocumented Population* states that North Carolina's undocumented and out-of-status population is 300,000.

For the foreseeable future, competent attorneys will have to analyze the myriad of traditional immigration issues on a regular basis. Additionally, there are other emergent and cutting-edge issues never envisioned just a few years ago. A few examples, by no means even the tip of the iceberg, are illustrative:

Criminal Attorneys - Once a criminal attorney could comfortably assume that she had obtained a good result by negotiating a reduced plea, a nolo contendere, Prayer for Judgment Continued (PJC) or a reasonable fine. If the client is a non-citizen foreign national, those days are over. Relatively minor criminal charges could have draconian consequences in the context of immigration law. Among the particularly problematic areas are any charges involving firearms, domestic violence, document fraud, or narcotics. Plea agreements acknowledging the elements of guilt are often treated the same as a conviction, and constitutional assumptions regarding the impact of the application of an *ex post facto* law can be a deadly trap in the immigration context.

Estate Attorneys - For deaths after November 10, 1988, transfers by Last Will and Testament made to a non-citizen spouse are, with limited

exceptions, subject to the full federal estate tax. Sometimes mitigation of the negative consequences is possible where the non-citizen spouse obtains U.S. citizenship.

Social Security Attorneys - The Social Security Protection Act of 2004 imposes new restrictions on the payment of benefits to non-citizens. There are particular consequences to alien workers whose Social Security Numbers were assigned on or after January 1, 2004, and to certain foreign nationals returning to their home country.

Domestic Attorneys - Custody issues, *e.g.*, if a U.S. court has granted custody of a U.S. citizen child to a person and the child is detained, restrained, or withheld outside the U.S. from the person granted custody, the person is inadmissible until the child is surrendered to the person granted custody. Inadmissible persons now also include those who assist, support, or provide safe haven to abductors or who are the spouse (other than the spouse who is the parent of the abducted child), child (other than the abducted child), parent, sibling, or agent of an abductor if designated by the Secretary of State. As a ground of inadmissibility this does not apply to a child located in a country that is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction.²

Business and Real Estate Attorneys - All foreign investments in U.S. business enterprises in which a foreign person owns a 10 percent or more voting interest are subject to reporting to the Commerce Department's Bureau of Economic Analysis, including all ownership of real estate, other than for personal use.

Tax Attorneys - Resident aliens are taxable on their world-wide income. The determination of resident alien status is determined by IRS regulations, not USCIS regulations. Consequently, even persons unlawfully in the United States may be deemed resident aliens for tax purposes.

Cross Disciplines - The attorney advising an employer how to handle a Social Security "no-match" letter may be dealing with irreconcilable differences between various government agencies. Some examples include the following: Social Security Administration (SSA): 'resolve the discrepancies'; Immigration and Customs Enforcement (ICE): 'avoid the knowing hire of unauthorized workers'; the Office of Special Counsel for Immigration Related Unfair Employment Practices of the Department of Justice (OSC): 'avoid citizenship discrimination'; the Internal Revenue Service (IRS): 'pay withholding taxes, possibly face a

2. IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 77-78 (10th ed. 2005).

fine *but* accept the employee's corrected W-2 - even with the same mismatched data'.

CLOSE TO HOME

"He who troubles his own house shall inherit the wind."

Proverbs 11:29

Immigration issues now trickle down from the federal level to the states and municipalities. North Carolina is no exception. Politicians and public officials are trying to cope with numerous issues including unfunded mandates, law enforcement, and social services. The result often includes a patchwork of sometimes well-intentioned but ineffective or redundant laws and occasionally xenophobic initiatives. A few examples:

- (1) Under the guise of national security, North Carolina joined the ranks of states restricting the issuance of driver licenses to immigrants. Directed at undocumented foreign nationals, the law has proven to be inartfully drawn and overly broad. Many lawful nonimmigrant workers and their families are unable to secure drivers licenses. Critics note that barring undocumented foreign nationals from securing licenses does little to keep them off the roads. In the absence of public transportation, they need to drive to their jobs, their physicians, buy groceries, and to take their children (some who are U.S. citizens) to school. The unintended consequence of the restricted law is unlicensed motorists who are not tested on the rules of the road and are now unable to secure liability insurance.
- (2) In explaining a federal proposal generated by vehicular deaths involving intoxicated drivers (historically a state concern) a sponsor explained that the law would "make it mandatory to detain and deport any illegal alien convicted of DWI. . . DWIs should be a deportable offense." No one defends drunk driving; but this provision in the legislation is redundant, since most illegal aliens are already deportable, and those who are not would be deportable for a vehicular homicide involving a DWI. The sponsor did not propose concurrent legislation with comparable federal sanctions for U.S. citizens convicted of DWI.
- (3) Local law enforcement agencies are sharply divided regarding programs that would let them enforce federal immigration laws. Sheriffs in Mecklenburg, Buncombe, and Alamance counties, among others, have entered into agreements with

the Department of Homeland Security authorizing local law enforcement officers to interrogate and process the illegal immigrants. In January 2007, the Orange County Board of Commissioners adopted a resolution barring detention of illegal immigrants who haven't committed other offenses.

Throughout the United States, local law enforcement agencies have expressed strong reservations regarding enforcing immigration laws. Aside from issues involving the complexity of immigration laws and police training, undocumented foreign nationals are far less likely to cooperate with neighborhood criminal investigations if the investigating officers are perceived to be immigration enforcement officers.

- (4) On February 1, 2007, House Bill 55 was introduced in the North Carolina General Assembly, entitled "An Act to Establish the North Carolina Security and Immigration Compliance Act to Provide for These Comprehensive Regulations of Persons in this State Who are Not Lawfully Present in the United States." It is available for download on the North Carolina General Assembly web site at <http://www.ncleg.net> using the "Bill Lookup" feature.

THERE ARE NONE SO BLIND AS THOSE WHO WILL NOT SEE

The North Carolina agriculture industry draws a large number of migrant laborers to the state each year. These are essential workers for apple, cucumber, cotton, soybean, wine, seafood, chicken, hog, and turkey production and operations.

On Thanksgiving weekend in 1960, CBS broadcast Edward R. Murrow's documentary, "Harvest of Shame." It exposed the poor living conditions of migrant farm workers - foreign nationals and U.S. citizens - many working in North Carolina. The broadcast was credited for legislation leading to migrant worker reform. Yet in 2005, the Alfred I. duPont-Columbia University award-winning documentary, "Standards of Living," found that 45 years after "Harvest of Shame," many migrant farm workers in North Carolina, now predominately foreign nationals, still face overcrowded, unsanitary, and unhealthy living conditions. "Standards of Living," a WRAL production, concluded that powerful voices oppose new state standards for migrant farm worker housing that would require farmers to provide more showers, toilets, and mattresses for workers. Some state officials claim upgrading would cost too much.

OTHER INCONVENIENT TRUTHS IN OUR BRAVE NEW WORLD

Just months before the September 11th attacks, *The Washington Post* quoted an INS spokesperson as saying immigration “is a mystery and a mastery of obfuscation, and the lawyers who can figure it out are worth their weight in gold.”³ I couldn’t agree more. Yet, as we practice in the new millennium, evidence of some tarnishing mounts.

On the first anniversary of the Department of Homeland Security (DHS), I commented to *The News & Observer* that it was “too early to tell” if the DHS immigration provisions would succeed. No one can fairly lay the blame for a broken immigration system on the legitimate national security concerns highlighted in the aftermath of September 11th. Neglect of the institutional infrastructure and the demoralized bureaucratic culture are decades old and never have proven amenable to cosmetic fixes on the cheap.

But, if *The News & Observer* asked me to revisit the question today, I would have fewer reservations and little reluctance in concluding that many of the promised life supports were lost in transit. Abolishing the Immigration and Naturalization Service and transferring many of its traditional responsibilities to United States Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE) has been, *perhaps unfairly*, compared to shuffling the deck chairs on the Titanic. *Still*, years later, the lines of authority often remain blurred, and the promised reduction of inefficiencies has often been illusory.

Technology has made us better able to serve our clients; yet despite our being available 24/7, we often cannot obtain the simplest response from USCIS. USCIS’s promise of reducing processing backlogs is hollow when statutory quota backlogs cannot abate without Congressional intervention. Fundamental liberties have been suspended in the name of national security.

Immigration attorneys, once almost immune to the pervasive jokes told at the expense of other lawyers on talk shows, at social functions, and within their own families, now face a reality that is no joke. Former AILA President Palma Yanni, noted in an *Immigration Law Today* (ILT) article that a former Florida AILA member was “sentenced to more than eight years in prison after being convicted of fraud and conspiracy in the filing of thousands of religious worker and multina-

3. Nurith Aizenman, *Md. Family Ensnailed in Immigration Maze*, WASH. POST, April 24, 2001, at B01.

Pinnix: Foreword and Commentary on the Impact of Immigration on the Legal tional executive petitions.”⁴ Another AILA member was convicted in Virginia in connection with filing phony labor certifications.

A veteran Carolinas Chapter member was convicted for arranging a sham marriage and “filing legal papers with authorities falsely claiming that another immigrant was gay and would be persecuted if sent back to Egypt.” The clients in the multi-count indictment were working as government informants. Also convicted was the attorney’s 27-year-old daughter, who worked as her paralegal.

In June 2002, I was installed as the President of AILA. I noted that the first 18 months of the millennium were hopeful. We sensed we had turned a corner on the anti-immigrant sentiments of the mid-1990s. While amelioration of the “Illegal Immigration Reform and Immigrant Responsibility Act of 1996” (IIRIRA) was not a done-deal, its excesses were generally acknowledged and hope for reform was on the horizon. The immigration restrictionists’ corrosive message, born of fear and loathing, was almost totally discredited in the marketplace of ideas and marginalized in the halls of Congress. Well-deserved credit was given to the best and brightest from around the world for their part in the sustained, albeit strained, economic growth and unprecedented prosperity in the United States. A long overdue evaluation of the role of essential workers was also on the horizon, as was hope for an earned adjustment and other immigration reform, perhaps beginning with the U.S.-Mexico initiatives.

Then came a day every bit as infamous as the day that plunged another American generation into the Second World War—September 11, 2001. Reform stalled as we encountered the realities of a new world and the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001). Virtually every American supports the measures that are legitimately required to guarantee our national security and combat the threat of terrorism; the devil is indeed in the details, and the road to hell has proven to be greased with the good intentions of a fearful public as well as by the maneuvers of opportunistic politicians.

The heroism of September 11th took many forms, as has the heroism required in the aftermath. Unlike the heroes created in the sudden first waves of terror, many subsequent heroic acts have occurred after full and agonizing deliberation. When called upon, our troops have selflessly and bravely left their loved ones to defend their country here

4. Palma Yanni, *Ethical Issues in Today’s Immigration Practice*, IMMIGRATION LAW TODAY, Nov.-Dec. 2003, at 6.

and abroad.⁵ Attorneys have displayed heroism in defending unpopular causes.

There is a dark side too; almost immediately after September 11th, immigration restrictionists seized on the indefensible criminal conduct of the terrorists to reinvigorate their failed and discredited xenophobic agenda. Immigration attorneys know better than most that attacks on the due process rights of the least protected in our society are attacks on the due process rights of everyone in our society. When called upon, Americans unequivocally support our government and our military and civilian law enforcement agencies in their vital, legitimate tasks. This support, however, is not for undermining our constitutional freedoms. These interests must be reconciled, however painful and inexpedient or inconvenient. This is the fundamental compact we ascribe to in this democratic society.

Curtailing basic freedoms is a slippery slope indeed. As early as 1755, Benjamin Franklin warned, "They that give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

The immigration bar is committed to both border security and real visa reform while maintaining civil liberties and due process. It supports immigration measures that balance the need to enhance our security with both our history and tradition as a nation of immigrants and the need to ensure our continued economic viability in a global economy.

The immigration bar absolutely opposes closed hearings, automatic stays, monitoring of conversations between detainees and their lawyers, and all similar initiatives. It supports the restoration of the discretion of immigration judges to grant relief from deportation. Immigration attorneys also support efforts to narrow the definition of aggravated felonies, to restore judicial review, to eliminate retroactive application of immigration laws, and to oppose authorization of low-level immigration officials and local police to make life and death decisions leading to detention and removal.

It is vital that we fix our broken immigration system. Employers and foreign nationals alike are the scapegoats for violating laws that are not only antiquated, but often are literally impossible to comply with. The time is overdue for the United States to enact legislation that

5. According to Margaret Stock, a Lieutenant Colonel in the Military Police Corps, U.S. Army Reserve; and Associate Professor in the Department of Social Sciences at the U.S. Military Academy, West Point, immigrant soldiers have been eligible to enlist since the Revolutionary War and have not only served with distinction but "have been critical to American success in every war." Today immigrants compose 3-4% of America's armed forces.

provides otherwise law-abiding undocumented workers a way to earn legal status. National security requires and simple humanity demands that we allow undocumented people to regularize their status through a realistic, appropriate means.

There are legitimate questions about the apportionment of the costs of immigration, about security concerns, and certainly about the implementation of policy. But, make no mistake, the *core* of the anti-immigrant lobby is fundamentally, intellectually dishonest and on the wrong side of history.⁶ Those who are true to the promise of America will continue to win the debate in the market place of free ideas. It often seems that the rabid restrictionists continue the debate as much for the fact that it has become a profit center and political cottage industry as because of legitimate public policy concerns.

A November 2006 Elon University poll found 56 percent of North Carolinians feel that immigrants are bad for the state because they take “jobs, housing and healthcare.”⁷ Yet an Elon poll earlier in the year showed only 44 percent of the population agreed with that conclusion.⁸ The polling data should not be considered surprising since the second poll was conducted at the close of the mid-term elections which included saturating, anti-immigrant advertising by restrictionists, future gubernatorial aspirants, and even some judicial candidates.⁹

6. They may also be on the wrong side of changing demographics. “Generation Next,” consisting of persons born between 1981 and 1988 (currently ages 18 to 25), represents a historic watershed. In a survey conducted by the Pew Research Center for the People & The Press and in NPR’s documentary *Generation Next* which aired during the fall of 2006, it was determined that the political outlook of Generation Next is the most tolerant of any generation on social issues such as immigration. About half believe that the growing number of immigrants strengthen the country. “They are more comfortable with the globalization and new ways of doing work. They are the most likely of any age group to say that automation, the outsourcing of jobs, and the growing numbers of immigrants have helped and not hurt American workers.” Generation Next includes 5.2 million immigrants “of various national and ethnic origins,” totaling 12%.

7. Elon University Poll, Nov. 20, 2006, available at <http://www.elon.edu/e-web/elonpoll/> (poll data available by following “Data” link on web page) (last visited March 30, 2007).

8. Elon University Poll, April 10, 2006, available at <http://www.elon.edu/e-web/elonpoll/> (poll data available by following “Data” link on web page) (last visited March 30, 2007).

9. The ‘Sound and Fury’ largely fizzled. In Arizona, restrictionist J.D. Hayworth lost his bid for re-election and Minuteman Randy Graf was defeated. Additionally, incumbents John Hostettler (Indiana), Melissa Hart (Pennsylvania), and Senator Rick Santorum (Pennsylvania), and challengers Mike Whalen (Iowa), Rick O’Donnell (Colorado), Tom Kean (New Jersey), Katherine Harris (Florida), and Jan Ting

The media has discovered immigration as a “hot topic.” Those whose source of information is confined to AM talk radio and cable news are far more hostile to immigration reform than the rest of the American public. But even the mainstream press doesn’t always get it right. The cover of the May 2006 issue of *Business North Carolina* featured the lead story, “Pay Down - by depressing wages, illegal immigration has become an unexpected bonanza for business.”¹⁰ Yet, the story concedes that some economists believe: “Without Hispanics . . . the state economy would come to a near standstill. People would pay more for goods. Houses would go without being built.”¹¹

Dr. William Louis Poteat, who served as president of Wake Forest College from 1905 until 1927, observed that “no man is entitled to an opinion until he knows the facts.” The fact is that study after study has concluded that immigrants have a positive impact on the nation’s economy. A 2006 study by The Frank Hawkins Kenan Institute of Private Enterprise at the University of North Carolina concluded that Hispanic immigrants contribute more than \$9 billion to North Carolina’s economy each year. As recently as January 2007, Duke University’s Pratt School of Engineering and the University of California at Berkeley’s School of Information issued a study that concluded “immigrants have been major contributors to the U.S. economy over the past decade.”¹² From 1995 to 2005, immigrants started technology companies

(Delaware) lost. Arizona Governor Janet Napolitano, a leader in seeking comprehensive immigration reform, defeated her challenger 63-35%. Restrictionist Congressman Bob Beauprez lost his race for Governor of Colorado (56-41%). In North Carolina, restrictionist Vernon Robinson was defeated by a nearly 2 to 1 margin in what may have been the nation’s most expensive Congressional race. Restrictionist state senators Russell Capps and Hugh Webster were defeated; the former represented suburban Wake and Durham counties, and the latter’s base included rural Caswell County.

10. AILA has analyzed studies contending that immigrants suppress wages and has concluded that the claim is often dubious. In the Immigration Policy Center 2006 study: *Immigrants, Skills and Wages: Measuring the Economic Gains from Immigration*, Dr. Giovanni Peri (an Associate Professor of Economics at the University of California, Davis, and a Faculty Research Fellow at the National Bureau of Economic Research in Cambridge, Mass.) concluded foreign-born workers do not compete with most native-born workers. Immigration raised the average wage of the native-born worker by 1.1% during the 1990s. Among native-born workers with a high-school diploma or more education, wages increased between 0.8% and 1.5%. Among native-born workers without a high-school diploma, wages declined by 1.2%.

11. Edward Martin, *Down Mexico Way*, BUSINESS NORTH CAROLINA, May 2006, available at http://www.businessnc.com/archives/2006/05/mexico_way.html (last visited March 30, 2007).

12. UC-BERKELEY SCHOOL OF INFORMATION & PRATT SCHOOL OF ENGINEERING AT DUKE UNIVERSITY, AMERICA’S NEW IMMIGRANT ENTREPRENEURS, available at <http://>

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that employ hundreds of thousands and generate tens of billions of dollars in annual sales.¹³

Nationally, over recent years, poll after credible poll consistently has found that while Americans have border security concerns, they also overwhelmingly support legislation that will offer foreign nationals a realistic path to citizenship.

CONCLUSION

Clarence Darrow observed:

I am a foreigner; my people didn't get here until about 1710, and now I am asked to close the doors to people who came on a later ship. My ancestors came here to get a better chance, and I don't believe in closing the doors on people who would like to come for the same reason now.

Some of my own forebears immigrated to the American continent, even before Darrow's, back in the 1600s. But the moment someone naturalizes, I am no more a citizen than he or she. We are all Americans without prefix, without suffix. That is one of the reasons I love this country, and I love the American form of government.

In the words of the ancient Chinese curse, we now live in interesting times. Attorneys have both the privilege and sacred professional duty to protect the fundamental rights that we inherited from our forebears.

Immigration attorneys have the unique opportunity to serve our country, to help reunify families, and to help our nation maintain its competitive edge by drawing the best and the brightest to our shores. September 11th lay to rest the notion that protecting the 'huddled masses' is a passe cliche.

It is said that Carroll W. Weathers, who practiced real estate law in Raleigh for seventeen years before serving as the Dean of the Wake Forest University School of Law for another twenty years, wished for his students that "to the end, their lives may be lived in the service of others, and they may find the satisfaction that comes from a noble purpose, high ideals and exemplary living." Dean Weathers, blind and

memp.pratt.duke.edu/downloads/americas_new_immigrant_entrepreneurs.pdf (last visited March 30, 2007).

13. In reporting the study, *The News & Observer* noted that North Carolina lags in the rate of technology companies started by foreign-born entrepreneurs, and consequently, the state is "missing some of the benefits of a major economic force."

retired, continued to teach legal ethics at Wake Forest until his death at age eighty-two.¹⁴

It is doubtful that Carroll Weathers ever handled an immigration matter, but he fervently believed that an attorney “occupies a preferred station of leadership, possesses exceptional influence, and it not only is his privilege but his duty to use his influence and position on behalf of a better social order, and live as a worthy example to others.” This personifies the immigration attorneys that I have been privileged to know throughout my professional career and I hope reflects the highest aspirations of every attorney.

14. “What Would Dean Weathers Do?” *North Carolina Lawyer*, September/October 1999.