Presentation to the American Association of Jewish Lawyers and Jurists
Importance of Sharing the Jewish Experience in Immigration Litigation

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Some of you may be wondering why is Muhammad Faridi addressing a Jewish association about the importance of sharing the Jewish experience in immigration litigation.

Lest there be any doubt, I should disclaim that I do not practice the Jewish faith. That is so despite the fact that I married into the tribe and grew up not too far away from Maimonides Hospital in Brooklyn. In my circle, it is called the *Maimoon* Hospital, because that was Maimonides's name in Arabic.

The reason I'm speaking with you today is to emphasize the role that your organization can play in some of the battles affecting refugees that are pending in our court system. Most of these battles affect refugees from the Central American countries of Honduras, El Salvador, and Guatemala, which are often referred to as the Northern Triangle. I'll go over those battles and also address why I think it is important for this particular organization—given the constituency that it represents—to get involved with them.

Over the last three years, I've been involved with several lawsuits related to our government's policies governing refugees—people who have fled their homelands because they have experienced persecution on the basis of their race, religion, nationality, political opinion, or association with a particular social group. Specifically, along with my colleagues at Patterson Belknap, I've represented, on a pro bono basis, a union of federal asylum and refugee officers who work for the Department of Homeland Security in their opposition to the various restrictions that our country has placed on refugees seeking to enter our country.[1] Along with my colleagues, I also represent a number of refugees—from Syria to Honduras to Pakistan—who are seeking to relocate to our country because they were persecuted in their homelands.

I have encouraged religious communities to get involved with these types of immigration cases—whether it's through the filing of an amicus brief or engaging in public or grassroots advocacy of the underlying issues. I have done so because, in my view, there is tremendous value in highlighting the experience of these communities in litigations seeking to enjoin government policies restricting the relocation of refugees to our country. The voice of religious communities matters in these cases. It is often that members of these communities (or perhaps their loved ones or ancestors) were themselves subjected to persecution in their prior homelands, prompting them to seek refuge in this country.

And even if that voice is not always heard, it is heard sometimes—and that's good enough of a reason to take action. In some ways, the fact that you have taken a stance makes a bigger difference out of court than it does in court.

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[1] *Trump v. Hawaii*, Nos. 16-1436, 16-1540 (U.S. Sup. Ct.); *Innovation Law Lab v. McAleenan*, No. 19-15716 (9th Cir.); *East Bay Sanctuary Covenant v. Barr*, Nos. 19-16487, 19-16773 (9th Cir.); *U.T. v. Barr*, 1:20-cv-00116-EGS (D.D.C.).

Take, for instance, an amicus brief that was filed in the discrimination lawsuit that the Muslim community in Basking Ridge, New Jersey, filed against the municipality for not allowing it to build a mosque in the township. My colleagues and I represented the plaintiffs in that lawsuit on a pro bono basis. In an odd turn of events, the municipality admitted in its answer to a core allegation in our complaint—that it had denied our clients a permit to build a mosque because of their Islamic faith. It reasoned that it was justified in doing so because Muslims are different from Christians and Jews. We apparently need more than two times the parking space than people from other faiths!

So we filed a motion for judgment on the pleadings, which is a rare motion for a plaintiff to file. That motion was supported by an amicus brief submitted by several affinity and religious organizations—including the AAJLJ and several organizations from the Baptist, Hindu, Buddhist, and Sikh communities. The brief was cited by and relied upon by the court in its decision granting our motion and finding that our clients were discriminated against because of their faith, in violation of federal law.[2]

But the message that the amicus brief sent outside of the courthouse was perhaps even more powerful. First, the brief legitimized our clients' grievance in the eyes of many people in the township. People in town finally took seriously our clients' discriminatory treatment by the township and their neighbors. It was no longer just the Muslims in town who were claiming that the township had discriminated against them. Other communities of faith were also saying that the township had acted in a bigoted manner. Second, the brief sent a strong message to the Muslim community. It impressed on that community that it, too, needs to stand up for the rights of others who suffer discrimination. And that community is indebted to organizations like the AAJLJ for standing up for their rights.

And let me give you another example of the important role that religious communities play as friends of court in lawsuits involving hot-button moral issues. That's in the death penalty space.

Under Supreme Court precedent, to determine whether a punishment is cruel and unusual under the Eighth Amendment, courts must look beyond historical conceptions of the Eighth Amendment to what is referred to as the "evolving standards of decency that mark the progress of a maturing society."[3] In other words, the determination of what the Eighth Amendment bans as "cruel and unusual" depends on the moral sensibilities of modern society. And because that is a quintessential moral question,[4] the Court has looked to and often cited amicus briefs submitted

[2] *Islamic Society of Basking Ridge v. Township of Bernards*, 226 F. Supp. 3d 320, 340 (2016).

[3] *Graham v. Florida*, 560 U.S. 48, 58 (2010).

[4] *Id.* (determining a "standard of extreme cruelty . . . necessarily embodies a moral judgment"); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime.") (citation omitted).

by communities of faith.[5] That's because the views of these organizations provide an important benchmark of what is considered moral in our society.

Immigration, too, is a moral issue. In his recent book titled "Strangers in Our Midst," David Miller seeks to answer an important question: when is a country obliged to open its door to a foreigner and allow her to remain there? Miller is not an advocate of open borders. His book actually defends a country's right to limit immigration in favor of its national interests. As he puts it, "justice permits us to do less for would-be immigrants than we are required to do for citizens."[6] That's because, according to him, liberal democracies must uphold "quite demanding standards of equal treatment for all who reside within their borders."

But even he acknowledges that the issue of refugees—people who have immigrated because of persecution—poses a special challenge. The state, he argues, is morally obligated to accept as many refugees as it can. That is because, according to him, when a refugee shows up at a country's border, she has established a physical connection to that state, which requires the state to provide a process that evaluates the legitimacy of her claim.[7]

But should a state be required to provide refuge to every refugee that shows up at its border? Not necessarily, according to Miller. Refugees can be transferred to a third country, but only if that third country is able to protect their human rights.[8] And that is exactly what our asylum law requires before our country can send refugees that have shown up at our door to a third country—an issue that I'll focus on shortly.

At the time I clerked for him, Judge Jack Weinstein—an honorary member of this organization's Board—delivered a speech at the New York City Bar Association that touched on the moral duty that our country owes to migrants. He said that although our government "has a large degree of freedom to deport undocumented immigrants, being cruel to them . . . is indefensible."[9] The judge invoked *Leviticus*: "And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and though shalt love him as thyself; for ye were strangers in the land of Egypt."[10]

As Rabbi Sheila Petz Weinberg has noted, "There are no less than 36 instances in the Hebrew Bible when we are instructed to care for the stranger"—the modern day immigrant.[11]

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[5] *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing amicus brief of United States Catholic Conference and other religious organizations as "additional evidence" of a broad "social and professional consensus" against the execution of persons with mental retardation).

[6] David Miller, Strangers In Our Midst 30 (2016).

[7] *Id.* at 83-88.

[8] *Id.*

[9] Jack B. Weinstein, 58th Benjamin N. Cardozo Lecture, The Role of Judges in a Government Of, By, and For the People, 63 The Record 362 (2008).

[10] *Id.* at 360 n.131 (citing Leviticus 19:33, 34 (King James)).

[11] Rabbi Sheila Petz, Leviticus 21:1-24:23: Strangers and Immigrants: Justice for All, Huffington Post, Apr. 23, 2013, https://www.huffpost.com/entry/leviticus-21-1-24-23-strangers-and-immigrants-justice-for-all_b_3140848.

She concludes, "Boundaries are necessary, security is essential, but justice cannot be trampled upon."[12]

My wife's parents, Claire and Barry Nelson, who are not particularly religious people but identify as Jewish, embody the teachings of *Leviticus* and Rabbi Weinberg. Last year, they organized people from their small town in upstate New York to travel to McAllen, Texas to protest our government's caging of migrant children who were detained there. Since they have been back, they have begun attending hearings in immigration proceedings to serve as watchmen on our court system and to also let the refugees in these proceedings know that there are people in our community who empathize with their suffering. There are probably many reasons why they have taken up this form of activism—at least one of which perhaps is the experience of their own relatives in Europe in the early part of the 20th century.

Joseph Carens, a political theorist, also focuses on our moral obligation to refugees who they show up at our borders. In his book, "The Ethics of Immigration," he outlines several reasons that warrant a country's admission of refugees. First, "sometimes we have an obligation to admit refugees when the actions of our own state have contributed in some way to the fact that the refugees are no longer safe in their home country.[13] Many would agree with me that our country's involvement in the civil wars of Central America in the 1980s has contributed in some way to the ongoing turmoil in that region, which is the reason why so many people from the Northern Triangle are seeking refuge here. The second source of the duty to admit refugees, according to Carens, is humanitarian concern. "We have a duty to admit refugees simply because they have an urgent need for a safe place to live and we are in a position to provide it"—facts that cannot be seriously disputed.[14]

Carens also make another point whose importance cannot be overstated. He proposes that whatever principles or approaches we use in evaluating whether we should accept refugees into our country, "We should always ask ourselves at some point, 'What would this have meant if we had applied it to Jews fleeing Hitler?' And no answer will be acceptable if, when applied to the past, it would lead to the conclusion that it was justifiable to deny safe haven to Jews trying to escape the Nazis."[15] This approach won't settle every occurrence of a group of refugees seeking to enter our country, "but it will give us a minimum standard, one fixed point in our moral compass."[16]

I do not need to remind this particular audience of our own country's baleful treatment of Jewish refugees fleeing Nazi persecution. Although our country accepted approximately 250,000 refugees fleeing Nazi persecution prior to our entry into World War II, we refused to

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[12] *Id.*

[13] Joseph Carens, The Ethics of Immigration 195 (2013).

[14] *Id.*

[15] *Id.* at 194.

[16] *Id.*

accept more as Nazi Germany increased its atrocities.[17] Our indifference to refugees fleeing German aggression is perhaps best reflected in our denial of entry in 1939 to the ocean liner known as the *St. Louis*, which was carrying 907 German-Jewish refugees.[18] We left it stranded on the shores of Miami, and the ship returned to Europe where many of its occupants met their fate.[19]

In many ways, our nation's refugee policy since the Second World War has sought to rectify our wartime humanitarian failures. After the war, we played a leading role in the formation and funding of international aid organizations such as the United Nations International Children's Emergency Fund and the World Food Programme, which provide support for refugees and displaced persons.[20] In response to reports that Jewish survivors of the Holocaust were kept in poor conditions in Allied-occupied Germany, President Truman directed the issuance of 40,000 visas to resettle the survivors in the United States.[21]

Congress also took action by passing the Displaced Persons Act of 1948, which allowed the admission of 415,000 displaced people by the end of 1952.[22] We took in another 214,000 refugees in 1953 who were mostly escapees from Communist-dominated countries.[23] In the following decades, we welcomed refugees escaping from violence, conflict, persecution or natural disaster, at times in waves of hundreds of thousands from the Azores in the mid-Atlantic, Cuba, Southeast Asia, Eastern Europe, the Soviet Union, and Afghanistan.[24]

And in 1968, we ratified the 1967 U.N. Protocol Relating to the Status of Refugees. Under this treaty, we agreed that we would not discriminate against refugees on the basis of race, religion, or nationality and that we would not engage in "refoulement"—to return a refugee to a place where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.[25] We re-affirmed that

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[17] *See* Philip A. Holman, Refugee Resettlement in the United States, in Refugees in America in the 1990s: A Reference Handbook 5 (David W. Haines ed., 1996) (citing Congressional Research Service 1991:556).

[18] The American Jewish Joint Distribution Committee, Minutes of the Meeting of the Executive Committee (June 5, 1939), available at https://archives.jdc.org/wp-content/uploads/2018/06/stlouis_minutesjune-5-1939.pdf.

[19] *Id.*

[20] *See* Maggie Black, The Children and the Nations: The Story of Unicef, 25-35 (1986); Bryan L. McDonald, Food Power: The Rise and Fall of the Postwar American Food System 143 (2017).

[21] *See* Gil Loescher & John A. Scanlan, Calculated Kindness: Refugees and America's Half Open Door 1945-Present 4-6 (1986).

[22] Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009.

[23] Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400.

[24] *See* U.S. Citizenship and Immigration Services, Refugee Timeline, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline; Carl J. Bon Tempo, Americans at the Gate: The United States and Refugees During the Cold War 107-15 (2008).

[25] U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

commitment in 1994 when we ratified the Convention Against Torture, which contains a similar provision.[26]

The goodness with which our country acted to rectify our failures of the 1930s is perhaps best reflected in the sheer number of refugees that we have absorbed into our society since World War II—nearly 5 million people representing over 70 nationalities.[27]

But let me now turn to our conduct in the last three years.

It is undisputed that our world is currently facing a migration crisis that is unprecedented in its scale. In 2018, there were about 71 million individuals who were forcibly displaced from their homes.[28] This displacement spans the globe—from the Middle East to Africa to Asia to Central America, a region that has a legacy of violence and fragile institutions in part from the civil wars of the 1980s.[29] Perhaps more than ever, our country needs to continue its commitment of offering protection and opportunity to the vulnerable and persecuted.[30]

But, despite the pressing need to afford protection, our government has implemented a barrage of measures whose impact and, in my view, intent are to dismantle the pillars of our defining role as a refuge for the world's persecuted, or—as the sonnet enshrined at the pedestal of the colossal sculpture sitting in New York Harbor that has welcomed many generations of Americans says—"its huddled masses yearning to breathe free."[31]

Let me give you a few examples of policies of our national government that, in my view, seek to erode the moral fabric of our country. These policies are currently being challenged in the court system.

First, in 2019, the administration promulgated what it referred to as the "Migrant Protection Protocols" or the "MPP"—which, as you'll see, is quite an Orwellian phrase for the policy.[32] Prior to the MPP, our country's processing of asylum applicants ensured that people fleeing persecution would not be—pending adjudication of their asylum applications or anytime thereafter—returned to a territory where they may face persecution or threat of torture. That

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[26] U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988).

[27] David W. Haines, Safe Haven? A History of Refugees in America 4 (2010).

[28] UNHCR, Global Trends: Forced Displacement in 2018 at 2 (June 20, 2019), *available at* https://www.unhcr.org/globaltrends2018/.

[29] *Id.* at 2-3, 7.

[30] *See* Examining the Syrian Humanitarian Crisis From the Ground (Part II) Before the Subcomm. on the Middle East and North Africa of the House Comm. on Foreign Affairs, 114th Cong. 114-115 (2017) (written testimony of Leon Rodriguez, Director, U.S. Citizenship and Immigration Servs., Dep't of Homeland Security), http://docs.house.gov/meetings/.

[31] Emma Lazarus, The New Colossus, Nov. 2, 1883.

[32] Dep't of Homeland Sec., Press Release, Migrant Protection Protocols (Jan. 24, 2019), *available at* https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols.

process was consistent with our international treaty obligations, which I spoke about earlier. But the MPP upended that process.

Under the new regime, asylum seekers entering the country through our southern border—who are mostly from the Northern Triangle—are forced to return to Mexico where they are required to remain pending adjudication of their asylum applications. In the course of waiting for a determination of their asylum applications, many will face persecution because of their race, religion, nationality, political opinion, or membership in a particular social group.

They will do so because Mexico is not safe for Central American asylum seekers. As the U.S. Department of State recently noted, "impunity for human rights abuses remain[s] a problem" in Mexico.[33] In 2018, "Central American gang presence spread farther into [Mexico] and threatened migrants who had fled the same gangs in their home countries."[34]

The risk of persecution in Mexico is even higher for the most vulnerable segments of asylum seekers. Many asylum seekers are ethnic minorities from indigenous cultures. Members of those cultures face persecution in Mexico that is similar to the persecution they face in their home countries. The National Human Right Commission recently recognized that indigenous women are among the most vulnerable groups in Mexican society.[35] Migrant women at large are at particular risk of sexual assault. In one study, nearly one-third of women fleeing the Northern Triangle have experienced sexual abuse during their journey through Mexico.[36] The situation is so bad that, according to a U.N. publication, "many migrant women take contraceptives before migrating to avoid the risk of pregnancy from rape by armed criminal groups, locals, or their smugglers."[37]

The second policy is the "Third Country Transit Bar."[38] That rule categorically denies asylum to almost anyone who crosses into our country through the southern border without first having applied for and been denied asylum in any country through which they transited. Under the bar, these people are ineligible for asylum no matter how serious the persecution they faced in their home country or in the third country that they transited through to reach our border. Even if the asylum seeker establishes that she credibly fears persecution based on a protected characteristic or membership in a protected class in her home country and each third country that she transited through to reach our southern border, the Third Country Transit Bar requires the

[33] U.S. Department of State, Mexico 2018 Human Rights Report, at 1 (2019).

[34] *Id.* at 19.

[35] *Id.* at 28-29.

[36] Doctors Without Borders, Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis 5 (2017).

[37] Anjali Fleury, Fleeing to Mexico for Safety: The Perilous Journey for Migrant Women, May 4, 2016, United Nations University, https://unu.edu/publications/articles/fleeing-to-mexico-for-safety-the-perilous-journey-for-migrantwomen.html.

[38] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829-45 (Jul. 16, 2019) (codified at 28 C.F.R. Pt. 208).

asylum officer to find that she did not in fact establish a credible fear of persecution because she had not applied for and been denied asylum in a third country.

This rule, too, is contrary to our asylum law and our moral obligations. Congress—and not the executive branch—has the right to determine whether an individual or group of individuals can be categorically prohibited from obtaining asylum in our country.[39] Congress has set forth specific exceptions to asylum protection in the United States, including exceptions governing the circumstances where the potential availability of asylum in a third country may preclude someone from obtaining asylum in the United States.[40] While Congress has delegated some authority to the executive branch to establish additional limitations on asylum, it has also decreed that those conditions must be "consistent" with our asylum law.[41]

But the Third Country Transit Bar is contrary to the narrow circumstance that Congress has determined should lead to asylum ineligibility based on the potential for asylum in a third country: the "safe third country" bar.[42] For the "safe third country" bar to apply, there must be a determination that an asylum seeker's life or freedom would not be threatened in the third country and that she would have access to a full and fair procedure for determining her asylum claim there. Again, it cannot be credibly disputed that neither Mexico nor Guatemala—the third countries that a substantial majority of asylum seekers transit through to reach our border—qualify as safe third countries under the statutory exception.

The narrow statutory exception was designed to carefully calibrate our nation's commitment of providing a safe haven to the persecuted while sharing the burdens of providing asylum with other countries that have the ability and means to ensure that asylum seekers will not face persecution. But the Third Country Transit Bar turns the exception on its head.

The third policy, referred to as the "ACA Rule," is the most extreme of the recent measures.[43] In July–September 2019, our government entered into bilateral Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador, purportedly "in an effort to share the distribution of hundreds of thousands of asylum claims" being made at our southern border.[44] These agreements, in conjunction with the ACA Rule, effectively bar most migrants seeking to enter the United States through the southern border from obtaining asylum relief in the United States and, moreover, provide for their removal to one of the ACA countries. The administration has begun permanently removing non-Guatemalans seeking to enter the United States through the southern border to Guatemala, and removals to Honduras and El Salvador are imminent.

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[39] *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.").

[40] *See* 8 U.S.C. § 1158(a)(1).

[41] *See* 8 U.S.C. § 1158(b)(2)(C).

[42] 8 U.S.C. § 1158(a)(1).

[43] 84 Fed. Reg. 63,994-64,011.

[44] 84 Fed. Reg. at 63,994.

The ACA Rule, too, has turned the American asylum system on its head. Rather than have their asylum claims heard, refugees from the Northern Triangle countries are permanently removed to other Northern Triangle countries. That is so despite the irrefutable fact—even acknowledged by our own State Department—that asylum seekers fleeing persecution in their home country will face similar if not more significant dangers in the country to which they will be removed.[45]

As I mentioned before, under our asylum law and treaty obligations, our nation can require an asylum seeker to pursue her asylum claim in a third country, but only if that country is a "safe third country" where the asylum seeker's safety and freedom will not be threatened on account of a protected status and where she will have access to full and fair asylum procedures. Guatemala, El Salvador, and Honduras are not "safe third countries" by any rational measure. These countries have a well-documented record of depriving vulnerable populations of safety and basic rights and of lacking meaningful systems for fairly adjudicating asylum claims. The ACA Rule ignores these realities.

The government has sought to justify these policies on the ground that we have a so-called "crisis" at the border that has overwhelmed our immigration system. But our immigration system has the foundation and agility necessary to deal with the flow of migrants through our Southern Border. The system has been tested time and again, and it is fully capable—with additional resources where appropriate—of efficiently processing asylum claims by those with valid claims while removing those that are not entitled to protection after they undergo the process designed to ensure that they will not be returned to a place where they will be persecuted. The policies that the government has instituted do nothing to streamline or enhance that process, but instead increase the burdens on our immigration courts and make the system more inefficient.

I sometimes wonder whether our government has created a "crisis" at the border as an excuse to wash our hands of our legal and moral commitment to refugees. There is no doubt that there has been a substantial increase in the number of migrants—mostly families fleeing violence from the Northern Triangle—who are seeking to cross our southern border.[46] In my view, that is *not* the "crisis." As I have already detailed, we have dealt with these types of challenges before. Our system can process these people, and, moreover, our country is fully capable—as the Census Bureau's data shows—of absorbing them into our society.[47]

At the same time, I do not dispute that there is in fact a crisis. But I query whether the crisis results from our government's handling of this situation. It is irrefutable that we now detain migrants and cage children who would have in the past been paroled into the country

[45] U.S. Dep't of State, Guatemala 2018 Human Rights Report (2019); U.S. Dep't of State, El Salvador 2018 Human Rights Report (2019); U.S. Dep't of State, Honduras 2018 Human Rights Report (2019).

[46] Caitlin Dickerson, "Record Numbers Crossing to U.S., Deluging Agents," N.Y. Times, Mar. 5, 2019, A1.

[47] John Cassidy, "Why the United States Needs More Immigrants," New Yorker, June 22, 2018.

pending adjudication of their claims for asylum.[48] Is it these types of draconian measures that have actually overwhelmed the system and caused the crisis? And is our government then using the self-created, overwhelmed nature of the system as an excuse to enact even more draconian policies? Perhaps only history will tell us answers to those questions.

Whatever the answers to those questions, one thing that is clear is that we are sending refugees who have shown up at our border to places where they will likely be persecuted. By doing that, we are engaging in practices that are reminiscent of our conduct from the late 1930s. In the end, our government is making the same mistake it has made before—the same mistake that we have sought to rectify in the past 70 years and that we vowed not to make again when we signed the 1967 Refugee Protocol and the Torture Convention.

In these times, I would encourage you to continue your tradition of standing up for what is right. To be clear, I am not saying that you have a moral obligation to take a stance on these issues, nor am I saying that any comparisons need to be, or can or should be, drawn between the Jewish experience and the suffering of another people, because human suffering cannot be compared in a quantitative or qualitative sense. But what I am saying is that, given the constituency that you represent, the voice that you lend to the persecuted is important, and it will reverberate, in the courthouses and outside.

[48] Caitlin Dickerson, "Migrant Children Pay Price as Trump Seeks to Extend Detention," N.Y. Times, Dec. 9, 2019, A12.