www.qcba.org

Queens Bar Bulletin

Queens County Bar Association / 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 / (718) 291-4500 **Vol. 75 / No. 7 / May 2012**

Right of Legal Residents To Travel Abroad Interpreted By Supreme Court

BY: JOSEPH F. DEFELICE*
AND MARIE-ELEANA FIRST**


Joseph F. Defelice


Marie Eleana-First

On March 28, 2012 the U.S. Supreme Court decided the case of Vartelas v. Holder, 566 U.S. ___ (2012)[1]. To more fully understand the holding in this case which dealt with the issue of retroactivity or non-retroactivity of certain Immigration legislation, some basic history and background of the facts is important.

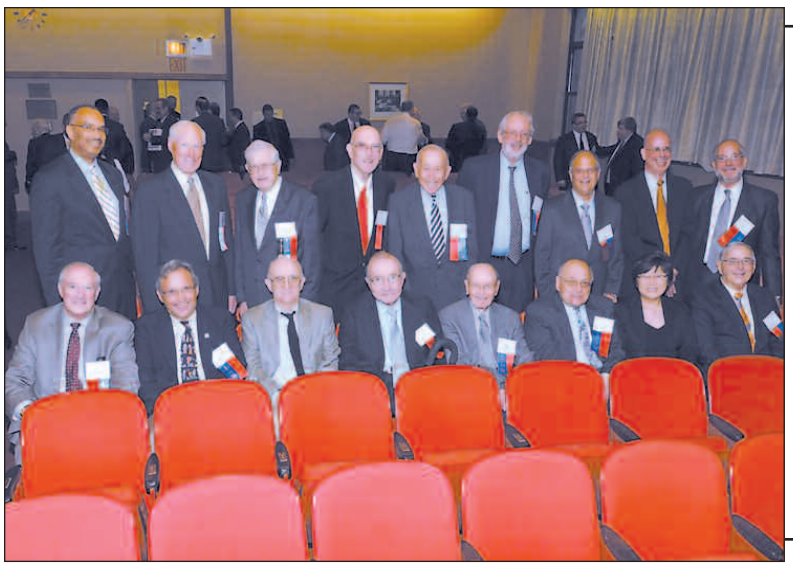
Mr. Vartelas was born and raised in Greece and had resided in the United States for more than 30 years. He first entered the U.S. on a student visa[2] in 1979. In 1989 he became a legal permanent resident obtaining what is referred to as a "green card".[3]

In 1992 Mr. Vartelas opened an auto body shop in Queens and apparently helped his partner, who was using the shop's photocopier to make counterfeit traveler's checks, to perforate the sheets into individual checks. Although he did not sell or receive any money from this criminal conduct which was the apparent mastermind of his partner, he did plead guilty in 1994 to conspiracy to make or process counterfeit securities. See 18 U.S.C.§371. Mr. Vartelas received a four month sentence and two years supervised release. His Immigration difficulties were the result of the 1996 legislation entitled Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and his desire to make continued excursions to Greece to visit his aging parents. Under the law prior to IIRIRA, an alien who traveled abroad for short periods of time and returned to the United States could do so without jeopardizing his resident alien status because of some conviction for a crime of moral turpitude. See 8 U.S.C. §1101(a)(13) (1988 ed.) and interpretation of that section in Rosenberg v Fleuti, 374 U.S. 449 (1963). This interpretation became known as the Fleuti doctrine and centered around the concept of "entry" back into the United States[4]. In Fleuti the U.S. Supreme Court determined that permanent residents were not making an "entry" back into the United States if their travel had been a brief excursion, innocent or casual. Under this doctrine permanent residents would only be subject to the provisions regarding "entry" on his/her return to the United States if the trip could be viewed as "meaningfully disrupting" the alien's residence or causing what might be viewed as a "disruption" of the residency. As such, Mr. Vartelas could, after his 1994 conviction, under the Fleuti doctrine continue to visit his aging parents in Greece as his trips would be considered casual and innocent excursions and not of the type that would lead anyone to believe that he might have abandoned his U.S. residency. So his return trips were not considered "entries".

Under IIRIA this all changed because in writing the legislation Congress changed the key word to "admission". Admission meaning the lawful entry of the alien into the United States after inspection and authorization by an immigration officer. See 8 U.S.C. §1101(a)(13)(A).

The Board of Immigration Appeals subsequently determined that the legislation and alteration of the meaning of admission superseded the Fleuti case holding that Fleuti was no longer good law as it was rooted in the definition of "entry". See In re Collado-Munoz, 21 I&N Dec 1061, 1065-1066 (1998). Relevant to Mr. Vartelas, the BIA also determined that an individual who had committed a crime of moral turpitude who now sought "admission" could be

Continued On Page 5



Which One is Different from the Others?

Standing: Seymour James (01-02), Robert Bohner (93-94), Hon. James Dollard (85-86), Douglas Krieger (81-82), Howard Stave (82-83), Steven Wimpfheimer (99-00), Steven Orlow (08-09), David Adler (98-99) and David Cohen (07-08). Sitting: Michael Dikman (78-79), Wallace Leinheardt (77-78), Paul Goldblum (79-80), Jules Haskel (73-74), Herbert Rubin (71-72), Edward Rosenthal (02-03), Chanwoo Lee (10-11) and Gary Darche (89-90)."
(Answer on page 2)

Warrants Required for Police GPS Tracking Devices

BY PETER DUNNE*


Peter Dunne

United States v. Jones, ____ U.S. _____, 132 S. Ct. 945, (2012) is a fascinating case which provides a glimpse into the future contours of the Fourth Amendment in these times of changing expectations of privacy and technological advances.

The facts of the case are quite simple. Antoine Jones came under suspicion for narcotics trafficking. The government began to watch a night club owned by Jones, installed a camera which monitored the entrance to the club, and applied for and obtained a pen register and a wiretap on his cell phone. Based upon information received from this investigation, the government obtained a warrant to place a GPS device on his automobile, which was registered to his wife, but concededly operated by the defendant. The warrant specified that the device was to be placed on the vehicle within the District of Columbia within 10 days of the warrant. On the eleventh day, and in Maryland, the police placed the device on the undercarriage of the car while it was parked in a public parking lot.

For twenty-eight days, the position of the car was monitored. Jones was indicted and a portion of the information obtained from the GPS device was used against him in the trial. The government conceded that the placement of the device did not comply with the conditions of the warrant, but argued that no warrant was required to place the device on the car. The trial court had held that the monitoring information was admissible, despite the violation of the conditions of the warrant, because "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *United States v. Jones*, 451 F. Supp 2d 71, 88 (2006)

After an initial hung jury, the defendant was subsequently retried, convicted and sentenced to life imprisonment.

The issue in this case is whether the placement of the GPS device on the car constituted a search within the meaning of the Fourth Amendment. The thorny problem is that the placement of the device is not really a search in that the government was not really looking for anything specif-

Continued On Page 10)

INSIDE THIS ISSUE

The Docket . . .

being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th St., Jamaica, New York. More information and any changes will be made available to members via written notice and brochures. Questions? Please call (718) 291-4500.

PLEASE NOTE:
The Queens Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

CLE Seminar & Event Listing

May 2012

Thursday, May 3	Annual Dinner & Installation of Officers
Tuesday, May 15	CPLR Update Seminar
Wednesday, May 16	Matrimonial Law CLE
Thursday, May 24	Retirement Decisions Workshop - MetLife (no CLE credit)

June 2012

Tuesday, June 19	Small Claims Arbitrator Training

September 2012

Monday, September 10	Annual Golf Outing

CLE Dates to be Announced
Civil Court
Elder Law

New Members

Placidus Aguwa
Suleida Indhira Arias
Munir Avery
Anthony Autar
Arthur Burkle
Peggy Collen
Amanda Connor
Ernest Jerome Dubose
Jeffrey J. Estrella
Michal Falkowski
Reuven S. Frankel
Samantha Gilles
Christos Hilas
Leoney A. Lee
Amanda L. Lewis
Anthony John LoCalbo
Elena K. Makau
Elias Malijouzakis
Helena Man
Michael McSweeney
Christian P. Myrill
Vikrum Singht Panesar
David Scott
Jacob Sherman
Bikram Singh
Anton Skuratovsky
Eun Chong Thorsen
Liang-Fu Wang
Aaron Ward
Jason David Weissman
Stephen Z. Williamson
Chak Lun Wong

Necrology

Donald R. Schechter

If you or someone you know is having a problem with alcohol, drugs or gambling, we can help. To learn more, contact QCBA LAC for a confidential conversation. Confidentiality is privileged and assured under Section 499 of the Judiciary Laws as amended by Chapter 327 of the laws of 1993.

Lawyers Assistance Committee
Confidential Helpline 718 307-7828

Worker's Compensation Board Job Posting

The New York State Workers' Compensation Board is presently recruiting attorneys in the NYC metropolitan and Nassau County areas who are interested in acting as part time, outside arbitrators in Employee Claims Resolution ("ECR") cases to adjudicate the workers' compensation claims of designated employees of the Board and the State Insurance Fund. The work is sporadic and the per case pay is modest.

If there are any attorneys in your area who have been admitted to practice for at least five years and currently do not appear before the Workers' Compensation Board who might be interested in an ECR arbitrator position, they can forward their resume to Andrew B. Mair, ECR Administrator, New York State Workers' Compensation Board, Office of General Counsel, Room 401, 20 Park Street, Albany NY 12207. Membership in the American Arbitration Association or other recognized alternative dispute resolution organization is a plus. Alternatively, resumes may be emailed to andrew.mair@wcb.ny.gov

Response to Which One is Different from the Others?

(from page 1)

Seymour W. James, Jr. will be the first Queens County Bar Association Past President to become President of the New York State Bar Association. Congratulations on this great accomplishment Seymour!

Publisher:
Long Islander Newspapers, LLC, under the auspices of Queens County Bar Association. The Queens Bar Bulletin is published monthly from October to May.
Advertising Offices:
Long Islander Newspapers,
149 Main Street, Huntington,
New York (631) 427-7000

Send letters and editorial copy to:
Queens Bar Bulletin, 90-35 148th Street,
Jamaica, New York 11435

Editor's Note: Articles appearing in the Queens Bar Bulletin represent the views of the respective authors and do not necessarily carry the endorsement of the Association, the Board of Managers, or the Editorial Board of the Queens Bar Bulletin.

"Queens Bar Bulletin"
(USPS Number: 252-520) is published monthly except June, July, August and September by Long Islander Newspapers, LLC., 149 Main Street, Huntington, NY 11743, under the auspices of the Queens County Bar Association. Entered as periodical postage paid at the Post Office at Jamaica, New York and additional mailing offices under the Act of Congress. Postmaster send address changes to the Queens County Bar Association, 90-35 148th Street, Jamaica, NY 11435.

President's Message

Last year when I was installed as President, I told you that my primary goal was to increase our membership. I focused on increasing membership by creating a stronger alliance with our two local law schools to create an outreach program that would utilize interested members of our Association in providing internships and externships to their students.

I have met with Michael A. Simons, the Dean of St. John's University Law School and am meeting with Sarah Valentine, Associate Dean of Students at CUNY School of Law on May 21, 2012. I believe providing second and third year law students with the opportunity to align themselves with a seasoned practitioner will be beneficial to them and our Association. Clearly, an influx of new law students members, will demonstrate our understanding of their significance in the legal community and their importance to our Association. I encourage any interested members to contact either me or a staff member at the Association so that we may add you to the list.

During my term, the Officers, Board of Managers and I had hoped to increase membership by providing free legal research to all paid members. Unfortunately due to the cost of this benefit and the Association's financial condition we were not able to provide this service. However, it is our hope that in the future we will have the resources to do so.

Richard M. Gutierrez

When I took office, I was charged with implementing the first phase of our strategic plan. That plan was to improve the services provided by the Bar to our members and the communities we serve. Although this plan is our vision of where we should be over the next four years, I believe we succeeded in establishing the importance and relevancy of our organization to the communities we serve. I am sure our new President, Joseph Risi, and his successors will continue to implement the plan and continue to show we are the "go to" organization for the legal profession in our county and the citizens we serve.

Being the President requires a lot of support and dedication from others. I had the good fortune to have a Board of Managers and Officers who worked together with me to make the Association vibrant, relevant and responsive to the needs of our members. Thank you for your help, support and confidence in me. I also want to thank Janice Ruiz, Sasha Khan and Shakema Oakley for all their help throughout the year. Each of you work tirelessly every day to assure the Association runs efficiently. Yet without someone we all know and respect, the Bar would not be as successful as it is. Presidents come and go but there is one person who over 25 years has dedicated his career to the Association. Our Executive Director, Arthur Terranova, watches over the Association with great care and pride. I want to thank you for your wisdom, guidance, support and friendship during my term. I again want to congratulate our new President, Joseph Risi. As I said, at his installation, he is a man of integrity and vision and I wish him much success.

Before I finish, I want to inform you that the New York State Bar Association has given its support to legislation to amend the CPLR with regard to the liability of referees for interest and penalties on deeds. The following revised language of the bill by the New York State Bar is recommended for passage:

"A referee shall not be liable for any interest or penalty in connection with any state or local transfer taxes imposed upon a deed delivered by a referee transferring a property pursuant to a judgment of foreclosure and sale".

Finally, I want to thank you for your unwavering support, loyalty and friendship. I will always cherish the opportunity I had to lead this great Association.

Thank you,

Richard M. Gutierrez

Reflection of Minimum Wage

BY ROBERT D. MCCREANOR*

On a recent Wednesday evening, in the community room of St. Sebastian's Roman Catholic Parish in Woodside, Queens, around one hundred people gathered to sit on folding metal chairs and hear a presentation about the ongoing campaign to raise New York State's minimum wage. Standing on the side of the room with my clipboard and calendar, I looked at the faces of my former and current clients, mostly low-income folks who immigrated to this country sometime in the past thirty-five years. Roughly reflecting the composition of the apartment buildings and neighborhoods where I've spent the better part of a decade organizing tenant meetings, holding legal clinics and occasionally enjoying meals served to me on birthdays or first communions, this group includes many of the post-1965 waves of migration to New York City: Elderly Colombian widows who have been here since the 1970's; Ecuadorians who came in 1990's and now have teenage, U.S. born children; Mexican families with babies and small children who came in the late 1990's and early 2000's; a group of Liberian refugees who were resettled in Elmhurst, Queens during their country's civil war; and a sprinkling of Bangladeshi and Korean men who come to this meeting without their wives or children. These men work as taxi drivers. Their income is low and unpredictable. When they fall behind in rent and are served with eviction papers, they come to the legal services office where I work to get help. Many of the Hispanic women in the group work as cleaners, some in office buildings with a union contract and basic benefits. But the others, especially the more recent immigrants, work as domestic help. Their husbands are day laborers and restaurant workers. Some of the elderly folks in the crowd are retired, living on social security, but not all of them. I know one woman in the audience who is in her 70's and still works cleaning offices six days a week.

As I look at their faces, I try to discern their reaction to the presentation. The speaker is a Hispanic woman in her late thirties, the director of a community organizing project sponsored by a powerful New York City janitors' union. She is speaking mostly in Spanish and stopping sporadically to give a hurried English language summary. Since the crowd is overwhelmingly Latin American, I think this is fine but nervously check on the non-Spanish speakers for signs of frustration. No one seems disgruntled about the language issue. In fact, no one seems to be registering any emotional response to the presentation whatsoever.

The speaker clicks through her PowerPoint presentation which is being projected onto a large screen. She moves from big picture statements about the dignity of all workers, the impossibility of living on $7.25 per hour in New York City and the widespread public support for an increase in the minimum wage to the specifics of her organization's campaign which aims to increase the legal minimum wage to $8.50 per hour. She exhorts the people in their chairs to support this effort by sharing their stories and providing a face to the issue of low-wage poverty. No one seems especially moved by her message. I am struck by this absence of response because we have this community meeting once a month and the presentations typically become interactive within the first few minutes. Last month, we listened to several women on whose behalf my office recently filed a lawsuit in federal court. They sued their sweatshop employer who locked them in a basement while they made piñatas for 14 hours a day in exchange for $40 and threatened to call Homeland Security if they complained. The audience could not stop asking questions and applauding the workers. Previously, we heard from a Legal Aid Society lawyer who explained the politics of rent regulation in New York City and State. The audience, almost all of whom are tenants, was engaged and we had to stop the questions before our potluck dinner became cold. But tonight, no such enthusiasm.

The presentation concludes and no applause are immediately forthcoming. I move to the front of the room and, about to gesture to the crowd with a clapping sign, I instead prompt the guest speaker to ask for questions. A hand goes up in the back of the room. It's a stocky man in his early forties who I have known for ten years. Half Puerto Rican and half Pakistani, a unique mix even in Queens, he works as an unarmed police officer for a New York State agency. Although by his native birth, educational level and earnings he is not representative of this crowd or of my office's clientele in general, he has been active in our community organizing campaigns and related lawsuits against slumlords over the years. He once started a blog chronicling our work against predatory investors who acquire residential apartment buildings in low-income immigrant neighborhoods like Corona and Elmhurst and rely on ruthless management agencies to clear out their low-rent paying tenants in order to rapidly increase revenue.

He asks, "Isn't Mayor Bloomberg opposed to the minimum wage increase?"

His reference to the Mayor is not surprising given the recent flurry of media coverage surrounding minimum wage issues at the city and state level in New York. Two weeks earlier, headlines in the local press blared "MAYOR BLOOMBERG COMPARES LIVING WAGE BILL TO SOVIET COMMUNISM." The Mayor's stated opposition, in fact, pertained not to the proposed increase in the State *minimum* wage but to a *living* wage bill introduced in the New York City Council which would require employees at certain city subsidized developments to pay at least $10 per hour without benefits or $11 per hour with benefits. (Officially, Mr. Bloomberg supports the proposed increase to $8.15 in the New York *State* minimum wage which, of course, he has no authority to enact and, therefore, no political liability for supporting). The campaign in support of the living wage bill had, I believe, been extensively covered in the local press, notwithstanding the fact that less than 500 workers in all of New York City would be covered by the proposed law. Rallies organized by a coalition of community groups and organized labor generated a steady buzz and when the Roman Catholic Archdiocese of New York entered the stage by participating in one such event, the volume rose a few decibels and culmination of the campaign seemed near.

But apart from this solitary question posed by our neighborhood activist blogger, the audience this evening at St. Sebastian's is a quiet contrast to the loud voices in media coverage surrounding this issue. I am surprised and wonder why this is so.

After the presentation, the room is abuzz with activity. The food committee is dishing out plates of rice, beans and chicken along the serving line, people are buying $2 raffle tickets to help us purchase food for the next meeting, music is playing through the sound system, and there is a growing line of people queuing up to show me their rent bill, ask about getting a repair in their apartment, make an appointment for an immigration consultation and to tell me that their brother has a labor question. I have my calendar in hand and try to satisfy their requests by offering them their own personal appointment without having to attend our regularly scheduled walk-in clinics where the waiting time can be very long. As I do this and later while I am gulping down a plate of the remaining food, I try to ask people about their reaction to the presentation.

Of course, any attempt by me to understand the feelings of my clients is seriously limited by the reality that my own life bears no resemblance to those of the people I represent in housing, employment and immigration matters. I am a thirty-five year old white lawyer, born and raised in the Hudson Valley. While a public interest legal salary and persistent law school loan repayment obligations certainly feel like financial pressures, I have not known the seemingly impossible challenge of raising children in New York City on an income of less than $20,000 per year. When I screen incomes of potential clients, I still often have the naïve realization that such a family's budget does not permit eating at restaurants, going to the movie theater or travelling outside of the city—ever.

Personally, I am far removed from minimum wage existence. But, this evening at

———————Continued On Page 4

EDITOR'S NOTE

The Law of Law Partnerships

BY PAUL E. KERSON

One of the largest law firms in New York is considering a bankruptcy filing. Apparently, 20% of its partners left the firm this year. Thus, banks are calling in the firm's credit lines. There are over 1000 lawyers in this firm. They have offices all over the world, and represent major corporations.

Can a lawyer walk away from his or her partners and proportionate share of debt for "more money" elsewhere?

Is there a distinct difference between a Law Firm Partner and the Vice President for Paper Clip Distribution at the XYZ Corp., or the Assistant Deputy Administrator for Administration in the State Department of Intergovernmental Relations?

Judge Benjamin N. Cardozo, perhaps the most admired New York State Court of Appeals Judge in our history, had this to say in judging the actions of two real estate partners:

> "Joint venturers, like copartners, owe to one another, while the enterprise continues, **the duty of the finest loyalty.** Many forms of conduct permitted in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. **Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."** See *Meinhard v. Simon*, 249 N.Y. 458 at 463-464 (1928). Emphasis added.

It is respectfully submitted that Judge Cardozo's opinion in *Meinhard v. Simon* is still the Law of this State on the subject of partnerships. In 1928, Judge Cardozo could not have anticipated Limited Liability Partnerships, or Limited Liability Companies. However, it is respectfully submitted that the Law of *Meinhard v. Simon* applies to LLPs, LLCs, PLLPs and PLLCs as well.

Paul F. Kerson

We bring great disrespect to our profession if we lightly desert our law partners and our financial obligations. How far have we sunk in the last 84 years if this is permissible? It is no wonder the general public no longer holds the legal profession in high regard.

I hesitate to use Leavitt, Kerson & Duane as an example, as we have had our ups and downs over 30 years. Some partners have left. New ones have come on board. But after all is said and done, we have remained loyal to each other in good times and bad. We became law partners not because anyone "made partner" or because of anyone's billings or client list. We became law partners because of mutual respect for each other's skills, and loyalty to each other's philosophy of law practice: the client comes first, and the fee second, not the other way around.

We have stuck to these views come what may. Oftentimes I have wondered if it was worth it. Certainly, we could have taken more secure jobs elsewhere. But by holding fast to Judge Cardozo's teaching, we have been able to accomplish things no large firm could ever hope to do.

The assets of *The Estate of Ignatz Nacher* were stolen in 1934 by the Nazis' Bank and used to finance World War II. We got this case 60 years later, in 1994, and spent 14 years seeking the return of this stolen brewery, restaurant and hotel empire back to its rightful owners. We achieved a measure of success. See *Nacher v. Dresdner Bank (In Re Nazi Era Cases, Mandowsky/Nacher v. Dresdner Bank)*, 198 F.R.D. 429 (D.N.J. 2000), 213 F. Supp. 2d 439 (D.N.J. 2002), 236 F.R.D. 231 (D.N.J. 2006), 240 Fed. Appx. 980 (3d Cir. 2007), cert. den. 552 U.S. 1098 (2008).

A New York State prisoner had given state's evidence. He thus received death threats. The Department of Correctional Services put him in the same cell as one of the people making the threats. Our client was stabbed repeatedly and nearly bled to death. We pursued this case for nine years, and achieved a U.S. District Court jury trial verdict of $7.65 million. A new trial was ordered. See *Britt v. Garcia*, 457 F. 3d 264 (2d Cir. 2006). A confidential reduced settlement was reached on the eve of the second trial.

I spent 19 years on our Bar Association's Bar Panels. This meant many low fee cases defending indigents accused of serious crime. My law partners certainly paid a price because I did that. But I strongly believe that every lawyer should spend considerable time representing the poor. Besides helping those in need, it helps the lawyer understand the concept of justice much more clearly.

I would like to publicly thank my law partners and associates for working with me all these years: Marc Leavitt, John Duane, Joseph Yamaner, Ira Greenberg, Isaac Abraham, Alexandra Mishail, Tali Sehati, Andrew Fistel, Jay Gellman, Howard Mandel, Wayne Greenwald, Eric Turkewitz, Manny Herman, the late Ben Shaw, the late Lenny Herman, and the late Michael Josephson. I hope we continue for many years to come.

Without them, I could not try to put more justice in the world every business day. Big law firms, corporate law departments and government agencies will rarely put up with this view.

To bring large law firms around to our philosophy, I propose the following modest reforms:

1. No one can serve as a law partner with anyone he or she has never met or rarely sees face to face. (Electronic meetings absolutely do not count).
2. No one can serve as a law partner with someone whose sole goal is to make as much money as possible. People like that should be encouraged to become stockbrokers, real estate agents or used car salesmen.
3. No one can serve as a law partner with someone who does not believe in establishing justice as the principal goal of the legal profession.

If every lawyer follows Judge Cardozo's opinion in *Meinhard v. Salmon*, cited above, and these three simple rules, our country will become a far better place, literally overnight. For justice completely depends on the legal profession. If we are not dedicated to it in our relations with our law partners, our clients, our lenders, our adversaries, and the Court System Itself, there will not be any.

Minimum Wage

Continued From Page 3

St. Sebastian's, I do have thoughts informed by my work in which I try to help my clients navigate the legal issues that permeate life in New York's low-wage immigrant workforce. I consider first that some of my clients here tonight have come to our office seeking legal assistance after working for weeks or months without being paid at all. Many come to us precisely because, like the piñata factory workers, they are paid substantially less than the minimum wage and no overtime. So, for these folks, what is the significance of a proposed increase in the minimum wage?

Reflecting on the somber response to tonight's presentation, it also strikes me that the notion of an increase to $8.50 per hour is, in itself, a less than inspiring proposition. A close consideration of this issue certainly suggests the profound difference to be realized by such an apparently incremental raise. Taking home an additional one hundred dollars every two weeks might, in certain instances, translate into a tenant making his monthly rent payment without sacrificing essential food purchases. But would this leave the minimum wage earning family in anything other than a persistently severe struggle?

Finally, I think about the significance of our faith-based venue this evening and the recent involvement of the Catholic Church in minimum and living wage debates. It is perhaps not widely known that the term "living wage" owes its prominence, if not its inception, to a late 19th and early 20th century Catholic priest. Monsignor John Ryan was a moral theologian who achieved prominence for his development of a Catholic critique of the American capitalist system. Widely credited as influential in the formulation of New Deal policies (and nicknamed the Right Revered New Dealer), Msgr. Ryan wrote his doctoral dissertation on the minimum wage issue and it was published in 1906 under the title *A Living Wage*. He believed that issues of economic and social justice were fundamental to the faith. As I think about the minimum wage presentation at St. Sebastian's parish center that evening, I wonder what the proper focus of a faith based treatment of the issue would be. A practical analysis and specific policy positions? Or an ethical consideration and proclamation of fundamental principles?

One week later, the Catholic Bishops of New York State publicly call on Governor Cuomo and the legislature to enact the proposed increase in the State's minimum wage. I view this as legitimate advocacy for a reasonable measure that would benefit New York's working poor, including many of my clients who came to listen to our guest speaker that evening. But, truthfully, I believe that my clients are looking for something more from our faith when we talk about economic and social justice. Even I can understand why $8.50 per hour is less than satisfactory when we gather in a Church to talk about dignity and labor.

Right to Travel

Continued From Page 1

deemed inadmissible. See 8 U.S.C. §1101(a)(13)(C)(ii).

The scene being set, Mr. Vartelas continued to make his trips to Greece even after IIRIA and returned without any difficulty until 2003 when an Immigration Officer determined that he was seeking "admission" and was an alien with a prior conviction for a crime of moral turpitude. See United States ex. Rel Volpe v Smith, 229 U.S. 422, 423 (1993)- which held counterfeiting is a crime of moral turpitude.

Mr. Vartelas was, after appearing before an Immigration Judge, ordered removed back to Greece, the Judge denying him any requests for relief. The Board of Immigration Appeals affirmed that decision and Vartelas, with the assistance of new counsel, sought to reopen his proceedings arguing among other things that his prior attorney had provided ineffective assistance of counsel and that IIRIA should only be viewed to operate prospectively. His requests for relief continued to be denied in the Immigration Courts and was also rejected by the U.S. Court of Appeals for the Second Circuit. The U.S. Supreme Court granted certiorari to resolve a conflict among the Circuits as both the U.S. Court of Appeals for the Fourth and Ninth Circuits had determined that IIRIA should be viewed prospectively and should not be interpreted retroactively. That is, under the interpretation of the other two Circuits, a permanent resident alien returning to the United States could not be denied admission because he had committed a crime of moral turpitude prior to IIRIA.

The U.S. Supreme Court ruled in favor of Mr. Vartelas by determining that IIRIA retroactively created a "new disability" on him which severely prejudiced him by causing any travel abroad for purposes of visiting family, financial interests, emergencies etc. subject to potential banishment [5] from the United States.

The Supreme Court determined that IIRIA's travel restraint could not be applied retroactively upon Vartelas or those similarly situated who were convicted of a crime of moral turpitude before its passage.[6] Significantly, the Court noted that the presumption against retroactivity "embodies a legal doctrine centuries older than our Republic" quoting Landgraf v USI Film Products, 511 U.S. 244, 265 (1994) and several provisions of the U.S. Constitution among them the Ex Post Facto Clause, Contract clause and Fifth Amendment's Due Process Clause.

The Court also rejected the Government's argument that Vartelas could simply have avoided any adverse consequences by simply staying home in the United States rather than visiting his parents. The Court noted that the loss of the ability to travel abroad is in itself a harsh penalty which is made all the more devastating if it means enduring separation from family members living abroad. Interestingly, in a footnote the Court quoted from Kent v Dulles, 357 U.S. 116, 126 (1958) where it was stated "Freedom of movement across frontiers...may be as close to the heart of the individual as the choice of what he eats, or wears, or reads".

In advising clients who have been convicted of crimes and who desire to travel aborad, Vartelas is now an important reference point for review if not a must read.

Continued on Page 11

PHOTO CORNER

Judiciary, Past Presidents and Golden Jubilarian Night, April 16, 2012

Bob Bohner, Dominic Villoni, Hon. Robert Nahman and Seymour James.

Caren Samplin, Hon. Robert Kohm, Mona Haas, Hon. Joseph Risi and Hon. Jaime Rios.

Chanwoo Lee being presented with her Past President's Scroll by Joseph Risi.

Hon. David Elliot, Hon. Nicholas Garaufis, Hon. Roger Rosengarten, Wally Leinheardt and Hon. Joseph Golia.

Hon. Dennis Lebwohl, Hon. James Dollard, Hon. Allen Beldock and Hon. Leonard Livote.

Hon. Ira Margulis, Hon. Thomas Raffaele, Seymour James and Howard Stave.

Hon. Morton Povman, Hon. Charles Lopresto, Hon. Jeremy Weinstein and Hon. Rudy Greco.

Hon. Peter Vallone, Hon. Seymour Boyers and Ed Rosenthal.

Hon. Randall Eng, Hon. Carmen Velasquez, Tom Principe.

Hon. Ronald Hollie, Hon. Cheree Buggs and Steven Orlow.

Hon. James Dollard, Hon. Nicholas Garaufis and Herbert Rubin.

Hon. Joseph Golia, Hon. Carmen Velasquez, Hon. Jaime Rios and Hon. Inez Hoyos.

Photos by Walter Karling

PHOTO CORNER

Judiciary, Past Presidents and Golden Jubilarian Night, April 16, 2012

Hon. Robert Nahman, Hon. Seymour Boyers, Bernie Vishnick, Hon. Richard Brown and Steve Orlow.

Jim Pieret, Hon. Peter Kelly and Tom Principe.

Hon. Phyllis Flug, Jacqueline Flug, Hon. Seymour Boyers, Hon. Bernice Siegal and Hon. Charles Lopresto.

Mona Haas, Dave Adler, Hon. William Viscovich, Hon. Leslie Purificacion, Hon. Denis Butler and Hon. Rudy Greco.

Steve Hans, Hon. Denis Butler, Hon. Sid Strauss, Hon. Morton Povman and Steve Wimpfheimer.

Joseph Carola, III, Chairperson of the Program Committee.

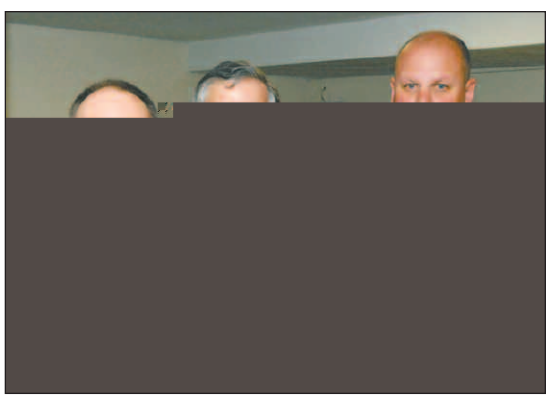
Joseph Risi, President-Elect of the Queens County Bar Association.

Seymour James, President-Elect of the NYSBA, Guest Speaker and Past President 2001-2002 of QCBA.

Maureen Heitner, Caren Samplin, Mona Haas, Liz Forgione and Norman Burack.

Frank Gonzalez, Tim Rountree and Paul Kerson.

Hon. Randall Eng, Hon. Carmen Velasquez, Tom Principe.



Joe Carola, Hon. Jeremy Weinstein and Hon. Fernando Camacho.

Photos by Walter Karling

Culture Corner

BY HOWARD L. WIEDER

ANTONIO PADOVAN, a trained architect turned film maker, has sufficient reason to be thrilled. The United States has granted to this Italian-born film maker the O-1 visa permitting extraordinarily creative talents to stay for an additional three years and is about to embark on directing his first feature film that is in the process of securing investors and arranging for financing. Rather than discuss his achievements, this modest, unassuming film maker wanted to spend the bulk of my interview of him discussing a little known school in Richmond Hill, in Queens County, New York, that tries to make a difference in the lives of Queens County residents.

As discussed in my prior column [*Queens Bar Bulletin*, November 2011], upon arriving in New York in 2007, the original goal of **ANTONIO PADOVAN** was to work in architecture. He soon landed a job at a New York architectural firm, but then decided to learn film-making, enrolling at the New York Film Academy, earning a scholarship. His first film ***SOCKS AND CAKES***, went on to win a Golden Ace Award at the 2010 Las Vegas Film Festival. **ANTONIO PADOVAN's** subsequent film ***PERRY ST.*** was accepted by fifteen film festivals across the United States, earning numerous awards.

Film director Antionio Padovan instructing cinematographer Nicola Raggi on a shot.

His following film, ***MIA***, a 20 minute short romantic comedy, played at major film festivals. The film was shot in New York's West Village, a favorite locale for all of Padovan's shooting. **ANTONIO PADOVAN** adores filming in Manhattan's West Village because its locales are beautiful and photogenic, and some of its streets look like they were built for a motion picture set.

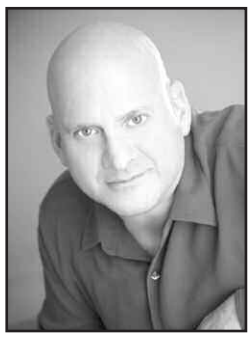
Film Director Antonio Padovan

First, the not-for-profit school and organization that excites **ANTONIO PADOVAN** is**:**

ONCE UPON A TIME, INC.
8761 111th St
Richmond Hill, NY 11418
Telephone: (718) 8469182
Email: oncetime@aol.com
Nearest Transit: 111 St (J subway line) or 104 St (J, Z)

ONCE UPON A TIME, INC. does not have a web site as of yet, so you must call the aforementioned telephone number or send an email to oncetime@aol.com in order to get more information regarding its programs.

ONCE UPON A TIME, INC.'s mission is that art can save lives. It has numerous programs and classes, at very low cost, in the creative arts for persons of all ages. **ANTONIO PADOVAN** will soon be teaching a once-a-week class in film making at **ONCE UPON A TIME, INC. ANTONIO PADOVAN's** class will cover the entire gamut of film making from script development to the all-important search for financing, to the choices a director makes in the final cut of the edited movie. Anyone with a passion for film is welcome to enroll, including beginners.



Howard L. Wieder

Hearing **ANTONIO PADOVAN** talk with earnest about **ONCE UPON A TIME, INC.**, gave a clue into **ANTONIO PADOVAN's** character. He kept emphasizing the great work of **ONCE UPON A TIME, INC.**, gently deflecting my questions concerning his own talents and career plans.

With a company named **JAJ, ANTONIO PADOVAN** has been shooting several commercials, including for Japan tourism and for the forthcoming European soccer games. On May 18, 2012, at 7:00 P.M., **ANTONIO PADOVAN** directed the evening's show of the popular, long-running ***STICKY*** series**,** produced by **BLUE BOX PRODUCTIONS**, playing at the Bowery Poetry Club [www.bowerypoetry.com].

GETTING CLOSER will be Padovan's first feature film as both writer and director. Together with co-writer **LIBBY EMMONS** -- a highly regarded producer and playwright [see, www.libbyemmons.com], **ANTONIO PADOVAN** wrote the feature film ***GETTING CLOSER*** regarding two women in their 40s, and the love relationship that develops between one of the women and her friend's 18-year-old son. The feature film is no esoteric treatment of a "Mrs. Robinson Syndrome" [see, ***THE GRADUATE*** (1967)] or a "May-December" romance. ***GETTING CLOSER*** explores the emotional consequences and toll of a sincere, love relationship of an older woman and a younger man, and the love relationship's effect upon the two female best friends.

GETTING CLOSER is a romantic comedy, **PADOVAN**'s specialty. The subject matter of ***GETTING CLOSER***, of course, by its nature, does involve drama. **PADOVAN** dislikes the word "dramedy," as a cheapening of both comedy and drama.

In arriving at the subject matter of ***GETTING CLOSER***, Padovan asked himself why does Hollywood usually turn its back on aging actresses [as opposed to the survivability of older male actors to find film work or of fresh faces of older men to embark in film]? **PADOVAN** was also stimulated by the question of why society accepts a love relationship between older man and a young woman, but the opposite - - older woman and a young man in love - - until recently, has been treated as taboo. These questions stimulated **PADOVAN** into writing ***GETTING CLOSER***.

ANTONIO PADOVAN states: "When a director becomes an adjective, that's wrong." PADOVAN explains that the public needs to be respected. The public is asked to spend at least $13 for admission to a film and then asked to give up 2 hours of its time. A film must tell a story, and a director should never push to force an imprint of his or her own style to detract from the meaning, purity, and beauty of the story unfolding.

ANTONIO PADOVAN cited **TERRENCE MALICK's *THE TREE OF LIFE*** [2011] as an example of a self-absorbed directorial style, where the use of albeit visually striking images clouded the story. **TIM BURTON** and the **COEN BROTHERS [Joel and Ethan]** are other examples, according to **PADOVAN**, of talented directors who need to be more conscious of their need to stamp a film in their own image. "When one leaves the cinema after seeing a good movie," says Padovan, "the praise should be on the story and not on the greatness of a particular director or actor."

ANTONIO PADOVAN continues: "Just because a director attains rock star status does not make him better than an unknown director, who does a lot of good films in an indistinct style. A truly good director adapts to the demands of the story and does not demand that the story bend to the director's forced impression."

"A film can begin to succeed," according to **ANTONIO PADOVAN**, "if its director does not impose a particular style or stamp on it, but permits it to breathe."

"The cinematography of ***THE TREE OF LIFE*** failed to tell the story. Its director indulged in self-gratification," states **ANTONIO PADOVAN.** According to Padovan, ***BRIDESMAIDS*** [2011] was a far better film than ***THE TREE OF LIFE*** [2011] because it succeeded in telling a story." Padovan continues that, in the same vein, he thought and still believes that ***TOY STORY 3*** [2010] was a far better film and a worthier recipient for the Oscar for Best Picture than ***THE KING'S SPEECH*** [2010].

I was mesmerized by **ANTONIO PADOVAN's** expression and innocent boldness. He continued that the public should be trusted in its choices. He derided "Angelika hipsters" referring to devoted denizens of the Angelika Film Center & Café, a well-known cinema on Manhattan's West Houston Street that showcases only independent films, who, "without adequate basis or facts, minimize a Hollywood-produced, big budget film, only because it is 'non-Indie."

ANTONIO PADOVAN,

Film Director Antonio Padovan

states with regard to his films, he engages in intense pre-production work. He does not believe in over-directing actors. "Cast good actors and get out of their way," is **PADOVAN's** policy. Only if an actor starts to get nervous as the shooting day approaches then it becomes necessary to feed them little lies just to bolster their self-confidence.

ANTONIO PADOVAN states that after his process of intense pre-production, he actually enjoys the days on the set shooting a film, because it is like, after days of rehearsal, actually performing at a concert and enjoying the moment. When shooting a film, on the set, **ANTONIO PADOVAN** likes to create "a bubble," trying to build a tranquil, calm, and happy atmosphere, making both cast and crew feel comfortable.

The most depressing thing about film making according to **ANTONIO PADOVAN** is the editing process. As you review the takes, you see what could have been done better and what didn't work. Anything less than the original mental image that a director had pictured will become depressing as a director reviews dailies and take sequences. Editing may also produce surprises, but it has disappointments, as well.

Although **ANTONIO PADOVAN** takes on film assignments of directing another writer's work, but he worries. "It is far less agonizing to direct a film based on your own writing than to direct another writer's work." **ANTONIO PADOVAN** explains that in directing someone else's work, the worry always is if he has achieved its writer's image and earned its writer's satisfaction.

Asked what current movies he would recommend to our readership, **ANTONIO PADOVAN** unhesitatingly responded with two romantic comedies: ***SALMON FISHING IN THE YEMEN*** [2011] by **LASSE HALLSTROM** and ***FRIENDS WITH KIDS*** [2011] by **JENNIFER WESTFELDT**.

* * * * * * * * * * * * * *

HOWARD L. WIEDER is the writer of both **"THE CULTURE CORNER"** and the **"BOOKS AT THE BAR"** columns, appearing regularly in ***THE QUEENS BAR BULLETIN,*** and is **JUSTICE CHARLES J. MARKEY's PRINCIPAL LAW CLERK** in Supreme Court, Queens County, Long Island City, New York.

Film director Antonio Padovan with cinematographer Nicola Raggi.

POETIC JUSTICE

Floridian Culture

Robert E. Sparrow

We wintered in Florida-
Wonderful weather, warm sun,
But in analyzing its "civilization"
Comparable to that of the Hun!

True - there are birds
Beautiful ocean and sand -
And it's no longer
A cultural wasteland...

But some recent legislation
And its grotesque laws
Are enough to give one
Reason to pause...

One in particular-
It's called "stand your ground,"
And thus a new way to murder
With impunity is found

No longer the need
To retreat if one can-
It's now open season
For any gun fan!

And of fans there are many
It's sad to relate
That Florida is now
Called the "gunshine state!"

What's more, we now find
That we must fear a
Congressman who restores
The McCarthy era...

Where is the "collegiality"
And congressional cooperation
When he accuses a hundred of his colleagues
Of being part of a communist organization?

I truly wonder
If anyone has the ability
To restore that beautiful state
to a modicum of civility.

Robert E. Sparrow

Warrants Needed For Police GPS

Continued From Page 1

ic, and it was not really a seizure because the placement of the device did not actually interfere with the defendant's use of the car. Furthermore, and what the trial court ultimately based its decision on, the installation of the device was essentially the functional equivalent to a full-time surveillance operation by the police.

The Supreme Court ruled unanimously that the installation of the GPS device on the car constituted a search within the meaning of the Fourth Amendment. However, what is intriguing is that the Court split 5-4 on the reasoning.

The majority opinion written by Justice Scalia based its decision on the notion that the placement of the device constituted a "trespass" within the meaning of the Fourth Amendment in the 18th century. "We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Jones*, at 949.

This holding was based upon the view that at the time of the adoption of the Bill of Rights, Fourth Amendment jurisprudence was tied to common law trespass. The court cites a pre-revolutionary war English common law case which held that "Our law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave; If he does he is a trespasser, though he does not damage at all; if he will tread upon his neighbor's ground, he must justify it by law." *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)

With regard to the expectation of privacy, the majority stated that *Katz v. United States*, 389 U.S. 347 (1967), established that property rights are not the sole measure of Fourth Amendment violations, but did not "snuff out the previously recognized protection of property". "Our task, at a minimum, is to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment." *Jones*, at 951.

The minority opinion by Justice Alito rejects the trespass basis of the majority opinion. Instead, the minority opinion bases its opinion strictly on the *Katz* ground of expectation of privacy. According to the minority, the only issue is "whether respondent's reasonable expectation of privacy [was] violated by the long-term monitoring of the movements of the vehicle he drove". *Jones*, at 958.

Justice Alito was of the view that "the attachment of the GPS device was not itself a search" and it was not a seizure because nothing was taken and the use of the automobile was not compromised. Rather, the minority opinion took the view that it was the gathering of information from the placement of the device which violated the Fourth Amendment. "Relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable, but the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Jones*, at 964.

The New York Court of Appeals reached the same conclusion in *People v. Weaver*, 12 N.Y.3d 433 (2009). In 2005, the New York State Police placed a GPS device inside the bumper of the defendant's car, without a warrant, and monitored it for 65 days. In a 4-3 decision, Chief Justice Lippman held that "The massive invasion of privacy entailed by the prolonged use of the GPS device was inconsistent with even the slightest reasonable expectation of privacy."

Chief Justice Lippman began his analysis by examining an eloquent dissent by Justice Brandeis in 1928. In *Olmstead v. United States*, 277 U.S. 438 (1928), the government placed a wiretap on the telephone line of the defendant in the public street. The majority held that because the wiretap involved no trespass into the houses or offices of the defendants, no violation of the Fourth Amendment occurred. In dissent Justice Brandeis stated,

"The protection guaranteed by the Amendments is much broader in scope [than the protection of property]. The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Olmstead*, at 478-479.

Olmstead was eventually overturned by *Katz*. In *Katz*, a listening device was placed on the outside of a telephone booth, and the voice of the defendant was listened to. "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiable relied while using the telephone booth, and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Katz*, at 353.

Katz was significant because it established the rule that a search can entail more than a physical intrusion. Even though the phone booth was accessible to the public, while the defendant was in the booth and using it for its intended purpose, his expectation that his conversation would be private was reasonable.

From then on, Fourth Amendment jurisprudence was concerned primarily with the expectation of privacy. Thus, in an early electronic tracking case, the Government placed a primitive tracking device referred to as a "beeper" inside a container which was subsequently delivered to the suspect, and the government tracked the movements of the container on public roads. The Supreme Court held that this monitoring did not constitute a search because it merely substituted for or supplemented visual surveillance that would have revealed the same facts. *United States v. Knotts*, 460 U.S.276 (1983). Under this holding, because GPS tracking mirrored visual surveillance, it would appear that no violation of the Fourth Amendment occurred in *Weaver*.

However, the Court of Appeals in *Weaver* found a difference in degree between the use of a "beeper" and the GPS monitor. "Disclosed in the data retrieved. . .will be trips the indisputedly private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on. What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations. . . ." *Weaver*, at 441-442.

Therefore, according to the minority opinion in *Jones*, and the Court of Appeals decision in *Weaver*, it is not the placement of the device on the car which constituted a search, but rather the long term monitoring which violated the Fourth Amendment. GPS monitoring constitutes a violation of the Fourth Amendment and a warrant based upon probable cause is required.

However, a number of questions remain. First, Justice Alito concedes that a shorter time period of monitoring may not constitute a search. "We need not identify with precision the point at which the tracking of the vehicle became a search, for the line was surely crossed before the 4-week period." *Jones*, at 964. Therefore, is tracking for a week without a warrant permissible? Under *Weaver* there is no question. All routine GPS tracking requires a warrant.

Second, both *Jones* and *Weaver* recognize that there may be exigent circumstances where GPS monitoring will be permitted without a warrant. "We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy." *Jones* at 964. Similarly in *Weaver*, "Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause." *Weaver*, at 447. What constitutes extraordinary offenses or exigent circumstances under these cases? If the police were investigating kidnaping, would they be permitted to place a device on a car without a warrant? What about a murder case? What about a terrorist threat?

A further problem is that as a result of these cases there is a disjunction in the warrant requirement for long term monitoring. Most people today carry with them a GPS device, known as a cell phone. Telecommunications companies retain a record of where the cell phone was when a call was made. These records are available to the government pursuant to a court order. 18 U.S.C. §2703. Under this law, the government is not required to establish probable cause. Rather, the government need only show "specific and articulable facts showing that there are reasonable grounds to believe that the [cell phone records] are relevant and material to an ongoing criminal investigation." 18 U.S.C. §2703(d).

A further problem is by basing these opinions on the notion that long-term monitoring violates the Fourth Amendment, the use of visual surveillance may now be questionable. For example, although, a GPS device can transmit its location, visual surveillance not only pinpoints the target's location, but also identifies what a person is doing and to whom he or she is talking. This seems to be much more intrusive than just the location.

Continued On Page 11

Right to Travel

Continued From Page 5

Currently, there are other issues which may also need to be interpreted under the reasoning of Vartelas. For instance, what if the determination as to whether a crime is one of moral turpitude changes from the time an alien takes a plea? In 1966 the Board of Immigration Appeals found that misprison of a felony (withholding information about a felony) was not a crime of moral turpitude. See Matter of Sloan, 12 I&N Dec. 840 (A.G. 1968, BIA 1966). But in 2006 Sloan was overruled and the BIA held that misprison of a felony was in fact a crime of moral turpitude. See In re Robles-Urrea, 24 I&N Dec. 22 (BIA 2006). See also, Itani v Ashcroft, 298 F.3d 1213 (11th Cir. 2002). What will happen to those aliens who with the advice of counsel and the understanding of the Immigration Laws at the time of a conviction entered a plea to a crime which at the time was not considered a crime of moral turpitude but was then later interpreted to, in fact, be a crime of moral turpitude? It would seem that under the reasoning of Vartelas and St. Cyr, that any retroactive interpretation would be rejected and is a violation of the U.S. Constitution. The Supreme Court rulings of Vartales, St. Cyr and Padilla were constructed with the overall focus not only that an alien is entitled to effective assistance of counsel in any decision which would effect their residence in the United States but also on the notion that people have a right to adequate notice and information regarding the law under the Fifth Amendment's Due Process Clause, Ex Post Facto Clause, and the Contract Clause. The holdings of these cases serve to protect those who come under the purview and jurisdiction of the legislative and judicial systems.

Of course retroactivity of laws in the Immigration area have been actively litigated. The 2010 decision of the Supreme Court in Padilla v. Kentucky, 130 S.Ct. 1473 (2010) has resulted in divergent opinions from Courts at nearly every level holding the ruling in that case either retroactive or nonretroactive [7] with the Court's struggling with the retroactivity issues and prejudice to the aliens under the Federal Standard for ineffective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668 (1984). In sum, the jury is still out on these latter issues and others of a similar nature and it will be left to further clarification by the Courts.

[Editor's Note– In the merry-go-round of Immigration decisions, the Ninth Circuit decided Robles-Urrea v. Holder, _____ F.3d ____ (9th Cir. 4/23/12) while this article was being sent to print. The Ninth Circuit reversed the Board of Immigration Appeals and held the misprison of a felony was not a crime of moral turpitude. It also held the reasoning of the Eleventh Circuit in Itani v. Ashcroft, supra, is flawed. The Court noted that a crime of moral turpitude is one that involves fraud or one that involves grave acts of baseness or depravity such that its commission offends the most fundamental values of society. The fact that the offense contravenes "societal duties" is not enough to make it a crime of moral turpitude. The Court noted that if it was enough then every crime would involve moral turpitude. The BIA and Itani case had reasoned that misprison of a felony was a crime of moral turpitude because it involved knowledge of a crime and some affirmative act of concealment or participation and that such conduct runs contrary to accepted social duties. However, the Ninth Circuit reasoned that the second crucial consideration for a crime of moral turpitude: that the crime involved some level of depravity or baseness so contrary to the moral law as to give rise to moral outrage, was missing.]

**Joseph F. DeFelice is President-Elect of the Queens County Bar Association and practices Immigration and Criminal Law from his office in Kew Gardens.*

***Marie-Eleana First is a member of the Queens Bar practicing Immigration Law from her office in Manhattan.*

1. The Second Circuit decision which was reversed can be found at 620 F.3d 108 (2d Cir.2010).

2. Student visas are classified by F-1 status and are usually valid for the term of study e.g. 4 years for college, provided the alien attends full time.

3. Resident cards are now actually white in color but the name "green card" is derived from the fact that when the cards were first issued more than a century ago they were green.

4. Prior to IIRIA entry was defined in INA§101(a)(13), 8 U.S.C.§1101(a)(13)(1994). Those sections were amended on April 1, 1997 with the statute now using the words "admission" and "admitted".

5. The Court mentioned Padilla v Kentucky, 130 S.Ct. 1473 (2010) and noted that it had on several occasions noted the severity of the sanction of banishment from the United States. See also, INS v St. Cyr, 553 U.S. 289, 321

6. Whether this applies to those convicted on a plea only rather than after trial as interpreted by the U.S. Supreme Court in INS v St. Cyr, 533 U.S. 289 (2001), another case dealing with issues of retroactivity in the Immigration law as it related to the former relief known as 212(c) of the Immigration and Nationality Act, was not addressed.

7. Some examples can be found in ***non-retroactive:*** U.S. v. Hernandez-Monreal, 404 Fed.Appx. 714 (4th Cir. 2010); Chaidez v. U.S., 655 F.3d 684 (7th Cir. 2011); U.S. v. Hong, 2011 WL 3805763 (10th Cir. 2011); Gacko v. U.S., 2010 WL 2076020 (E.D.N.Y. 2010); Ellis v. U.S., 2011 WL2199538 (E.D.N.Y. 2011); U.S. v. Chapa, 800 F. Supp.2d (N.D. Georgia 2011); U.S. v. Laguna, 2011 WL 13557538 (N.D. Illinois 2011); U.S. v. Perez, 2010 WL 4643033 (D. Nebraska 2010); Mendoza v. U.S., 774 F.Supp.2d 791 (E.D. Virginia 2011); People v. Feliciano, 31 Misc.3d 128 (A)(1st Dept., App Term, 2011); People v. Sanchez, 29 Misc.3d 1222(A) (Queens County Supreme Court 2010); People v. Coelho, 331 Misc.3d 1230(A)(Nassau County Supreme Court 2011); People v. Kabre, 29 Misc.3d 307 (NYC Criminal Court, NY County 2010); Barrios-Cruz v. State, 63 So.3d 868 (Florida Dist. Ct. App. 2011); Miller v. State, 11 A.3d 340 (Maryland Ct. Spec. App. 2010); Gomez v. State, 2011 WL 1797305 (Tennessee Ct. Crim. App. 2011). Examples of ***retroactive effect*** are United States v. Obonaga, 2010 WL 2629748 (E.D.N.Y. 2010) ("It is unclear if Padilla applies retroactively... Accordingly...the Court elects to assume *arguendo* that Padilla applies retroactively"); Martin v. U.S., 2010 WL 3463949 (C.D. Illinois 2010); Amer v. U.S., 2011 WL 2160553 (N.D. Mississippi 2011); Zapata-Banda v. U.S., 2011WL 1113586 (S.D. Texas 2011); Marroquin v. U.S., 2011 WL 488985 ((S.D. Texas 2011); People v. Nunez, 30 Misc.3d 55 (2d Dept., App. Term 2011); People v. Bennett, 28 Misc.3d 575 (Bronx County Supreme Court 2010)(Kotler, J.); People v. Garcia Hernandez, 30 Misc.3d 1234(A) Suffolk County Court 2011); Denisyuk v. State, 30A.3d 914 (Maryland Ct. App. 2011); Commonwealth v. Clarke, 460 Mass.30 (Mass Sup. Jud. Ct. 2011); U.S.v. Orocio, 645 F3d 630 (3d Cir. 2011).

Warrants Needed For Police GPS

Continued From Page 10

Lastly, technology is changing rapidly and in ways that implicate expectations of privacy. One need look no further than the facts of *Katz*. That holding was based on the view it was reasonable to expect that conversations had within the booth were private. However, when was the last time you saw a phone booth. Would *Katz* have been decided differently if instead of inside a phone booth the conversation was held while walking down Fifth Avenue? It does not appear to be reasonable to expect privacy in such a conversation. Would a police officer who was following a suspect on the street be permitted to listen to a suspect's cell phone conversation? This, of course, is the problem of outlining the contours of the Fourth Amendment according to an expectation of privacy. For example, the proliferation of surveillance cameras on the streets make it unreasonable to expect privacy when we walk down the street.

In conclusion, the holdings in *Jones* and *Weaver* clearly require the government to obtain a warrant to place a GPS device on a car and monitor its position. However, it is certain that new technologies will develop and new devices will be invented which will further test the boundaries of the Fourth Amendment.

**Editor's Note: Peter Dunne is Court Attorney to Justice Robert C. McGann.*