THE ADVOCATE

A Bi-monthly Publication of the Kentucky Department of Public Advocacy
Advocacy Rooted in Justice

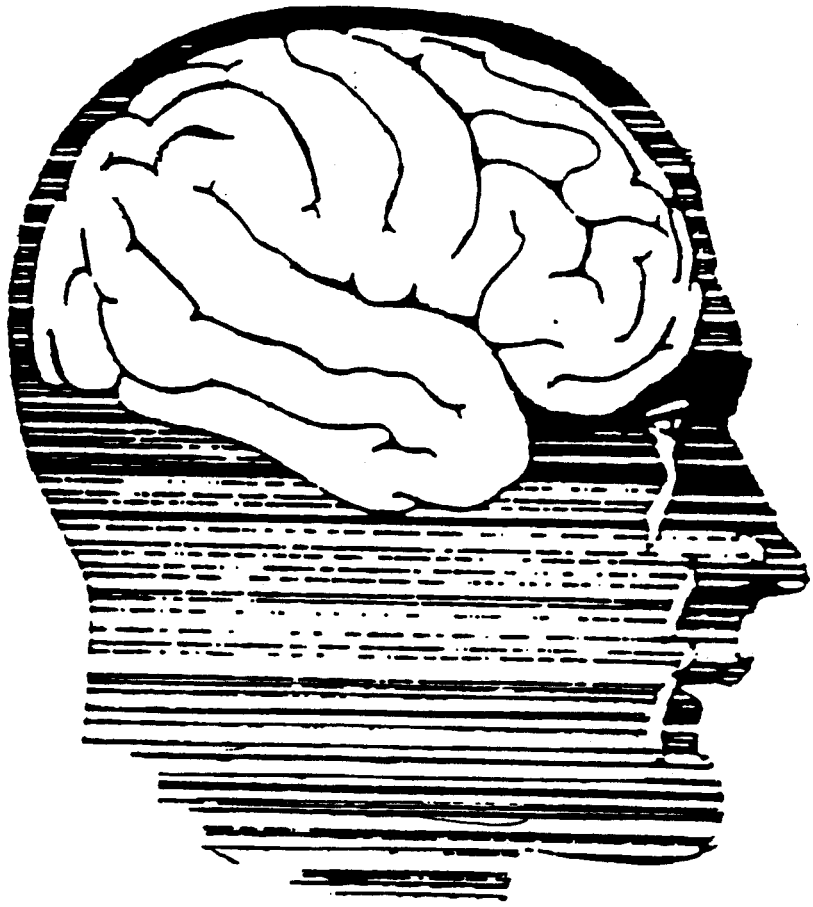

Illustration by Mike Reedy

ANGER AND AGGRESSION

Volume 12, Number 4 **June, 1990**

FROM THE EDITOR

Anger and Aggression

"Aggression influences lives as much as love and friendship, thought and inspiration, or nutrition and sleep," according to Michael McGuire, M.D. and Alfonso Troisi, M.D. See Aggression, Chapter 3.4, *Comprehensive Textbook of Psychiatry V* (1989). One of Webster's definitions for aggression is "... hostile, injurious, or destructive behavior or outlook especially when caused by frustration."

How is aggression linked to anger? How do anger and aggression explain criminal behavior? These important issues are explored in an extraordinarily enlightening article by Lane Veltkamp, MSW and John D. Ranseen, Ph.D.

Law Schools and Public Defenders

Why do so few law graduates desire public defender careers? How can law schools help Kentucky's public defender efforts? Kentucky's 3 law school deans give us their thoughts this issue.

DPA Funding

DPA has received additional funding but not nearly what it needs. Bill Jones, chair of the Public Advocacy Commission, relates the details. The 1990 Legislature has granted DPA substantially better starting salaries, $21,600, which is up from $16,600. Yet, even with this very substantial increase, our starting salary is the lowest of the 7 surrounding states.

Ed Monahan

The Advocate is a bi-monthly publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet for administrative purposes. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the attention of the Editor.

Edward C. Monahan, Editor 1984-Present
Erwin W. Lewis, Editor 1978-1983
Cris Brown, Managing Editor

Contributing Editors

Linda K. West West's Review	Barbara Holthaus Juvenile Law
Allison Connelly Post-Conviction	Donna Boyce 6th Circuit Highlights
Neal Walker Death Penalty	Ernie Lewis Plain View
Dan Goyette Ethics	Rob Riley In the Trenches
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IN THIS ISSUE

FEATURES

REGULAR COLUMNS

TRIAL TIPS

THE ADVOCATE FEATURES

David R. Steele

During all but a brief portion of the period since his admission to the Kentucky bar in 1973, David Rand Steele, a 1973 graduate of the University of Cincinnati School of Law, has been a roster public defender in Kenton County.

He took some time away when he served as an Assistant Commonwealth Attorney [1978-79]- he led the Major Offender Program [operated under a LEAA Grant] to prosecute career criminals. In 1978 he worked as a special agent for the F.B.I. in the Detroit field office. While at the Bureau, he worked on 2 separate squads, one dealing with HUD fraud and the other with public corruption. David left the Bureau toward the end of the Carter administration.

David approaches criminal defense work with the thoroughness he gave to the investigation of crimes as a Bureau Agent. Defense work is particularly challenging when the case goes to trial. The need for sincere advocacy is great, but thorough investigation both of the facts and the law present the greatest opportunities for good results in a case. David feels good about the work he and co-counsel, C.J. Victor of Florence, KY did in the case of Commonwealth v. Cornwell. Excellent legal work was accomplished in the face of adverse public opinion, adverse news coverage and courts mindful of both.

Here's some of David's thoughts on public defender practice:

CLIENTS

The first thing a lawyer learns about accused citizens is that it is not uncommon for them either to lie to you or to fail to tell you all of the truth. An accused often operates on fear. Chiefly that fear is that if they tell the truth, the attorney will not be nearly as ardent in his advocacy. Perhaps this is human nature or perhaps a prior lawyer was not as adversarial as he should have been after the client was completely candid.

Guilt or innocence is an issue best left to the jury. What is important is what the Commonwealth can prove. A tougher problem occurs when the client gives several versions of the facts. It is important for the attorney to explain to his client clearly what he's charged with and what the Commonwealth Attorney can put on to prove his case. It is also important for the attorney to explain to the client, that he, as an officer of the court, has responsibilites to the court, the law, and the system of justice and is not there to serve as an accessory after the fact.

"While clients don't always like what I have to tell them, they always know I am in their corner, fighting for them the best I can."

Disputes between lawyers and clients can most often be attributed to misunderstandings because the lawyer is speaking on one level and the client is understanding on another. It is important to strive to approach the same level. Many times before seeing a client, I make an effort to investigate the facts independently.

On a number of occasions, I have been called upon to deal with clients that other lawyers have had difficulty working. I can recall at least one client that I don't believe anybody could have worked with, and I was no exception, despite the fact I was doing everything legally possible for his defense. With the exception of that one client, most clients are looking for some degree of understanding as to the process being confronted, the role of attorney (the limitations of his services) and what can be done within those confines for that individual.

There is no substitute for taking some time with the client to explain the situation confronting the client. While it is a burden to deal with some of the clients in the public defender system, I've found if you treat them decently, they usually respond in kind.

MONEY/RESOURCES
"necessary legal service chasing too little funding."

Public Defender funding has been a significant and newsworthy issue in Northern Kentucky since the Gregory Wilson case. The issue has not gone away, nor should it go away.

I have been obligated in my role as public defender to "advance" certain expenses as the need arises in a case, for example, to obtain records. These "special expenses" are advanced by the office prior to billing.

Governmental officials and the public are unaware that those cash outlays get prorated along with the usual billable time. When the allotment is prorated and costs that have already been advanced also get prorated, the funds received do little more than cover the cost of incidental expenses.

There are substantial differences in the Commonwealth's resources versus those available to the the defense.

In Kenton County we have some 20+ roster attorneys. Each pays his/her own expenses- rent, malpractice insurance, equipment, staff, etc, and maintains a law practice as well. The Office of Public Advocacy does provide an investigator, but the investigator is responsible to any public defender in the numerous counties he covers.

In contrast, the Commonwealth Attorney is salaried, has assistants/staff, and state facilities (thus no overhead). For investigative resources, in addition to the detectives in their office, the Commonwealth Attorney can call upon local law enforcement agencies and the Kentucky state police to investigate cases.

Letters to the Editor

Racism in Kentucky's Justice System and Money for Indigent Resources

Dear Mr. Monahan,

I have always enjoyed reading *The Advocate* which is published by the Department of Public Advocacy. However, I must say that I was dismayed by your comments in the February, 1990 issue. While the percentage of blacks in prison compared to the percentage of blacks in the general population is cause for concern, I heard a synopsis of an in-depth study done in California on National Public Radio a couple of weeks ago which shed much light on the reasons for this problem. Your conclusion that "the justice system is stacked against people of color" was certainly not consistent with what a tremendous amount of research showed and is a wholesale condemnation of all of us who work in the justice system.

I am further disappointed by your comment that "few other judges in our state have been willing to follow the law" in discussing court ordered payment of attorney fees by fiscal courts pursuant to Chapter 31. The Jefferson Circuit and District benches (which total 39 Judges) have always been proud and supportive of our public defender system. While the comments you made as the editor will not affect the relationship that we have established in Jefferson County, it certainly will not promote better relations between the bench and the public defender system in areas where any problems exist, if in fact they do.

Martin E. Johnstone
Judge, Jefferson Circuit Court

The following is the reply of the Editor of *The Advocate*:

Dear Judge Johnstone,

Thank you for your letter of March 12 expressing your very serious concerns about my editorial remarks in the February, 1990 issue of *The Advocate*.

My personal experience in the criminal justice system, and the knowledge I have gained as a person working in the state defender office for 14 years, have led me to believe that the color of the skin of criminal defendants in this state does make an unfortunate difference. The fact that percentagewise there are 4 times as many blacks in prison than in our population is an indicator of such a problem in our state.

It would be presumptuous of me to say that I know for sure why such a significant disparity exists. That is why I asked the *question* in my editorial comment as to whether this racial disparity is a product of open or subtle racism that continues in today's society. I also urged that we *all* together had better commit ourselves to finding out why this disparity exists in such a large proportion and to commit ourselves to correcting it.

I did not label judges as the sole culprits in this matter. The justice system consists not only of judges but also of prosecutors, criminal defense attorneys, public defenders, jurors, police, corrections, etc. I would not be surprised if there are problems in every aspect of the justice system as it relates to this racial disparity, including subtle or open racism on the part of criminal defense attorneys and public defenders in this state.

I do not stand alone in questioning whether or not the justice system is working for blacks. As we indicated in the February, 1990 *Advocate*, Bruce Wright, New York State Supreme Court Justice, has written a book entitled *Black Robes, White Justice*, where he investigates why, in his opinion, our justice system does not work for blacks.

On page 23 of the February, 1990 *Advocate*, State Representative and attorney Bill Lear expressed grave concern about the significant racial disparity of Kentucky prisoners.

And what does the attached study on Young Black Men in prison implicate? (See April, 1990 *Advocate*, pp. 11-14).

Our Chief Justice just March 14, 1990 indicated that he wants us to "search out and eliminate racial bias in our judicial system."

On February 27, 1990 the General Accounting Office released a study finding "a pattern of evidence indicating racial disparities in the charging, sentencing and imposition of the death penalty after the *Furman* decision."

In *Race, Homicide, Severity, and the Application of the Death Penalty: A Consideration of the Barnett Scale*, Criminology, Vol. 23, No. 3 (1989), the University of Louisville's Drs. Keil, Thomas and Vito conclude:

> Blacks who kill whites are more likely to be charged with a capital crime than others (*i.e.*, blacks who kill blacks, whites who kill whites, and whites who kill blacks).
>
> . . . .
>
> Kentucky juries are...more likely to send blacks who kill whites to death row.
>
> . . . .
>
> In Kentucky, race is inextricably bound up with the way in which the capital sentencing process operates.

In their pastoral letter *Brothers and Sisters to Us*, the Catholic Bishops have offered some rather stark insights into the radical evil of the structural racism present in our society:

> The structures are subtly racist, for these structures reflect the values which society upholds. They are geared to the success of the majority and the failure of the minority.
>
> Members of both groups give unwitting approval by accepting things as they are. Perhaps no single individual is to blame. The sinfulness is often anonymous but nonetheless real. The sin is social in nature in that each of us, in varying degrees, is responsible. All of us in some measure are accomplices.
>
> . . . .
>
> Racism is not merely one sin among many,

> it is a radical evil dividing the human family and denying the new creation of a redeemed world. To struggle against it demands an equally radical transformation in our own minds and hearts as well as the structure of our society.

Kentucky is not, as much as you or I might like to think otherwise, exempt from significant racism in the criminal justice system.

My hope is to continue to address this problem in future issues of *The Advocate*. If you are willing, I would like to reprint your March 12 letter in the June *Advocate*.

As to your disappointment with my comment about few other judges in our state being willing to follow the law by ordering fiscal courts to pay attorney fees in excess of the statutory maximums, that simply is my experience across the state. You are very correct in saying that Jefferson Circuit Judges have generally distinguished themselves by following the law in the area of enforcing KRS Chapter 31 mandates on things like fiscal court's responsibility for expert witness fees. However, that is not a thoroughly common experience across the state of Kentucky, even in the very most serious cases when the life of the defendant is at stake. In fact, outside of Jefferson County and maybe a handful of other counties, it is probably the exception.

Many circuit judges in this state have never ever ruled that the fiscal court is responsible for paying a dime. While there are many reported appellate cases that acknowledge that fiscal courts are responsible under Chapter 31 for expert witness fees, I know of no published appellate case that has reversed a conviction due to a trial judge's refusal to order the fiscal court to pay requested expert witness fees.

There is an unpublished Court of Appeals case, *Kathi S. Kerr v. Commonwealth*, Ky. App. No. 86-CA-2564-MR (2/5/88), reversing a Jefferson Circuit Court judgment due to the court's refusal to order the fiscal court to pay fees to bring a defense witness in from out of state.

Yes, there are a couple of Kentucky cases that require fiscal courts to pay attorneys' fees when ordered. But those cases represent the minority *practice* in the 120 counties in this state.

I believe that a significant number of circuit judges in this state refuse to follow the law that is so clearly enunciated, and that fellow citizens who have their liberty or their life at risk, aren't getting the benefit of a fundamentally important principle that money shouldn't make a difference.

And yes, the Jefferson Circuit Court judges stand out as examples of judges who are following the law. And yes, there are other judges in this state who have very courageously followed the law in this regard. And yet, Jefferson County has appointed attorneys representing capital clients for the pitiful sum of $500!

In Kenton County a black defendant was recently sentenced to death because no competent attorney experienced in capital cases would represent the client for minimum wage or less. And haven't there been instances of note in Jefferson County, at least in district court, where certain judges were stubbornly reluctant to appoint counsel for obviously needy and qualified defendants? We have to recognize that there are significant "politics" involved in whether an elected circuit or appellate judge orders an elected fiscal court to pay money for criminals.

While I do not know you personally, I have a great deal of respect for you from what I know of you through other people in this office and persons that I know in the Jefferson District Defender Office. It is disconcerting to me that I have invoked your ire. However, my experiences repeatedly have instructed me that the color of a person's skin makes an unfair difference in our criminal justice system, and that too many circuit judges have been unwilling to require fiscal courts to meet their statutory and constitutional fiscal obligations and Kentucky appellate courts have not rushed in to protect indigents. That experience led me to make the editorial comments in *The Advocate*.

People of integrity who are well educated and in positions of influence - like you, Judge Adams, Judge Daughaday, Justice Stephens and me - have, in my opinion, a high moral duty to not only lead others to be color blind and to follow the law by our example but we must also call them to eliminate racial disparity and practices that unfairly penalize those without means. And yes, we should *never ever* do it with the purpose of hurting anyone or damaging relationships - but we must do it even if it has the unfortunate and unintended effect of having others think less of what we do, say or are.

Edward C. Monahan
Editor, *The Advocate*

And Judge Johnstone's reply:

Dear Mr. Monahan,

Thank you for your response to my letter of March 12, 1990. Perhaps I took your statement that "the justice system is stacked against people of color" too literally. I certainly do not deny that a problem exists and appreciate those, like you, who attempt to raise people's consciousness to what is a national dilemma. Nevertheless, I think that all of us in the criminal justice system are tending to "whip ourselves" when the insatiable desire to incarcerate is driven by forces outside of my ranks or yours. Special interest groups, knee-jerk legislators, and the press must accept and bear part of the responsibility.

Admittedly, my experience in dealing with fiscal court under Chapter 31 is limited to Jefferson County. The bench here enjoys an excellent relationship with the Public Defender's Office and I wonder if bad experiences out in the state are not the result of lack of knowledge on the part of Judges as to their ability to mandate payment by the various fiscal courts. It may be a ripe area for a presentation at the annual judicial colleges of the District and Circuit Courts.

Finally, you certainly have permission to reprint my letter. It may cause those who read it to consider the issues raised. I am confident that such was your purpose in writing the editorial and I applaud your efforts in that regard. Be assured that you have not invoked my "ire" or damaged any relationships. I probably had just finished a divorce case when I read your editorial. That invokes my ire!

Martin E. Johnstone
Judge, Jefferson Circuit Court

LETTERS TO THE EDITOR

If you have views about matters addressed in *The Advocate*, share them with us by writing to:

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The Advocate
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1264 Louisville Road
Perimeter Park West
Frankfort, KY 40601

1990 LEGISLATIVE SESSION IMPACT ON DPA

New DPA Money Obtained

Now that the 1990 legislative session is over, it seems appropriate to report to you briefly on how the Department of Public Advocacy fared. This was a very difficult session in which to get attention for anything other than education reform. Yet, despite some disappointments, the Department of Public Advocacy was successful in obtaining major new funding in the amount of $817,000 in the first year of the biennium and $984,900 in the second year of the biennium.

DPA's Budget Request

The original budget request which the Department submitted to the Governor included seven expansion requests and one item which had no fiscal impact. These were
(1) salary improvement
(2) grants to counties
(3) major litigation
(4) alternative sentencing program
(5) post-conviction offices
(6) additional positions in Protection and Advocacy
(7) improvements in the information management resources plan, and
(8) transferring FFTL positions to merit positions [no fiscal impact].

The Executive Budget

The Executive Budget submitted to the Legislature included only the Alternative Sentencing Program and Information Management Resources Plan. Salary improvement was included in the Executive Budget, but none of those funds were earmarked for any particular department.

Commission Action

The Public Advocacy Commission decided to concentrate its efforts on obtaining reinstatement of 4 of the items in the original budget request:
(1) salary improvement,
(2) grants to counties,
(3) capital litigation, and
(4) moving FFTL positions to merit positions.

Our efforts were partially successful in the first two of these items. The two items included in the Executive Budget, alternative sentencing and information management system plan, were also approved.

Money for Local Programs

In the Grants to Counties area, the Department received an additional $350,000 in the first year of the biennium and $500,000 in the second year. In order to distribute these funds as equitably as possible, the Department has decided to increase each county's allotment by 12% in the first year and 17% in the second year, which is the increase which the Legislature approved.

Salary Improvement

The Legislature approved funding to raise the beginning salary for attorneys to the mid-point of the salary range in each category.

Capital Trial Litigation

The one critical area where we were not successful was capital litigation. Currently, the Public Advocate is evaluating the total budget to see if there is any innovative way in which some additional money can be channeled to this area. However, there certainly are no guarantees that this problem area can be addressed in any meaningful way during the upcoming biennium.

Many Helped

A number of people helped in our efforts before this Legislative Session, and it is not possible to thank all of them, or for that matter, to necessarily know all who are deserving of thanks. However, in addition to my efforts and those of the Public Advocate, **Paul Isaacs**, a number of persons supported our efforts by attending hearings before Senate and House Committees. Among those lending their support by attending were **Beverly Storm**, President of the Northern Kentucky Bar Association, representatives from the Fayette County and Jefferson County Public Defender Offices, and Commission members **Bob Carran** [Bob is also Director of Northern Kentucky Public Defender, Inc.,] **Judge Lambert Hehl**, and **Susan Stokley Clary**.

Senator Moloney

Senator Michael Moloney also deserves special recognition for his guidance and efforts during the 1990 Legislative Session. It is my firm belief that we would not have received any increases in funding for salary improvement and grants to counties without his efforts. The Department is indebted to him for his commitment to equal justice for all.

William R. Jones, Chairman
Public Advocacy Commission
Chase College of Law
Northern Kentucky University
Highland Heights, KY 41076
(606) 572-5340

DPA COMMISSION REAPPOINTMENTS

SUSAN KUZMA was reappointed by Dean Barbara Lewis to a 4 year term on April 26, 1990. Her new term begins July 15, 1990.

MARTHA ROSENBERG was reappointed on April 9, 1990 by Chief Justice Robert F. Stephens to a 4 year term beginning July 15, 1990.

DPA COMMISSION MEETS

The next DPA Commission meeting is on August 9, 1990 in the DPA Conference Room, 1264 Louisville Road, Frankfort, Kentucky.

1990 STARTING SALARIES FOR PUBLIC DEFENDERS
7 SURROUNDING STATES AND KENTUCKY

1. West Virginia	$25,000-28,000
2. Ohio	$26,936
3. Missouri	$23,220
4. Virginia	$27,000
5. Illinois	$25,536
6. Tennessee	$25,000
7. Indiana	$23,478
Average for 7 Surrounding States	$25,167
Kentucky	**$21,600**

(as of July 1, 1990)

ILLINOIS P.D. OFFICE GETS LAWYER ON LOAN

LAWYER-SHARING

Just as "time-sharing" was the popular trend for the '80s, an Illinois public defender office is hoping that "lawyer-sharing" will be a hot trend for the 90's and beyond. The Cook County Public Defender Office has teamed up with the Chicago law firm of Latham & Watkins to start a pilot "lawyer on loan" program, in hopes that law firm attorneys will help reduce escalating case loads in the public defender's office and help to improve the criminal justice system. Through the program, lawyers from area law firms will be assigned cases from the public defender's office on a *pro bono* basis for a specified period of time.

Latham & Watkins associate Doug Freedman, who came up with the idea for the pilot and is the first participant in the project, was assigned a 3-month stint with the public defender's office. The Cook County office is taking part in a growing trend. Lawyer loan programs have also been undertaken in California where attorneys there have worked in the Orange County state's attorneys office and for an enforcement agency in San Diego.

Cook County Public Defender Randolph Stone, who has sent recruiting letters to 30 of the largest Chicago law firms, said he sees the pilot program as a first step toward major changes in the public defender system. Stone, who is also an NLADA Defender Committee member, said the private bar will have to be involved in improving the criminal justice system, not only on the defense side but in the system as a whole.

Over the years, however, the private bar's participation in criminal defense work in Illinois has diminished. Currently, public defenders handle 90% of all criminal defense work in the city and 70-75% in the suburbs. In Cook County, about 470 public defenders handle 200,000 cases a year. Stone said the reason for this decline is that criminal law is not an especially popular form of practice because it is not income producing since most defendants are indigent. By getting large firms involved in the system, Stone is hoping that private lawyers will become interested in helping to make substantive changes in the system.

Attorneys seeking trial experience, Stone said, would benefit from working with and gaining tips from experienced trial attorneys as well as learning by doing. Stone hopes eventually this program will bring about a mixed system of representation of the indigent in Cook County. Mixed representation systems already exist in many jurisdictions. In the District of Columbia, where the public defender's office is not required to represent such a large percentage of indigents, public defenders take about 60% of the cases and private counsel are appointed the remainder. Stone said he prefers a mixed system of representation to a contract system where cases are contracted out to a firm or group for a specific amount of money. Stone said a contract system leads to abuses because the contracting agency has a specific amount of money to work with and there is a chance that the group will not provide quality representation. Stone said he would like to get more firms involved in the "lawyer on loan" program and for the participating lawyers to make longer commitments of a minimum of 6 months to a year.

NLADA 1625 K Street, NW 8th Floor Washington, D.C. 20006
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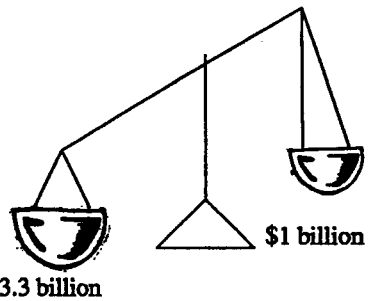
WE CARE MORE ABOUT DOGS THAN PEOPLE ACCUSED OF CRIMES

In 1986, according to the September, 1988 U.S. Department of Justice Bureau of Justice Statistics Report, *Criminal Defense for the Poor, 1986* we spent almost $1 billion dollars nationally to represent indigent citizens accused of crimes. That same year we spent $3.3 billion dollars nationally on dog food. Our values seem clear.



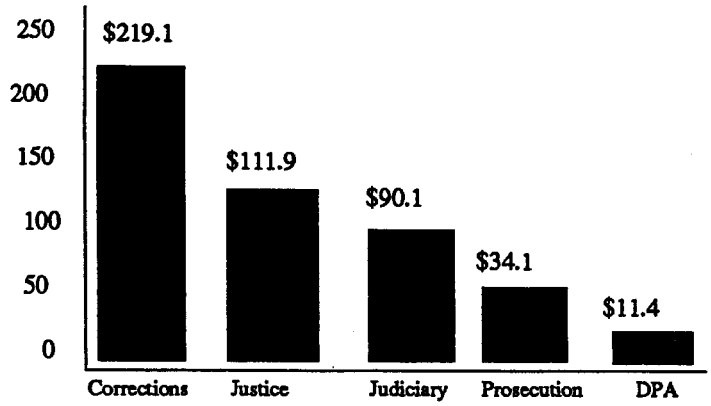
WHAT'S THE WORTH OF THINGS?

Third baseman Paul Molitor agreed February, 1990 to a $9.1 million 3 year contract with the Milwaukee Brewers. He is but the 7th highest paid major league baseball figure.

The total yearly salary for the Cincinnati Reds is $14,231,500.

DPA's annual budget for 70,000 cases is but $11.4 million. A telling revelation of our values.

1990-91 MONEY FOR KENTUCKY AGENCIES, IN MILLIONS OF DOLLARS



UNIVERSITY OF LOUISVILLE LAW SCHOOL

Working to Establish a Commitment to Public Interest Law

The following is a written interview with Dean Barbara Lewis.

Surveys consistently show that as many as 40% of incoming law school surveys express an interest in public interest legal careers. Yet only 3% of law school graduates choose public interest law. Why is this when so many of the poor have unmet civil and criminal cases?

Students have more local opportunities to find part-time/summer positions in private practice and corporate environments while they are in law school. Therefore, they get exposed to these options for post-law school employment. Also, larger firms are visible with their attractive firm resumes and active recruitment programs on campus and at job fairs. Salary differential must also be an important factor for many.

What does it cost to attend 3 years of law school in Kentucky?

	Annual	3 Yr Total
1) Resident	$2,500	$7,500
2) Non-resident	$7,400	$22,200
3) Single, off campus living expenses	$7,546	$22,638
4) Married, off campus living expenses	$10,250	$30,750

Over the last several years, how many graduates of your law school have gone into public service law? Into public defender law?

1989 - 3 public defender law, 1 legal service
1988 - 0 public defender law, 1 legal service
1987 - 2 public defender law, 1 legal service
1986 - 2 public defender law, 1 legal service
1985 - 2 public defender law, 0 legal service

Why do you think so few Kentucky law graduates are willing to go into public service law, especially Kentucky public defender work?

Many U of L law graduates would be willing to go into public service law, including public defender work, if more positions were located in Louisville or other similar metropolitan areas.

What are Kentucky law schools doing to educate lawyers about the entire justice system, especially the critical importance of the criminal justice system?

Courses are offered in criminal law and criminal procedure. In addition, we have an internship program under the auspices of which students have an opportunity to work in the office of the Public Defender, Commonwealth Attorney and County Attorney. Students are encouraged to participate in this program. Further, the faculty in discussions with students do emphasize the importance of the justice system, both criminal and civil.

What is your law school doing to imbue the importance of public service law into the persons you are training to be lawyers?

There is no formal program to imbue the importance of public service; however, as an integral part of the courses which are taught, the faculty do emphasize the significance and importance of public service. In addition, we offer a seminar in "Legal Problems of the Poor," in which great emphasis is placed on public service. The School of Law always encourages students to participate in public service. There is also an internship program under which students may work at Legal Aid.

Some law schools require law students to provide free legal services to the poor as a condition of graduation. Tulane requires 20 *pro bono* hours, the University of Pennsylvania requires 35 hours during each of the second and third years, Florida State University requires 20 hours. Is this kind of commitment to serving the poor something that your law school requires or will be requiring?

The School of law does not at present require *pro bono* hours; one faculty member is preparing a proposal regarding *pro bono* requirement, which will be submitted to the faculty for its consideration during the 1990-91 academic year.

What is your law school doing to encourage criminal defense work and public service through its offered courses, attitudes of professors, providing role model professors who have a public service/criminal justice background, through loan forgiveness, through job placement?

Through the Placement Office, invitations to interview on campus have been mailed to legal services/public defender organizations throughout Kentucky. Invitations to participate in our annual Career Night program are mailed to Department of Public Advocacy, local legal services, public defender offices and A.P.A.L.-R.E.D. offices. Over the years we have sponsored speakers and panels on public interest topics. Legal service directories and other resources are organized in the Placement Library.

Some Kentucky law graduates would choose public interest law, including public defender jobs, if their significant law school educational loans were forgiven in whole or part or had repayment deferred. In the past 4 years over 20 postgraduate loan repayment assistance programs have been established at law schools. Does your law school have this kind of program for those entering public interest law? If not, what are the possibilities of one being started?

The U of L School of Law does not have an educational loan forgiveness program. We have investigated the possibility and found that the educational loan forgiveness programs that have been established are primarily from those institutions which have funds available to loan to students. As a state institution, we do not loan funds to students. Our students acquire their fund loans from the federally

The Kentucky Department of Public Advocacy enjoys a nationwide reputation for excellence among public defender programs. Working for the Department of Public Advocacy provides the opportunity for a young lawyer to obtain litigation experience and skills. It also provides a chance to make a meaningful and lasting contribution to justice, which is, after all, the aim of every lawyer.

Barbara B. Lewis, Dean, University of Louisville Law School

funded student loan programs and the program funded by the Law School Admissions Council. We therefore are not in a position to forgive any loans.

What should the Kentucky Bar Association and the Department of Public Advocacy be doing to increase attorneys going into public interest law?

If the Kentucky Bar Association and the Department of Public Advocacy were to establish funding and a program whereby assistance could be provided in the repayment of educational loans, this would remove a financial barrier to assuming a position in public interest law. Since one of the primary problems is low compensation offered in public interest law, efforts to increase that compensation, would encourage attorneys going into public interest law.

When a person graduates from law school and passes the bar exam, is the attorney ready to represent criminal defendants?

Yes and no. Certainly the attorney has the requisite knowledge and information to be a member of the Bar and therefore is qualified to practice law; however, there is no substitute for experience. Attorneys need assistance and guidance in obtaining experience in representing criminal defendants as well as other clients.

Do you have a prosecution/criminal defense clinic? Why? If not, why not and do you expect establishing one?

We do have a criminal law clinic, though it is not an in house clinic. Students are offered the opportunity to intern with the office of the Public Advocate, the Commonwealth Attorney and the County Attorney. These internships do provide an opportunity for students to receive some experience in trying criminal cases.

Does your law school have a National Association of Public Interest Law Chapter?

No.

Any other thoughts?

The increasing attention to *pro bono* services and to public interest law on the part d of the Bar Association is a very healthy move. This in turn influences directly and indirectly law students. All members of the profession, including the law schools, must work together to seek to establish a commitment to public interest law on the part of students as well as attorneys.

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UNIVERSITY OF KENTUCKY LAW SCHOOL

Low Salaries Keep Law Graduates from Public Defender Careers

The following is an interview with Dean Rutheford B. Campbell, Jr.

Surveys consistently show that as many as 40% of incoming law school students express an interest in public interest legal careers. Yet only 3 % of law school graduates choose public interest law. Why is this when so many of the poor have unmet civil and criminal legal needs?

Primarily salary differentials—not only starting salaries but projected salaries after 5 years.

What does it cost to attend 3 years of law school in Kentucky?

Tuition - (KY residents) - about $7,000
Living Costs - about $20,000

Over the last several years, how many graduates of your law school have gone into public service law? Into public defender law?

Public Service	1%
Public Defender	1%

Why do you think so few Kentucky law graduates are willing to go into public service law, especially Kentucky public defender work?

Inadequate salaries. Since 1978 average KY law firm salary has increased from $13,500 to $28,600; average public interest/state government salary has increased from $12,500-$13,000 to only $17,500.

What are Kentucky law schools doing to educate lawyers about the entire justice system, especially the critical importance of the criminal justice system?

1) Courses - Constitututional Law, Criminal Procedure, Criminal Trial Process, Litigation Skills. 2)Intern Programs with Ed Henry & Ray Larson. 3) Occasional speakers.

What is your law school doing to imbue the importance of public service law into the persons you are training to be lawyers?

We try to emphasize the public service obligation in Professional Responsibility and other courses. Many of the faculty are involved in *pro bono* work.

Some law schools require law students to provide free legal services to the poor as a condition of graduation. Tulane requires 20 *pro bono* hours, the University of Pennsylvania requires 35 hours during each of the second and third years, Florida State University requires 20 hours. Is this kind of commitment to serving the poor something that your law school requires or will be requiring?

We encourage volunteerism, but we have no such requirement.

What is your law school doing to encourage criminal defense work and public service through its offered courses, attitudes of professors, providing role

I admire the public advocates as much as any group of lawyers in our profession. Their dedication to service and their commitment to justice are unsurpassed by any other group in the profession.

Bob Lawson, University of Kentucky Law Professor
UK Law School Dean, 1982-1988

model professors who have a public service/criminal justice background, through loan forgiveness, through job placement?

Allison Connelly of the Department of Public Advocacy is a visiting professor this semester. Bill Fortune has a public defender background. John Batt has extensive experience in criminal defense matters.

Some Kentucky law graduates would choose public interest law, including public defender jobs, if their significant law school educational loans were forgiven in whole or part or had repayment deferred. In the past 4 years over 20 post-graduate loan repayment assistance programs have been established at law schools. Does your law school have this kind of program for those entering public interest law? If not, what are the possibilities of one being started?

We do not have such a program but would be interested in starting a loan forgiveness program if funds became available.

What should the Kentucky Bar Association and the Department of Public Advocacy be doing to increase attorneys going into public interest law?

The KBA could fund a loan forgiven program at the law schools with IOLTA money. Firms could start "sabbatical" programs for would-be litigators with the DPA and prosecutors office.

When a person graduates from law school and passes the bar exam, is the attorney ready to represent criminal defendants?

The attorney is ready to second chair in a public defender office.

Do you have a prosecution/criminal defense clinic? Why? If not, why not and do you expect establishing one?

Yes - taught by Ray Larson - very successful program.

Does your law school have a National Association of Public Interest Law Chapter?

No - National Lawyers Guild Chapter.

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SALMON P. CHASE LAW SCHOOL

Too Much Emphasis is on Attaining Private Wealth, Not Working for the Public Good

The following is an interview with Dean Lowell F. Schechter.

Surveys consistently show that as many as 40% of incoming law school students express an interest in public interest legal careers. Yet only 3% of law school graduates choose public interest law. Why is this when so many of the poor have unmet civil and criminal legal needs?

If these surveys are based on what incoming students say on their applications to law school, I would tend to discount their validity. Having served on our Admissions Committee for the past 6 or 7 years, it is my belief that while some applicants do have a genuine interest in public interest law, other applicants express an interest because they believe that is what the admissions committee wants to hear. I think it is true that law schools do tend to emphasize private law and practice to our students. In addition, many of our students are not well off and have to take student loans to complete school. Faced with post-law school financial pressures, students may be less willing to consider relatively low paying jobs in the public sector.

What does it cost to attend 3 years of law school in Kentucky?

For residents, tuition is now running at approximately $2500 per year. The University Financial Aid Office estimates that total expenses, including tutition, will run a resident student close to $15,000 per year.

Over the last several years, how many graduates of your law school have gone into public service law? Into public defender law?

Our Placement Director puts the figure at less than 2% overall. Perhaps half of those going into public service law have taken public defender positions.

Why do you think so few Kentucky law graduates are willing to go into public service law, especially Kentucky public defender work?

Students perceive public interest law jobs as having low pay and little prestige. Students I have talked to have also indicated that they have reservations about working with the type of clients public interest agencies tend to serve. Interestingly enough public defender jobs may have somewhat more prestige than legal aid positions. Student perceptions may simply reflect the values that have been prevalent in our society for the past decade: the emphasis on achieving private wealth rather than working for the public good.

What are Kentucky law schools doing to educate lawyers about the entire justice system, especially the critical importance of the criminal justice system?

At Chase we require students to complete courses in criminal law and criminal procedure. We also have an elective criminal justice seminar.

What is your law school doing to imbue the importance of public service law into persons you are training to be lawyers?

Not as much as we should be doing, but: 1) For the past 2 years we have used IOLTA grants to fund student fellowships with public service agencies in Northern Kentucky. 2) We have a very active VITA program. (See answer to question below).

Some law schools require law students to provide free legal services to the poor as a condition of graduation. Tulane requires 20 *pro bono* hours, the University of Pennsylvania requires 35 hours during each of the second and third years, Florida State University requires 20 hours. Is this kind of commitment to serving the poor something that your law school requires or will be requiring?

We have no such requirement at present. It is worth noting that a VITA program, run by Professor Nacev, this year had 28 students providing volunteer tax assistance to low income tax payers in Northern Kentucky.

Given our small size, 28 students is a not inconsiderable percentage of our upper division student body. The fact that so many students voluntarily put in the number of hours of service required by some of the schools listed above, indicates to me that there is a sizable segment of our student body willing to do some public service work.

What is your law school doing to encourage criminal defense work and public service through its offerred course, attitudes of professors, providing role model professors who have a public service/criminal justice background, through loan forgiveness, through job placement?

1. In terms of courses,we did offer a "poverty law" course back in the early 80s, but it died for lack of student interest. We do have a new federal judicial seminar program, where some students who are working with a federal magistrate in Cincinnati may concentrate on habeas corpus and prisoner rights issues.

2. In terms of professors, we do have one professor with a legal service background who currently serves on a legal aid board. Due to financial constraints, we have done very little hiring in recent years, not even replacing some professors who have left. So, there is little realistic prospect of hiring new 'role-model' professors with legal service backgrounds.

3. In terms of job placement, our Placement Director does discuss public service jobs with our students in one of her placement seminars.This is one area where it would be feasible to provide an immediate improvement. We could move to bring in some dynamic public service lawyers to talk about their jobs in one of the placement seminars.

Some of Kentucky law graduates would choose public interest law, lucluding public defender jobs, if their significant law school educational loans were forgiven in whole or in part or had repayment deferred. In the past 4 years over 20 post-graduate loan repayment assistance programs have been established at law schools. Does your law school have this kind of program for those entering public interest law? If not, what are the possibilities of one being started.

We do not have such a program. Given our limited financial resources, I do not think it likely that such a program will be started in the forseeable future. Quite frankly, I think there are higher priorities for whatever additional scholarship funding we receive, such as providing more scholarships for minority or economically disadvantaged students on the front end.

What should the Kentucky Bar Association and the Department of Public Advocacy be doing to increase attorneys going into public interest law?

1. Make presentations about public service job opportunities at the law schools.

2. Emphasize that public interest lawyers deal with interesting and significant issues; that they are not involved with simply boring, routine, repetitive work.

3. Provide internships at public service agencies and emphasize that these internships will give students valuable experience in developing their skills, no matter what area of law they eventually wind up in. (The Director of our VITA program has told me that one reason so many of our students sign up for VITA is that they believe they will get valuable hands-on tax experience, while at the same time helping the poor.)

4. Provide additonal funding through IOLTA and other mechanisms for fellowships for interns with public services agencies. The IOLTA Fellowships we currently have enable some of our students who need to work for financial reasons to choose to work for public service agencies rather than for private firms.

5. The KBA and judges must act to show that public service work is important work. If private firms in their hiring process would give preference to students who had gone out and worked a couple of years for legal aid or the Department of Public Advocacy, I think that would help to get the message across.

When a person graduates from law school and passes the bar exam, is the attorney ready to represent criminal defendants?

The opinion of the public-service oriented faculty member I asked for advice is that our students upon graduating and passing the bar are probably capable of representing individuals charged with misdemeanors, but should not be out on their own defending individuals facing felony charges.

Do you have a prosecution/criminal defense clinic? Why? If not, why not and do you expect to establish one?

No. We have disbanded our extern clinical program, because the ABA has imposed very stringent requirements on such programs., We did not feel that we could meet these requirements especiually the requirements in terms of full-time faculty supervision, given our current staffing levels. Barring either a totally unexpected substantial relaxation of ABA requirements, I do not foresee any revival of a criminal clinical program in the near future.

Does your law school have a National Association of Public Interest Law Chapter

No. How do we go about establishing one? *[Editor's Note: See accompanying NAPIL article.]*

Any other thoughts?

I think you have raised an important problem which needs to be addressed by the bar as a whole. Any real solution is going to need the cooperation of the private bar and all 3 state law schools.

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I believe the Department of Public Advocacy to be one of the outstanding agencies in the Commonwealth. The caliber of representation is excellent, the attorneys committed and competent and the philosphy exemplary. I know of no greater field of law or agency which a beginning lawyer could enter that would give greater experience, better instruction and higher ethical associations than the Department of Public Advocacy.

L. Stanley Chauvin, Jr. President, American Bar Association, 1989-90

WHITTLING AWAY AT TUITION DEBTS WHILE HELPING THE POOR

Michael Caudell-Feagan

Only 3% Choose Public Interest

Surveys consistently show that as much as 40% of incoming law school classes express an interest in public interest legal careers. Unfortunately, few of these young would-be public servants follow through with their first-year plans. In 1987, only 3% of law school graduates chose public interest career paths, while 63.5% chose private law firm practice. These statistics are disheartening when viewed against the backdrop of a legal system which consistently neglects more than 80% of the legal needs of the poor.

Why So Few?

Something drastic is happening to law students' career aspirations over the course of their legal education. Fingers point to a tight job market, the traditional law school curriculum, aggressive law firm on-campus recruiting, and the perceived selfishness of a generation wallowing in materialism. Although each of these factors may affect students' career choices, another factor presents an insurmountable barrier to public interest work: law student debt burden.

It is no coincidence that the decline in public interest legal placement has accompanied exploding law school tuition rates, an increase in law student reliance on loans, and a rapidly expanding disparity between starting salaries in the public and private legal sectors. Indebted for an average of $35,000, most law school graduates have mortgaged their future to finance their education.

Even those graduates who retain their commitment to public service through graduation, and work for a public interest employer, often are unable to remain at their jobs and still pay back their law school debts.

A recent survey of legal services and public defenders offices, jointly conducted by the National Legal Aid and Defenders Association and The National Association for Public Interest Law (NAPIL) found that 58% of organizations that had experienced problems with retaining their attorneys cited education loans as an important cause.

Poor Clients Suffer

In the 1990s, the legal profession will continue to be inaccessible to all but the wealthy and those who plan to become wealthy representing those who can pay to hire an attorney.

The real victims are the vast numbers of poor people who are unable to receive assistance for essential legal needs.

Aid Programs Can Help

In response to this growing crisis, law schools, bar associations, legal services attorneys, public defenders, and legislators have begun to look for ways to eliminate the debt burden barrier to lower-paying public interest practice. These concerned members of the legal community have embraced new post-graduate financial aid programs, which defer or forgive educational debts for graduates pursuing public interest careers.

In the past 4 years, close to 30 post-graduate loan repayment assistance programs (LRAPs) have been established at law schools, and the first state-financed loan repayment assistance legislation has been passed in Maryland. Law students on an additional 40 campuses are in various stages of advocating for LRAPs so that they and their colleagues can fulfill their public interest career aspirations, and advocates in at least 4 states are seeking to establish state-wide programs.

At its 1988 annual meeting, the American Bar Association added its voice to the growing chorus of loan assistance supporters. The ABA passed a resolution endorsing LRAPs and calling on the legal community to establish such programs in order to open doors to public interest careers and improve legal services to under-represented constituencies.

A loan repayment assistance program reverses more traditional financial aid plans by distributing benefits after graduation, based on employment and salary criteria. Although unorthodox, this reversal makes sense in the legal education context. The past decade has seen law school tuition rates jump more than 150%, while loans supplanted grant programs as the basic component of federal higher education funding. As a result, law students, relying heavily on loans, rack up tens of thousands of dollars in debt by the time they graduate.

How It Works

To a large extent, this system of financing legal education is made possible by the high post-graduate salaries which most law school graduates enjoy. However, it precludes debt-burdened graduates from pursuing lower paying positions in the public interest field. An LRAP solves this problem by efficiently allocating limited financial aid resources to those who, because they choose public services careers, are most heavily burdened by debt obligations after graduation.

Most of the LRAPs designate qualifying employment as working for the government, legal services, or a non-profit organization as defined in the IRS Code, Sections 501(c)(3) or (c)(4). The programs defer a portion of educational loans while the graduate remains in qualifying employment. The majority of programs phase in loan forgiveness, by which student debt is wholly forgiven following a certain number of years in public interest employment.

Where It is Working

Currently, graduates of the following law schools benefit from some variation of this program: American University, Boston College, Capitol University, Columbia University, Cornell University, Duke University, Franklin Pierce University, Georgetown University, Hamline Univer-

sity, Harvard University, Loyola University (Los Angeles), New York University, Northeastern University, Northwestern University, Ohio Northern University, Santa Clara University, Stanford University, Suffolk University, Tulane University, University of Baltimore, University of California at Berkeley, University of Chicago, University of Maryland, University of Michigan, University of Notre Dame, University of Pennsylvania, University of Southern California, University of Virginia, Yale University.

A Variety of Models

Not surprisingly, loan repayment assistance programs caught on first at the well-endowed, private law schools. Other schools facing greater budgetary constraints can look to state legislatures, the private bar, community organizations, and foundations for loan repayment assistance initiatives. The legal community can draw on several interesting models as alternatives to law school-funded loan assistance.

State legislated loan repayment assistance programs have proven to be comprehensive, feasible alternatives to law school-based programs. In 1988, Maryland Legal Services Corporation, under the leadership of Director Robert Rhudy, issued its *Action Plan for Legal Services to Maryland's Poor,* which counted among its proposals, a state-legislated loan repayment assistance program. Triggered by the legal services community, the Maryland loan assistance legislative effort garnered crucial support from educators, students, the private bar, legislators, and the governor, who allocated $100,000 for the program in the 1989 fiscal budget. In its first year, the program helped approximately 40 graduates of Maryland graduate schools pursue public interest careers in Maryland. With similar cooperative efforts, other states should be able to incorporate loan assistance into state post-secondary funding programs and at relatively low cost, improve legal services to impoverished communities. A similar bill has recently been passed by a Florida House of Representatives committee, although it only covers state attorneys and public defenders.

Local and state bars have begun to move beyond just advocating for state legislated LRAPs; many bars are now developing innovative methods for financing their own loan forgiveness programs, through bar associations, by "stand-alone" non-profit corporations, and through agencies of the state legislatures. The Arizona Association for Public Interest Law (AAPIL) is a recently incorporated non-profit with a board of directors made up of leaders in the legal services, state bar, and law school communities. AAPIL is in the process of raising funds for loan forgiveness, and has already arranged that the proceeds from the recreational activities at this year's state bar convention will be used for AAPIL's LRAP. The Columbus Bar Association in Ohio has granted $15,000 in scholarships and stipends to graduates of Columbus' two law schools who pursue careers in public interest law. And LRAP proponents in Texas hope that they will be able to establish the nation's first LRAP financed solely by a state bar instead of the government.

Community-based loan repayment assistance programs might be modeled after an innovative project launched by a group of past presidents of the greater New Haven Board of Realtors. Acknowledging that they reap the benefits of strong community leadership and public service, these business leaders endowed a local loan assistance program for legal services attorneys, social workers, public interest advocates, public health workers, and other providing community services in the area.

First year response to the program has been so overwhelming that the board of directors has decided to expand the program, granting 10 loan subsidies instead of the 5 originally planned. "There's a greater need than we anticipated," explains John Donnell, program chair. "These people are very committed and providing tremendous services, so we don't want to turn any of them away."

Bar leaders can replicate this successful program with law firm or business community funding. On a small scale, law firms might consider contributing to a fledgling law school-administered LRAP. An LRAP could be named in honor of a donor law firm, just as easily as a wing of a law school library.

Student groups and school administrators have tapped several other sources for loan assistance funding. Stanford Law School, for instance, received seed money for its program from a Cummins Engine Foundation grant. The University of California at Berkeley solicited and received LRAP funds for the U.S. Department of Education through its Fund for the Improvement of Post-secondary Education. Finally, the Tennessee Bar Foundation IOLTA (Interest on Lawyer's Trust Accounts) Program has established loan forgiveness stipends which will be offered by public interest organizations to attorneys they seek to hire. Members of the private bar can play an important role in soliciting such grants. They can help the legal education com-

KENTUCKY BAR ASSOCIATION PUBLIC INTEREST LAW SECTION

The Public Interest Law Section (PILS), of which I am a member and Secretary, is a section of the Kentucky Bar Association whose membership includes both criminal and civil lawyers. The Section holds quarterly luncheon meetings featuring outstanding speakers. The Section has made an effort to ensure that over a period of time there will be a wide array of speakers, both representing and appealing to the divergent membership of the Section. The latest speaker was Jefferson Circuit Judge Rebecca Westerfield, co-chair of the Gender Fairness Task Force. In recounting the plans, present status, and objectives of the Task Force (established by the Chief Justice in cooperation with the Kentucky Bar Association), Judge Westerfield also enumerated two recent personal examples of sexual discrimination in the legal arena.

Other speakers have included former Governor and 6th Circuit Court of Appeals Judge Bert Combs; Supreme Court Justices Donald Wintersheimer, Charles Leibson, and Dan Jack Combs; Court of Appeals Judges John Miller and Anthony Wilhoit; U.S. District Court Judge William O. Bertelsman; U.S. Bankruptcy Judge Joe Lee, Attorney General Fred Cowan; attorney Joe Childers (founder of a non-profit public interest law firm); and — of particular interest to the criminal bar — now former, then, Parole Board Chairman Ron Simmons.

Some of the activities that PILS has been involved in have included promoting the adoption and implementation of IOLTA in Kentucky, urging the Kentucky Board of Governors to adopt a policy against Bar Association groups meeting in any facility that discriminates, sponsoring continuing legal education seminars on various topics, monitoring legislation affecting indigents and others traditionally underrepresented, monitoring and promoting Supreme Court rule changes, and advocating the appointment of a state-wide Gender Bias Task Force.

The activities of PILS are dependent on the democratic input and participation of its membership. To become a member of PILS, all you need to do is check a box this fall on the annual form used to renew membership in the Kentucky Bar Association and pay an extra fee of $5 dollars.

OLEH TUSTANIWSKY

munity identify likely funding sources and contribute valuable letters of support for grant proposals.

Conclusion

Contrary to popular belief, law student surveys and placement office anecdotes indicate that there exists no shortage of young attorneys anxious to work in legal services and public interest law. Unfortunately, these students face many institutionalized barriers to the pursuit of their aspirations. One of the most prohibitive of these obstacles is educational debt, and the legal education community has lighted upon an effective solution: post-graduate loan repayment assistance programs. Law schools with sufficient resources have already established loan assistance programs for their graduates. The challenge remains, however, for educators, community groups, bar associations, and government leaders to expand loan repayment assistance and open the door to public interest legal careers for graduates of all schools.

These programs are easily administered, relatively economical, and can make a significant difference in our ability to provide unmet legal needs. For additional information regarding existing programs and advocacy efforts, contact NAPIL, 1666 Connecticut Avenue NW, Suite 424, Washington, DC 20009; (202) 462-0120.

MICHAEL CAUDELL-FEAGAN

Michael Caudell-Feagan is the Executive Director of the National Association for Public Interest Law (NAPIL). This article is reprinted from the Summer 1989 PBI Exchange. The cartoon is reprinted with permission from the April 1988 issue of The NAPIL Connection. The Loan Repayment Assistance Program Comparison Charts are reprinted from NAPIL's 1989 Loan Repayment Assistance Report.

10 REASONS TO BE A PART OF NAPIL

1) Be Part of a Dynamic & Growing Network of Student & Graduate Funded Public Interest Fellowship Groups. NAPIL was founded in 1986 by 15 law student public interest organizations. NAPIL is currently 65 member programs strong. This past year, NAPIL member programs raised over $800,000 to fund 520 summer fellowships and project grants—a 60% increase in revenues over the previous year.

2) Tap Into Existing Resources On Other Campuses. NAPIL serves as a clearinghouse and a resource center on law student public interest activities. By producing publications, such as the 1989-90 Directory of Member Groups, exchanging information on individual programs, and working with NAPIL's Organizer, programs can learn from and replicate the successes on other campuses.

3) Benefit From Fundraising & Tax Expertise. NAPIL provides technical assistance and specialized training to law students promoting public interest initiatives. For example, NAPIL's Campus Organizer has attained specialized training in fundraising campaigns, including personal, mail, and telephone solicitation. This past summer, NAPIL hired a public interest law firm to produce a memorandum for public interest grant programs addressing the tax and reporting requirements they and their grant recipients need to satisfy.

4) Participate In The National Conference & Career Fair. Each year, NAPIL organizes a National Public Interest Law Career Fair and Public Interest Law Student Conference. Over 800 students and graduates attended the 1989 Fair and met with representatives from 130 public interest organizations and government agencies. The 5th Annual Conference, Students Making a Difference, is the only national gathering of law students, law school administrators, and practitioners working on public interest initiatives. Participants exchange invaluable information on their campus and community programs.

5) Receive Financial Benefits. NAPIL solicits contributions from the country's largest law firms as part of a campaign entitled The Public Service Challenge. In its first year, The Challenge raised $120,000 from 26 law firms. Each member program received between $1,600-$4,000 to be used in their grant disbursal process and we hope to double that amount in the coming year.

NAPIL and SMH-Kaplan Bar Review Services have also recently entered into an agreement to provide 2 Public Interest Law Bar Review Scholarships to every member program for their use in 1990.

6) Be Part Of The Solution To Barriers Confronting Students And Graduates Pursuing Public Interest Practice. NAPIL assists law students and others interested in removing the barriers confronting students and graduates interested in pursuing public interest careers. In addition to our work on student and graduate funded fellowships, NAPIL has taken the lead in 2 other areas:

— Loan Assistance/Forgiveness Advocacy: NAPIL has become the clearinghouse for information on loan repayment assistance programs, by producing an action manual (with the assistance of the ABA/Law Student Division), a comprehensive report of existing law school based LRAP programs, and fact sheets on the issue. NAPIL also works with the legal services community and other proponents of LRAPs.

— Public Interest Placement Resources: NAPIL efforts include advocacy for more public interest career counselors, as well as the development of materials and programming for public interest careers. The Fellowships Guide, Directory of Public Interest Legal Internships, and Annotated Bibliography for Public Interest Placement Resources are distributed annually to member programs and provide invaluable information on public interest careers.

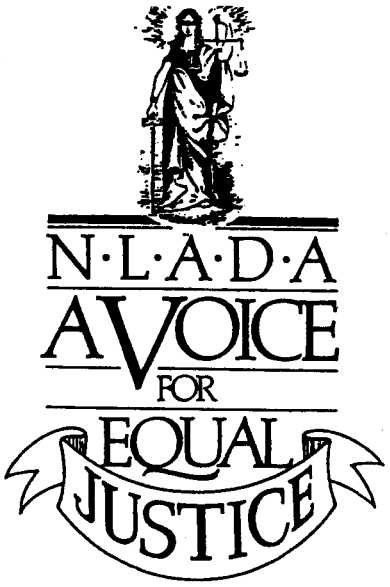
7) Participate In Regional Training Sessions. NAPIL works with member programs through campus visits and regional training to provide individualized and specialized assistance on areas of concern. Last academic year, NAPIL's staff visited approximately 70 law schools. So far this year, regional training sessions have been held in New York and North Carolina. Further sessions are currently being planned in Atlanta, Los Angeles, San Francisco, Boston and Chicago. Visits and trainings are altered to serve the participants' needs, but generally provide assistance in the areas of fundraising, organizing, and public relations, and provide the opportunity for groups to network and exchange information among themselves.

8) Impact Leading Legal Organizations. NAPIL acts as a spokesperson for law students concerned with the lack of access to legal representation in our society. By playing a prominent role with organizations such as the ABA, NLADA, National Association for Law Placement (NALP), and Law School Admissions Council (LSAC), NAPIL has been able to focus their attention and resources on our concerns. As a result NALP established the Task Force on the Public Interest, the ABA produced a loan assistance action manual and passed a resolution endorsing loan forgiveness and income sharing programs, and the NLADA recently conducted a survey of its members to begin to examine the problem of debt management in recruiting and retaining lawyers for legal services work. All of the projects were undertaken with the guidance and assistance of NAPIL.

9) Take An Active Role In Establishing NAPIL's Agenda. NAPIL exists for the purpose of serving and strengthening our member programs. All member programs that have established a public interest grant program maintain a seat on NAPIL's Board of Directors. Through this governing body, NAPIL's member programs establish the agenda and priorities of the national office.

10) Help To Ensure That These Benefits Continue. Join with NAPIL in lending support to the national law student public interest movement and giving law students a voice in ensuring that our legal system will serve those in need.

Eligibility Nature of employment	American Univ.	Boston College	Columbia Univ.	Cornell Univ.	Franklin Pierce Law Center]	Geor-getown Univ.	Hamline Univ.	Harvard Univ.	Mary-land State-wide Prog.	New York Univ.	North eastern Univ.	North western Univ.	Stanford Univ.	Suffolk Univ.	Tulane University	Univ. of Chicago	Univ. of Michigan
Public Interest Private Firm Gov. Service Judicial Clerk	Yes No Yes No	Yes Gen. Not Yes No	Yes No Yes Yes	Yes Gen. Not Yes No	Yes No No No	Yes Gen. Not No No	Yes Yes Yes No	Yes Yes Yes Gen. Not	Yes No Yes No	Yes Yes Yes No	Yes Yes Yes Gen. Not	Yes No Yes No	Yes Yes Yes Gen. Not	Yes No No No	Yes Gen. Not Yes NO	Yes Gen. Not Yes Gen. Not	Yes Yes Yes No
Max. Entry Income	$27K	No Cap	$35K	$31,500	No Cap	NoCap	Av.Grad. Start. salary	$36,500	$40K	$37K	$30K	$30K	$34,500	$21K	$22,907	$30K	$32K
Loans Covered Undergrad.	Yes	Yes	Yes	No	Yes,	No	No	No	Yes	No	Yes	Yes	Yes	No	Yes	No	Yes
Law Schools	Yes	Yes	Yes	Yes	Yes	Yes	Bremer PS Loan	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Grad's Share of Loan Payment	$880 $2,080	$450 $1,800	First 3 Year in Prog. $540 $720	$1,020 $2,430	Formula Varies	-0- -0-	-0- -0-	-0- $600	$300 $900	See footn.	-0- $1,500	$1800 $2400	-0- $600	-0- -0-	$1,080 N/A	$580 $1,780	$600 $1460
Family Situation Leaves/ Unemployment Loan Forgiveness	$5K deduc-tion per dependent Up to 2 years for child care, relocation, further educ.	Spouse's income over $20K incl. in AGI; $5,000 deduct. per child; $1,200 living allow. Undeter-mined	Based on graduate's AGI Up to 2 years for child care, relocation, further educ., etc.	$5,000 deduct. per child from AGI case-by-case basis	$5,000 deduct. per child]None 2nd Year Depends on debt/in-come ratio	Spouse's income over $15,000 included in AGI; $5,00 deduct. per child For dis-ability or un-employ.t	Upon ap-plication Up to 1 year of child care, reloca-tion, further educ., etc.	$4,00 deduct. per child ;not con-sidered in computing eligib. May leave for any reason; no time limit	Based on Federal Gov. #'s N/A	$4K deduct. per child from AGI 6 month disability leave	$4K deduct. per child 6 month parental leave	No deduct. for children Up to one year for child care, relocation, further educ., etc.	$5K deduct. per child from AGI any reason Must return within 10 years	Not to exceed $3,500 monthly; 300 mthly. child deduct. None	$3K child deduct. Non-law job, child care, educ. up to 2 years	$20K or above Spouse's income; $3K child deduct. Any reason; must re-enter pro-gram within 3 years	$10,00 added to cap if spouse $4,000 child deduct. Undeter-mined
Begins Per Year 100% By	4th Year 25% Each Year	3rd Year 25% year 6th Year	4th Year 10% 4th Yr.; 15% thereafter 10th Year	End of 1st Year After 1st Yr. Only Grants		2nd Year 10% Each Year	1st year Pro-rata monthly basis over 4 years	1st Year Grants only no loans	1st Year Grants only; no loans	1st Year grants only; no loans	5th year 15% 10th year	End of 4th year 15% 10th year	End of 3rd year 25% 4th year; 15% thereafter 10th year	1st year Grants; no loans	1st year Grants; no loans	End of 3rd year 25%	2nd Year 33% each Year 4th year
Classes Eligible	1988 and After	1987 and After	1983 and After	1984 and after	1985 and After	1987 and After	All Classes	All Classes	All Classes	1984-990	1987 and after	1987 and after	1985 and after	1989 and after	1988 and after	1986 and after	1986 and after



When indigent people accused of crimes need help, they often turn to defenders and assigned counsel. When defenders and assigned counsel need help, many have found the NLADA to be the place to turn.

NLADA is a private, not-for-profit national membership organization dedicated to developing and supporting high quality legal help for poor people in America. NLADA's goal is to ensure that all of America's poor people — those accused of crimes as well as those with civil complaints — can get quality legal help when they need it.

NLADA members- over 25,000 - are primarily programs that provide civil legal aid and criminal defense services to poor persons. About 70% of all civil legal aid offices and criminal defense services in the United States are members.

For maximum impact, NLADA's efforts are concentrated on the issues and problems that directly affect legal services for poor persons. NLADA represents no clients directly.

NLADA Activities

Ensuring that poor people get quality legal service is pursued in several different ways. Some of NLADA's activities include:
1) building support for legal services among public officials, community groups, public interest groups, organized bar associations, individual attorneys, and business organizations and leaders;
2) coordinating the national activities of legal services advocates, informing them of events affecting legal services, and fostering discussion and communication among them;
3) providing training, technical assistance, and other direct services to providers of legal assistance and their funding sources;
4) developing standards to guide providers in delivering high quality legal services;
5) conducting national pilot projects to develop advanced techniques and systems for legal services;
6) advocating directly for legal services before national and state legislative, administrative, and judicial bodies;
7) informing the public about legal services and publicly advocating the right of poor persons to high quality legal services.

NLADA Sections

Much of this work is done through NLADA's staff and the different sections of the association. Some of these sections include:
1) Appellate Defender Section,
2) Death Penalty Litigation Section,
3) Defender Trainer's Section,
4) Women's Issues Section,
5) Legislative Advocacy Section,
6) Indigent Defense Services Section,
7) Juvenile Law Section,
8) Paralegal/Legal Assistants Section and
9) Private Bar Section.

NLADA Projects

Section members often work with NLADA staff to produce national projects. Some recent projects of NLADA include the:

1) Standards for the Appointment and Performance of Counsel in Death Penalty Cases,
2) Standards for the Administration of Assigned Counsel Systems,
3) Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services,
4) Case Weighting Project Systems: A Handbook for Budget Presentation and Standards and Evaluation Design for Appellate Defender Offices.

Capital Report

Death Penalty Litigation Section members work with NLADA staff to produce *Capital Report*, a newsletter published 6 times a year that features articles on trends in the trial, appeal and conviction stages of capital cases. *Capital Report* subscriptions are available to those working on or interested in the defense of death penalty cases, but are not available to prosecutors.

NLADA Training

NLADA has also established training events designed to aid defenders and assigned counsel in their work. Recent trainings include NLADA's annual death penalty training event entitled Life in the Balance: Defending Death Penalty Cases, a Defender Management training, and the first Appellate Defender training in 10 years.

For more information about NLADA's Defender Division, please call or write us at:

MARY BRODERICK
Director, Defender Division
NLADA
1625 K Street, NW 8th Floor
Washington, DC 20006
(202) 452-0620

NLADA
Individual Membership Application

Please answer all questions on application: Please print or type.

Name _____ Date _____

Address _____

City _____ State _____ Zip _____

Occupation _____

Telephone Number(s): office (_____) _____ home (_____) _____

Check appropriate membership category.

- ☐ Individual Attorney Member, $50
- ☐ Non-attorney Professional, $25 (investigators, social workers, paralegals, etc.)
- ☐ Client Member, $15
- ☐ Student Member, $15
- ☐ Sustaining Member, $100
- ☐ Life Member, $1,000 or more (one-time payment)

Check appropriate voting classification.*

- ☐ Public Member
- ☐ Defender Member
- ☐ Civil Member
- ☐ Client-Civil Member
- ☐ Client-Defender Member

*Your voting classification determines what candidates you vote for in the NLADA Board and Committee elections. Public Members vote for Public seats on the Board. Defender Members vote for Defender seats on the Board and on the Defender Committee. Civil Members vote for Civil seats on the Board and on the Civil Committee. Client-Civil members vote for Civil seats on the Board and Civil Committee and for Client seats on the Board. Client-Defender Members vote for Defender seats on the Board and Defender Committee and for Client seats on the Board. If you do not check any classification, you will be listed as a Public Member.

NLADA Sections

Check the boxes below of those sections you wish to join. Amounts shown are annual dues.* To enroll in an NLADA section, you must either:

1. be a current NLADA individual Member; OR
2. be appointed by a current Program Member to that specific section.**

- ☐ A) Appellate Defender Section, $5 (36100)
- ☐ B) Defender Trainers Section, $10 (36110)
- ☐ C) Native American Section, $5 (36200)
- ☐ D) Juvenile Law Section, $5 (36300)
- ☐ E) Legislative Advocacy Section, $5 (36400)
- ☐ F) Disability Rights Section, $5 (36500)
- ☐ G) Paralegal/Legal Assistants Section, $5 (36510)
- ☐ H) Private Bar Section, $10 (36520)
- ☐ I) Civil Trainers Section, $10 (36105)
- ☐ J) Senior Citizens Section, $5 (36600)
- ☐ K) Social Services Section, $10 (36700)
- ☐ L) Student Legal Services Section, $5 (36710)
- ☐ M) Welfare Section, $5 (36720)
- ☐ N) Communications Section, $10 (36730)
- ☐ O) Rural Advocacy Section, $5 (36540)
- ☐ P) Indigent Defense Network***
- ☐ Q) Farmworker Law Section, $5 (36115)
- ☐ R) Death Penalty Litigation Section, $10 (36150)
- ☐ S) Women's Issues Section, $5 (36725)

*Clients maintaining current NLADA Client Individual Memberships may participate as members of sections without paying section dues.
**Current NLADA Program Members may designate one person as a member of each section.
***The Network is funded by the ABA Bar Information Project—no dues required.

Additional Contribution

I know that NLADA needs financial support. In addition to my dues, I am contributing $_____ (write in amount) to support NLADA's work for legal services.

Membership dues $_____
Section dues _____
Contribution _____
TOTAL ENCLOSED $_____

Membership dues are tax deductible. Membership is for one year from receipt of this Membership Application. Please enclose payment with application. Make checks payable to NLADA.

Please return to:

National Legal Aid and Defender Association
Membership Department
1625 K Street, N.W.
Eighth Floor
Washington, D.C. 20006
(202) 452-0620

RACIAL BIAS IN CRIMINAL JUSTICE SYSTEM

IT'S ALL THINGS CONSIDERED...I'm Noel Adams. Almost 1 out of every 4 young black males in this country is in prison, in jail, on probation, or on parole. That's 1 in 4. Among young white males the number is 1 in 16. The number of young black men in the criminal justice system is now higher than the number going to college. And the annual cost for incarceration is estimated at 2.5 billion dollars. There's a new study about young black men in the criminal justice system. The report does not try to explain why the numbers are so high for black men. Instead it looks at the end result. Congressman John Conyers of Michigan believes the current justice system is perpetuating the problem.

John: "In prisons there's little or no rehabilitation, but there are fewer drug treatment programs. There's no job preparation and you're talking about a part of the community that's experiencing unemployment rates that hovers somewhere in the 30 and 40% of the rates of unemployment. So by increasing the severity of punishment you're guaranteeing that you'll need more cells, that it's going to cost you more, and you're going to get relatively little in terms of an effective criminal justice result."

Noel: The study calls it a failure of the get tough approach to crime control.

John: "That to me is the one delicate and sensitive issue to which more decent public officials have to repair so that we can try to begin to get a rational discussion about this increasing severity of punishment which has, while it's cost us billions, has gotten us very, very little."

Noel: With regard to the crime rate, the study says that the get tough approach has put more people in prison and yet the victimization rate hasn't gone down. Couldn't you argue it the other way, turn it around and say that the people who have been doing the crimes are now in prison, therefore the crime rate hasn't changed?

RACIAL/ETHNIC BIAS IN THE COURTS

Racial and ethnic bias in the courts is a topic that has generated a good deal of attention inside the legal profession in recent months. Materials on this issue have been collected by the National Center for State Courts (NCSC) Information Service.

In March, *The National Law Journal* reported that NCSC would be acting as a clearinghouse for information generated following creation of the National Consortium of Commissions and Task Forces on Racial/Ethnic Bias in the Courts. (The Consortium was created as a way for groups studying bias in various courts "to share our research goals and methods, [and] to provide a blueprint for future efforts of other task forces," according to a quote from Edna Wells Handy, executive director of New York's Judicial Commission on Minorities).

NCSC staff lawyer Phillip Lattimore and intern Jeremy D. Blank have prepared 2 bibliographies containing materials generated by, relevant to, or concerning the commissions and task forces studying racial bias in court systems.

Racial/Ethnic Bias in the Courts Bibliography I lists 6 states (New York, Washington, Michigan, Oregon, New Mexico, and New Jersey) and 1 Canadian province (Nova Scotia) that have commissions or task forces, as well as the American Bar Association Commission on Opportunities for Minorities in the Profession. Materials that have been produced to date by these commissions which are noted in the bibliography include questionnaires, memoranda, reports, press releases and pamphlets.

Questionnaires have been designed for a number of different groups within or associated with the court system, including: Questionnaire for Judges Relating to Judicial Selection and the Perception of Racial Fairness and Sensitivity in the Courtroom (NY), and Survey Questionnaire for the 15 ABA-approved New York Law Schools Requesting Data on Admissions and Placement Practices, Law School Environment, Minority Organizations, and Clerkships, etc.

Memoranda cover a wide variety of commission/task force concerns, for example: Memorandum for Dr. Monica Holmes (12/5/88) regarding a sampling design and methodology for distribution of litigator's questionnaire (NY); Memorandum to members of the Task Force on Racial/Ethnic Issues that details personal contact assignments with representatives of special interest groups (8/29/88) (MI); and New Jersey Administrative Office of the Courts Interoffice Memorandum on Suggestions for Working with Committees/Task Forces (June 6, 1985).

Substantive reports contained in the bibliography are, to date, interim rather than final, *e.g.*, Washington State Minority and Justice Task Force Interim Report (March, 1989). Other reports, as well as pamphlets and press releases, relate to the role of the commissions/task forces rather than to their conclusions, for example: Report of the New York State Judicial Commission on Minorities; Pamphlet on the Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts; and Project and Activities Booklet, ABA Commission on Opportunities for Minorities in the Profession.

The second NCSC list, Racial/Ethnic Bias in the Courts Bibliography II, consists primarily of news clippings from several states. It also refers to books, journals, and miscellaneous materials on the question of bias in court systems, such as: *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, by Cassia Spohn et al., Criminology, Volume 25, Number 1, 1987, pp. 175-91; *Sex, Race, and the Law*, by Jeanne Gregory (book); and *Information on the Number of Minority and Women U.S. Attorneys*, U.S. Department of Justice, January, 1988.

Both bibliographies provide a "check-off" feature that allows readers to indicate materials they would like to receive from NCSC. There is no charge. (NCSC's Information Service is supported by assessments from the states and by a grant from the State Justice Institute; persons who seek and receive information are asked to complete an evaluation form.) Persons requesting this information can also ask to be placed on a list to receive updated information as it is complied by NCSC. Contact Phillip Lattimore III, National Center for State Courts, 300 Newport Avenue, Williamsburg, VA 23187-8798. Phone 804-253-2000.

NLADA, 1625 K Street, NW, 8th Floor Washington, D.C. 20006. *Reprinted with Permission.*

John: "If that has in fact been happening, we are doing this at such an incredible cost of human resource of great unfairness because what this report is suggesting is that what we have is a criminal justice system that is racist on impact if not by intention. Now just a word about what else could be happening since one and a half billion dollars of the 8 billion dollar drug budget under Mr. Bennett's domain is going for federal prison construction, but there is no treatment in any city available on demand from a person who is trying to get out from the evil of addiction."

Noel: What about the idea as outlined in the study to reverse the trend as you're talking about, decriminalize some acts?

John: "Lights go on when you say decriminalize. What I have in mind is stopping adding on to the incredible prison sentence lengths, and that is not decriminalization. What we need are alternatives to incarceration. What we do need is an additional complimentary study by G.A.O., for example, to study which parole programs are really working, and on what conditions and terms are they most effective."

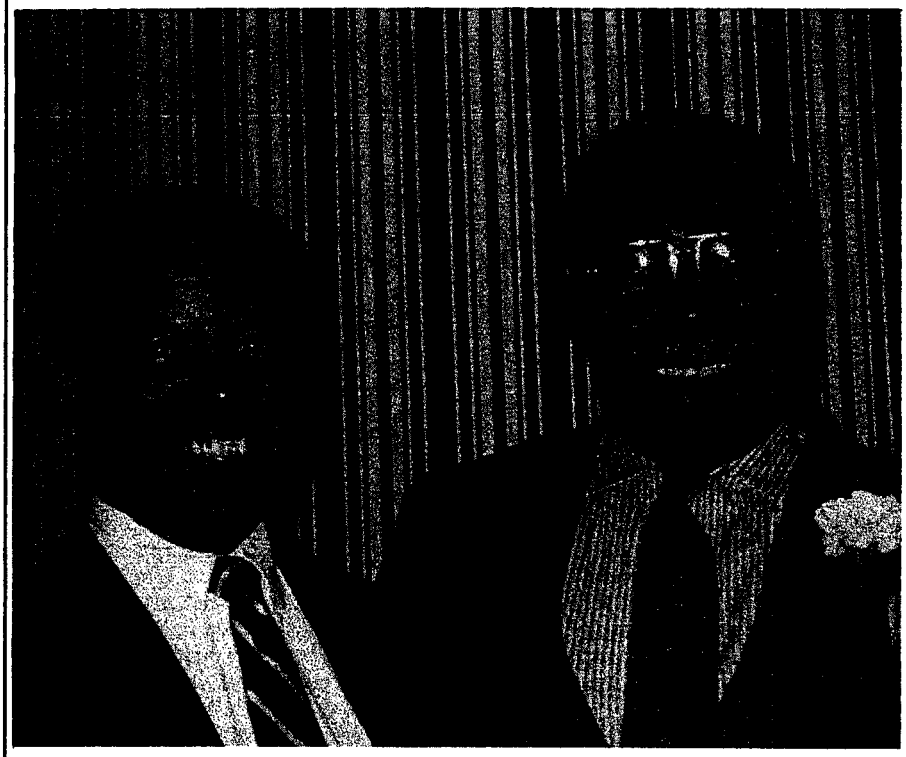
Noel: Your point is, and the point of the study I gather is, that an entire generation of young black leadership is being lost?

John: "It devastates in so many ways. Not only the individual tragedy but the family, the community, the national productivity, the whole possibility of women starting families with these men who would have been there but who are not by virtue of incarceration. Between these factors, what we have is a social tragedy that goes even beyond criminal justice policies."

Noel: Talking with us from his office in Detroit, Congressman John Conyers discussing a study released today by The Sentencing Project, a group which promotes sentencing reform.

National Public Radio
2025 M Street, N.W.
Washington, DC 20036
(202) 822-2000

BLACK MALES IN PRISON



(L to R) Judge Gary Payne, Dr. William C. Parker

"If you want to learn about society, look into its prisons," said one of the greatest Russian novelists, Fyodor Dostoyevsky, who was in prison himself.

Nationally, blacks go to prison at a rate nearly 10 times that of whites 1984 figures indicate. But in February 1990, a national report was released that states 1 in 4 young black American men (mainly aged from 20 to 29 years) are in prison or jail or on probation or parole. "These figures finally give some substance to the cries of genocide of young black males," said Marc Mauer, the author of the study "Young Black Men and the Criminal Justice System: A Growing National Problem" by the Sentencing Project that seeks sentencing reform.

"In Kentucky, the black population is 8%, but 32% of the population in our prisons are black," said Ed Monahan, assistant public advocate with the state Department of Public Advocacy and member of the Pro-Life Committee of the Catholic Conference of Kentucky. "If you are a black defendant you get treated differently by prosecutors, judges, and juries. Poverty and economic factors are manifestations of racism and cause many blacks to go to prison. Prosecutors also have a way of striking blacks from juries without cause. There are not many blacks in the jury pool to start with because the names are taken from voter registrations, and many blacks do not vote. Also jury commissioners in different counties do not select many blacks to be on juries."

Monahan's office defends people against the death penalty. In his recent book *Black Robes, White Justice*, Bruce Wright, a New York State Supreme Court justice wrote about the disparities in the death penalty. "Since executions were resumed in 1977; a black who kills a white is about 60 times more likely to be executed than a black who kills a black. Even though there have been 2,500 white on black homicides nationally since 1977, not a single state has yet put to death a white who killed a black. A black who kills a white is 10 times more likely to be executed then someone who kills a black," Wright said.

"Hatred of blacks can stem from social isolation and fear of blacks," said District Court Judge Gary Payne, the only black judge in the central Kentucky area. "There are more poor young blacks who drop out of school and do not have opportunities. Most do not have adequate black male role models and often end up in criminal activity."

The prison figures for Kentucky of black males incarcerated are high. Robert Wet-

ter, executive staff adviser of the Corrections Cabinet, reported the numbers as of December 31, 1989. There were a total of 7,842 black and white men in Kentucky's 13 prisons, including 1 American Indian. Of this total, 5,486 are white men and 2,356 are black men. Much lower are black and white women prisoners with a total of 447, with 170 being black.

In the national study, Mauer reported the number of young black men under the control of the criminal justice system at 609,690, which is greater than the total number of black men of all ages enrolled in college (436,000 as of 1986). For white males the comparable figures are 4,600,000 total in higher education and 1,054,508, ages 20 to 29, in the criminal justice system.

At the University of Kentucky, there is a ratio of 8 black females to 1 black male graduating, according to Dr. William Parker, vice-chancellor of minority affairs and recent 1990 recipient of a brotherhood award from the Bluegrass Chapter of the National Conference of Christians and Jews.

"Society's perception of black males is part of the cause of more black men in prison. It stems back to slavery where men were separated from women and were feared by the white population," said Parker. "Black men have been emasculated, and this attitude still exits psychologically today. White women are taught at an early age to fear black men because they are described as hostile, violent, and apt to rape you."

"Integration has hurt the black male because of expectations of white teachers. It is amazing to see kids in Headstart - they are bright and have aspirations. By the 4th grade, their aspirations are gone," he said. "When you are in a white environment, black men in particular are under a microscope and expected to be 'superior,' which causes much bitterness that leads to crime and jail. We are lousy criminals because we get busted mostly due to prejudice."

In order to resolve some of the causes of more black men being in prison, Dr. Parker has traveled to many areas with seminars and workshops. When he retires in July of this year and moves back to Princeton, New Jersey, he plans to spend more time trying to reach black males. "We must take young black males and put them in a class with a black teacher. They have done this successfully in Florida, but now people are screaming it is unconstitutional."

"I am putting together about 20 retired black PhDs that can go into inner city schools and spend a week working with black males. Young people can rub shoulders with college and bank presidents. More successful black males need to be surrogate fathers of those sons of single black mothers. Black mothers are very protective of their sons and they need more support in order to cope with the repression in our society," Dr. Parker asserts.

The national report on prisons contained many recommendations. Some of these were diversion and dispute resolution processes for first-time offenders; victim restitution and community service programs; drug treatment programs; intensive probation supervision; employment and education programs; uniform sentencing procedures; and realization that the "get tough approach" is not working.

LINDA HARVEY
INTERCOM
Kentucky Council of Churches
1039 Goodwin Drive
Lexington, KY 40505

Civil Commitment Materials

To promote improved legal representation of persons subjected to involuntary civil commitment, the American Bar Association's Commission on the Mentally Disabled has developed a variety of training packages for lawyers and judges. The components of these packages are: *Involuntary Civil Commitment: A Manual for Lawyers and Judges*; The National Center for State Courts' *Guidelines for Involuntary Civil Commitment*; a video entitled *Commitment to Advocacy;* an up-to-date printout of citations and case summaries of all civil commitment cases covered in the *Reporter*; and a two-day training workshop, which can be conducted by the Commission's staff or by others who want to adapt our format to conduct their own workshops.

Involuntary Civil Commitment: A Manual for Lawyers and Judges (1988) is available for $30; for orders of 10 or more, the price is $20 per copy. *Commitment to Advocacy* (1989), a VHS video, is available for $50 per copy. The video, plus one copy of the manual, is available for $75.

The workshop package, designed for adaptation on the local level, includes one copy each of: *Involuntary Civil Commitment: A Manual for Lawyers and Judges; Commitment to Advocacy; Mental Disability Law: A Primer; Guidelines for Involuntary Civil Commitment;* selected civil commitment article reprints from the *Mental and Physical Disability Law Reporter;* the case summary package printout and the workshop instructor's manual. This complete workshop package is available for $195; extra copies of the *Manual*, the *Primer* and the *Guidelines* for group participants are $32 per participant.

Commission-conducted workshops for up to 50 people are available at a negotiable price. For more information, please contact the Commission at 1800 M St., N.W., Washington, D.C. 20036, (202) 331-2240.

PUBLIC ADVOCACY ALTERNATIVE SENTENCING PROJECT* (PAASP)

Part of the Solution to Jail and Prison Overcrowding

Dave Norat

Funding for Continuation of the Public Advocacy Alternative Sentencing Project Approved by the Kentucky General Assembly.

The 1990 Kentucky General Assembly approved the Governor's recommended appropriation of $104,700 in FY 1990-91 and $109,500 in FY 1991-92 for continuation of the PAASP.

Funding at this level will allow 4 sentencing specialists working with defense attorneys in project areas to present to the court punishment options other than incarceration.

If fully funded the program would have increased the number of sentencing specialists to 18 across the state. A full staff would have put the courts in a position to adopt 274 non-prison punishment options over the 1990-92 biennium thus decreasing the Corrections Cabinet's projected need of 9,325 prison beds by the end of FY 1992 by 274 beds.

The action taken by the Governor and the General Assembly in recommending and appropriating funds for the PAASP is a recognition that Kentucky cannot build its way out of its jail and prison overcrowding crisis. A recognition that alternatives must be developed. Alternatives such as the PAASP which are a more responsible use of public funds while achieving the goals of punishment and community safety.

Without the support of the Developmental Disabilities Planning Council, the Public Welfare Foundation and former Corrections Secretary, George Wilson, the PAASP would not have been available as part of the solution to the current jail and prison overcrowding crisis.

Over the course of the 1990-92 biennium defense attorneys, using sentencing specialists, will continue to present punishment options to the court. As the benefits of punishment options are recognized by the courts, the 1992 Kentucky General Assembly will again have the opportunity to continue its responsible use of public funds by expanding the PAASP to additional counties throughout the Commonwealth.

Judicial Training Grant Awarded to DPA to Conduct Training on Sentencing Options

A judicial training grant awarded by The Sentencing Project enables the DPA and the Administrative Office of the Courts to conduct a joint training session for judges, defense attorneys, sentencing specialists, prosecutors and probation and parole officers on punishment options. This training will replicate an earlier training session held in January, 1988.

Kentucky is one of 3 recipients nationwide to receive the award. The ability to conduct a session involving the many different components of the criminal justice system provides a sound basis of understanding and an opportunity to exchange experiences concerning punishment options. This is especially true now that punishment options are here to stay in Kentucky.

SELECTED CUMULATIVE STATISTICS CONCERNING CLOSED CASES

*Cases Referred to PAASP	213
Punishment Plans Presented in Court	130
Punishment Plans Accepted in Whole or in Part	65 (50%)
Jail and Prison Beds Made Available to Corrections	65

DEFENDANT RESTITUTION

	Total in Plans Presented to Courts	Total in Plans Granted by Court
Dollars to Victim	$68,073.03	$39,360.12
Service Fees	$ 5,243.11	$4,625.61
Court Costs	$ 3,549.26	$2,624.26
Fines	$ 4,138.50	$2,923.00
Miscellaneous Dollars	$ 1,680.00	$1,170.00
Miscellaneous Hours	100.00	-0-
Community Service Hours	1,355.00	925.00

RESOURCES TO BE UTILIZED BY THE DEFENDANT**

Substance Abuse - In Patient	37	23
Substance Abuse - Out Patient	59	40
Mental Health/Mental Retardation	44	19
Vocational Rehabilitation	15	8
Adult Learning Centers	56	26
Vocational Schools	17	5
Family Counseling	18	3
Sexual Abuse Counseling	5	1
Other	57	23

**Some cases involve the same client due to charges in different jurisdictions or ASP Modification*
***A defendant can utilize more than one resource.*

**PAASP is presently a joint private and state funded multi-agency effort involving the Department of Public Advocacy, The Developmental Disability Planning Council and the Public Welfare Foundation. The initial grantor was the Kentucky Developmental Disability Planning Council (DDPC). For more information contact Dave Norat at (502) 564-8006.*

Kentucky's Jail and Prison Overcrowding crisis to be Addressed by a Legislative Task Force and a Newly Created KY State Corrections Commission

On March 30, 1990, Governor Wallace Wilkinson signed into law, House Joint Resolution No. 123 (HJR 123). HJR 123 creates a legislative task force on sentences and sentencing practices charged with the following responsibilities:

a) To review Kentucky's statutory punishment structure for appropriateness and consistency;
b) To investigate Kentucky's sentencing, probation and parole trends;
c) To determine what effect Kentucky's present sentence requirements and sentencing practices have on the prison population;
d) To investigate sentencing practices as applied to men, women, and racial and ethnic minorities;
e) To investigate sentencing disparities between different jurisdictions in Kentucky;
f) To investigate the use of and determine the effectiveness of alternatives to incarceration. A sampling of alternatives are intensive and advanced parole and probation supervision, home incarceration, rehabilitation treatment and counseling, work release and community service;
g) To make recommendations concerning sentencing and parole options to the Governor, the Secretary of Corrections, the Court of Justice and the Attorney General;
h) To provide the Corrections Commission with an interim report on its findings;
i) To propose to the 1992 General Assembly legislation based on the Task Force's findings.

Members of the Legislative Task Force will serve for 2 years and shall consist of a representative from each of the following organizations or constituencies:

a) Attorney General's Office;
b) Parole Board;
c) Corrections Cabinet;
d) Department of Public Advocacy;
e) Commonwealth Attorney's Association;
f) County Attorney's Association;
g) Jailer's Association
h) Circuit Judge or Retired Circuit Judge;
i) Law Enforcement Agency;
j) House Appropriation and Revenue Committee;
k) House Judiciary Committee;
l) Senate Appropriations and Revenue Committee;
m) Senate Judiciary Criminal Committee;
n) Statewide Victims' Group;
o) Criminal Justice or Law School Faculty;
p) General Public.

HJR 123 was passed as an emergency piece of legislation going into effect when signed by the Governor on March 30, 1990. This gives the Task Force the maximum amount of time possible to complete its work before the 1992 session.

House Bill 603 signed by the Governor on April 19, 1990, could be labeled the omnibus corrections bill. HB 603 deals with the administration of the Corrections Cabinet, correctional programs and makes changes in the law which affects sentencing considerations, presentence investigations and shock probation.

An amendment to KRS 500 specifically addresses the judge's obligation to consider alternatives to incarceration. An amendment to KRS 533.010 appears to have established a new class of probation, probation with an alternative sentencing plan. This new class of probation may be an option that does not come under existing sentencing restrictions.

The major thrust of House Bill 603 is the creation of the Kentucky State Corrections Commission. A Commission that deals with the administration of the Corrections Cabinet and its programs.

The Kentucky State Corrections Commission is charged with the primary respon-

PROBATION MUST BE CONSIDERED

May it please this Honorable Court:

THE SUBSEQUENTLY ENACTED, PURPOSEFUL AMENDMENT TO KRS 533.010 REQUIRES TRIAL JUDGES TO CONSIDER "PROBATION WITH AN ALTERNATIVE SENTENCING PLAN" IN ALL CASES.

Your Honor, on April 19, 1990, Governor Wallace Wilkinson signed House Bill 603 which became law on July 13, 1990. House Bill 603 amends KRS Chapter 533.010, the sections which deals with Kentucky's presumption for probation. The amendment to KRS 533.010 establishes a new class of probation, "probation with an alternative sentencing plan." This new class of probation must be considered in this and every case that comes before you in which a defendant "...pleads guilty to or is convicted of a crime punishable by imprisonment...." That Your Honor is pursuant to a new section of KRS Chapter 500. This new section of KRS Chapter 500 is also a part of House Bill 603 and became law on July 13, 1990.

Your Honor, this new class of probation, probation with an alternative sentencing plan, has none of the sentencing prohibitions which exist for other classes of probations found throughout the Penal Code [See, *e.g.*, KRS 532.045; KRS 533.060]. This is due to the fact your honor, as I understand Kentucky law, to the failure of the legislature to specifically include the qualifying words "probation with an alternative sentencing plan" in those "disqualifying" statutes, and due to the fact that those disqualifying statutes are not applicable to this "subsequently enacted, purposeful" amendment to KRS 533.010.

Your Honor, I think you will find that you once again have the discretion to review each case on an individual basis and determine if the goals of community safety, restitution, retribution, and treatment can be truly met by incarceration or perhaps better served by probation with an alternative sentencing plan.

This discretion enables you to better utilize the state's finite resource of incarceration for the more violent defendants that come before you.

Your review and consideration of probation with an alternative sentencing plan for my client is now mandated by statutes and your consideration is greatly appreciated.

THE PUNISHMENT ADDICTION

Twenty Years of Compulsive Punishment Lifestyles

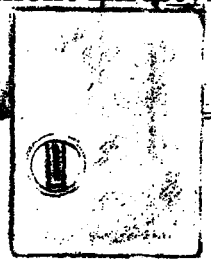


illustration by Kevin Fitzgerald

sibility of developing and maintaining a 6 year plan for Corrections Cabinet operations. This plan is to include both construction and program elements based on input not only from the Corrections Cabinet but from the groups represented on the Commission and ..."Other public and private agencies and citizens with a vested interest in corrections." This 6 year plan will undergo semiannual changes and will take into consideration current trends and needs in order to maintain its value as a planning document for Corrections and the criminal justice system.

Based on this 6 year plan the Commission will be charged with the responsibility of assisting the Correction's Cabinet in preparing and submitting legislative and budget proposals. To develop in cooperation with DPA, the Administrative Office of the Courts, the Prosecutors Advisory Council and other parties, a schedule of punitive and rehabilitative alternatives to imprisonment for dissemination and use by judges, prosecutors and defense attorneys.

Other responsibilities of the Kentucky State Corrections Commission are:

a) To receive regular reports from the Corrections Cabinet as to their progress in complying with the six year plan;
b) To review and make recommendations to the Cabinet when the Cabinet has made any significant changes in programs, policies, procedures, staffing, classification, or any other component of Corrections operations which departs from the six year plan;
c) To assist the Legislative Research Committee in the preparation of Corrections impact statements for proposed legislation;
d) To make recommendations to the Governor and the General Assembly on legislation concerning sentencing, probation and parole which would effect the Corrections Cabinet.

This list highlighting some of the responsibilities of the Kentucky State Corrections Commission, indicates a recognition by the Kentucky General Assembly and the Governor that the prison and jail overcrowding crisis needs the involvement of the total Kentucky criminal justice system if a solution is to be found. A solution which requires a continuous coordinated effort with communication between all parties involved in the criminal justice system. The Commission shall consist of 12 members who are as follows:

1) The Attorney General
2) The Public Advocate
3) The Chairman of the Parole Board
4) The Secretary of the Justice Cabinet
5) The Secretary of the Corrections Cabinet
6) The Secretary of the Cabinet for Human Resources
7) A County Jailer chosen by the Governor
8) A sititing or retired Circuit Judge chosen by the Governor from a list of 3 submitted by the Chief Justice
9) Two Criminal Justice Professionals who are familiar with correctional research, theory and program implementation, appointed by the Governor
10) A representative from the Law Enforcement Agency appointed by the Governor
11) A Commonwealth's Attorney chosen by the Governor from a list of 3 submitted by the Prosecutors Advisory Council.

As initially stated this article discusses only one part of House Bill 603. There are other changes brought about by HB 603 which will need to be discussed but at a later time.

DAVE NORAT
Director, Defense Services
Frankfort

DPA MOTION FILE

MOTIONS COLLECTED, CATEGORIZED, LISTED

The Department of Public Advocacy has collected many motions filed in criminal cases in Kentucky, and has compiled an index of the categories of the various motions, and a listing of each motion. Each motion is a copy of a defense motion filed in an actual Kentucky criminal case. Many motions include memorandum of law. They were updated in April, 1989.

CAPITAL CASES

The motion file contains many motions which are applicable to capital cases, and many motions filed in capital cases on non-capital issues.

COPIES AVAILABLE

A copy of the categories and listing of motions is free to any public defender or criminal defense lawyer in Kentucky. Copies of any of the motions are free to public defenders in Kentucky, whether full-time, part-time, contract, or conflict. Criminal defense advocates can obtain copies of any of the motions for cost of copying and postage. Each DPA field office has an entire set of the motions.

HOW TO OBTAIN COPIES

If you are interested in receiving an index of the categories of motions, a listing of the available motions, or copies of particular motions, contact:

TEZETA LYNES
DPA Librarian
1264 Louisville Road
Frankfort, KY 40601
(502) 564-8006, ext. 119.

WEST'S REVIEW

Linda West

KENTUCKY COURT OF APPEALS

OTHER CRIMES/USE OF A MINOR IN A SEXUAL PERFORMANCE/AMENDMENT OF INDICTMENT/CONFESSION-INTOXICATION

Gilbert v. Commonwealth
37 K.L.S. 3 at 10
(March 2, 1990)

Defendant husband and wife were convicted, respectively, of committing and complicity to commit attempted rape, use of a minor in a sexual performance, and first degree wanton endangerment. The victims were the wife's daughters by a previous marriage.

The Court first held that introduction of evidence that the husband supplied the daughters with marijuana and liquor was not inadmissible evidence of other crimes. The evidence was properly admitted as proof of the defendant's effort to induce the victims to have sex with him.

The Court upheld the wife's conviction of complicity to commit attempted rape after distinguishing *Knox v. Commonwealth*, Ky., 735 S.W.2d 711 (1987). In *Knox*, the Court held that the minor victim's mother could not be convicted of complicity on the theory that she had a "legal duty" to prevent her child's abuse. The Court found the case before it to be factually distinguishable since the wife actively told the victim to get in bed with the husband, while in *Knox* the mother merely stood passively by.

The Court also upheld the convictions of use of a minor in a sexual performance. The convictions were based on the defendant's acts of forcing the victims to perform various household chores while nude. The defendants argued that the offense as created in KRS 531.310 addresses the commercial use of minors in sexual performances, and not conduct required of a minor in a family setting. The Court rejected the argument.

Among the offenses charged were some alleged to have occurred in 1985. At trial, the prosecutor was permitted to amend the indictment to charge that the offenses occurred in 1986. Defense objection that the defense had prepared based on the fact that the defendants did not marry until 1986 was overruled. The Court held that the amendment of the indictment was permissible under RCr 6.16 because "the substantial rights of the accused are not prejudiced" since the main thrust of the defense was actually a denial of the charged offenses.

The Court upheld the introduction of the defendant husband's statement to police while he was intoxicated. The Court cited *Hamilton v. Commonwealth*, 580 S.W.2d 208 (Ky. 1979) for the principle that in the absence of hallucinations or confabulation intoxication does not require the exclusion of a confession.

DUI-JURISDICTION

McIntosh v. Commonwealth
37 K.L.S. 3 at 16
(March 9, 1990)

In this case, the Court held that a trial commissioner does not have jurisdiction to accept a guilty plea to a charge of DUI. Under SCR 5.03(a)(iii) a trial commissioner has jurisdiction to accept a guilty plea in a case in which the possible sentence is limited to a fine of $500 or less. He may not accept a guilty plea to a charge of DUI since that offense may be punished by imprisonment. An order of the district court, amending the sentence imposed by the trial commissioner, did not correct the jurisdictional problem since the order was entered pursuant to a void judgment. The district court should instead have vacated the judgment.

DOUBLE JEOPARDY-RECEIVING AND DISPOSING OF STOLEN PROPERTY/BIFURCATED TRIAL OF POSSESSION OF HANDGUN BY CONVICTED FELON CHARGE

Cooley v. Commonwealth
37 K.L.S. 4 at 2
(March 23, 1990)

Cooley was convicted of receiving stolen property in Mason County. He was subsequently convicted of disposing of the same property in Bourbon County.

The Court rejected Cooley's argument that his Bourbon County conviction constituted double jeopardy. The Court noted that the offense denounced by KRS 514.110 may be committed either by receiving, or disposing of, stolen property. Citing *Blockburger v. United States*, 234 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) the Court held that "[t]he evidence to prove disposition is different than that used to prove receiving stolen property. As a result, the double jeopardy problems do not exist in this case." The Court distinguished *Jackson v. Commonwealth*, 670 S.W.2d 828 (Ky. 1984) in which the defendant's convictions of theft and receiving stolen property involving the same property were held to violate the double jeopardy prohibition. *Jackson* was inapposite to Cooley's situation since in *Jackson* "the evidence to prove both crimes is virtually the same."

The Court additionally held that the trial court complied with the procedure mandated by *Hubbard v. Commonwealth*, 633 S.W.2d 67 (1982) when it bifurcated the trial of a charge of possession of a hand-

This regular *Advocate* column reviews the published criminal law decisions of the United States Supreme Court, the Kentucky Supreme Court, and the Kentucky Court of Appeals, except for death penalty cases, which are reviewed in *The Advocate* Death Penalty column, and except for search and seizure cases which are reviewed in *The Advocate* Plain View column.

gun by a convicted felon so that the jury was unaware when hearing the receiving stolen property charge of Cooley's status as a felon. Judge Dyche dissented in part.

DOUBLE JEOPARDY-SETTING ASIDE DIRECTED VERDICT OF ACQUITTAL

Campbell v. Commonwealth
37 K.L.S. 4 at 6
(March 30, 1990)

At Campbell's trial, a critical prosecution witness, who had waited for two days to testify, disappeared just before being called. A four day continuance was granted the prosecution, but the prosecution remained unable to produce the witness and so announced closed. The trial judge then granted a defense motion for directed verdict, but before the jury was discharged the missing witness arrived. The trial court then set aside the directed verdict.

The Court of Appeals held that it did not offend the constitutional guarantee against double jeopardy for the trial court to set aside the directed verdict since the jury had not yet been discharged. KRS 505.030 bars another prosecution where "[t]he former prosecution resulted in a determination by the Court that there was insufficient evidence to warrant a conviction." The Court of Appeals cited the Commentary to the statute in support of its holding that the statute applies only "*when an initial prosecution terminated* in a determination by the trial court, after hearing the evidence, that the defendant's conviction would have been unwarranted." In the Court's view, "termination would have occurred only at the point the court finally discharged the jury."

RICHARDSON IMPEACHMENT/TRUTH IN SENTENCING-PROOF OF PRIOR CONVICTION/INTOXICATION INSTRUCTION/IDENTIFICATION

Hall v. Commonwealth
Poston v. Commonwealth
37 K.L.S. 4 at 13
(April 6, 1990)

In his appeal, Hall argued that the trial court should have *sua sponte* admonished the jury pursuant to *Richardson v. Commonwealth*, 674 S.W.2d 515 (Ky. 1984) that his prior felony conviction could be considered only as it affected his credibility. The Court disagreed: "The trial court should not be required to admonish the jury *sua sponte*; defense counsel should request the admonition."

The Court also held that it was permissible for the commonwealth to prove Hall's prior felony convictions at the sentencing phase through Department of Corrections records rather by the judgments of conviction. The Court of Appeals acknowledged that this was not the best evidence and would not have been sufficient to prove a prior felony in PFO proceedings. However, the Court held that "[s]uch business records as certified Department of Corrections reports or an inmate's Resident Record Card are trustworthy documents for purposes of proceedings pursuant to KRS 532.055."

In Poston's case, the Court rejected Poston's argument that the trial court erred in refusing to instruct the jury on his intoxication defense. The Court noted that Poston did not claim that he had blacked out or suffered a memory loss and held that "[t]here was not sufficient evidence that he was too drunk to know what he was doing to warrant a jury instruction on intoxication as a defense."

The Court found no error in the introduction of an out-of-court identification of Poston by the robbery victim based on a show-up an hour and fifteen minutes after the robbery. The Court additionally found no abuse of discretion by the trial judge in determining that jurors had not violated their oaths by discussing the case with an individual hostile to Poston.

Finally, the Court held that a 20 year old felony conviction was properly admitted at Poston's bifurcated sentencing hearing.

POSSESSION OF COCAINE-"USABLE QUANTITY" RULE

Commonwealth v. Shively
37 K.L.S. 4 at 13
(April 6, 1990)

In this appeal by the commonwealth, the commonwealth urged the Court to adopt the rule that the possession of "any amount" of cocaine will support a possession charge. The Court instead adopted the rule, applied by the trial judge, that a possession charge may only be sustained upon proof of possession of a "usable quantity." Judge Lester dissented.

FOURTH DEGREE ASSAULT

Adkins v. Commonwealth
37 K.L.S. 5 at
(April 13, 1990)

Adkins appealed his second degree assault conviction on the grounds that the jury should have been instructed on fourth degree assault. Adkins testified at trial that he did not intend to shoot his wife in the leg three times, but only to frighten her. Adkins argued that, based on this testimony, the jury could have concluded that his conduct was reckless rather than intentional, thus justifying a fourth degree assault instruction. In rejecting Adkin's argument, the Court cited the Commentary to the KRS 501.020(4) definition of "reckless," which states that "reckless conduct involves inadvertent risk-creation." The Court then stated "[i]t is difficult to see how a person could argue that pointing a gun at another person at close range and pulling the trigger admittedly one time, if not three times, was inadvertent risk-creation."

KENTUCKY SUPREME COURT

CONSTITUTIONALITY OF KRS 218A.990(16)-TRAFFICKING WITHIN 1,000 YARDS OF SCHOOL

Cooper v. Commonwealth
37 K.L.S. 3 at 21
(March 15, 1990)

KRS 218A.990(16) provides for enhanced sentences for persons convicted of trafficking within one thousand yards of any school. Cooper challenged the statute as unconstitutionally vague and overbroad since an individual may not know he is within one thousand yards of a school. The Court rejected this argument: "The statute is not over broad simply because the appellant may be unaware of the proximity to a school."

The Court also held that Cooper was not entitled to a directed verdict because the commonwealth offered no proof that anyone had actually measured to determine that the offense was within the prescribed distance. "A police officer testified the location was within a thousand yards of a school, and this was not challenged." The Court also upheld Cooper's conviction under KRS 506.120, the criminal syndication statute, citing *Phillips v. Commonwealth*, 655 S.W.2d 6 (Ky. 1983), for the principle that: "All the jury is required to believe for conviction is that 'five or more collaborated'...it is not necessary for the commonwealth to show that each participant collaborating in the scheme collaborated with or was even aware of the other participants." Justice Combs dissented.

WANTON MURDER/CAPITAL KIDNAPPING/DOUBLE JEOPARDY/UNANIMOUS VERDICT/ KIDNAPPING EXEMPTION /MITIGATING EVIDENCE

Harris v. Commonwealth
37 K.L.S. 3 at 22
(March 15, 1990)

Harris and one Elmore intended to "play

a joke" on the victim by forcing her car off the road and then firing a gun into the air. However, the victim got out of her car, and lunged at Harris. The gun discharged, killing the victim. Harris was subsequently convicted of wanton murder, kidnapping, and abuse of a corpse based on an act of sexual intercourse with the dead victim.

The Court held that the evidence supported instructing the jury on wanton murder. "[A]ppellant was carrying a loaded, cocked pistol, and admitted intent to point it at the victim but did not admit intent to cause her death. [Citation omitted]. The wanton murder instruction was proper."

Harris was convicted of capital kidnapping, which is committed when the victim is not released alive. KRS 509.040(2). Harris contended that he could not be convicted of capital kidnapping and sentenced to life without the possibility of parole for 25 years unless the jury found one of the aggravating circumstances listed in KRS 532.025(2)(a). The jury found as an aggravating circumstance that the victim was murdered during the course of the kidnapping, but that is not a circumstance enumerated by the statute. However, the Court pointed out, the statute permits the jury to consider "any aggravating circumstances otherwise authorized by law." The Court held that the failure to release the victim alive was such a circumstance.

The Court rejected Harris' argument that it was double jeopardy to convict him of both murder and capital kidnapping. The Court noted that the victim's death was not an essential element of kidnapping but became relevant only at the penalty phase in fixing punishment. "In the case at bar...appellant was not twice punished for the same act, but rather was punished for two separate courses of conduct."

Harris attacked the unanimity of the verdict as to his kidnapping conviction. The jury was instructed that it might convict Harris under the alternate theories that Harris restrained the victim while intending 1) to commit a felony, or 2) to cause bodily injury or to terrorize. Harris contended that the evidence did not support the theory that he intended to commit a felony. The Court rejected this argument inasmuch as Harris' subsequent abuse of the corpse was evidence that he had intended to rape the victim.

The Court held that Harris was not entitled to the benefit of the kidnapping exemption statute. KRS 509.050. The Court reasoned that Harris was not benefited by the statue because, although his intent was to commit an offense other than the kidnapping, he failed to meet the requirement of the statute that the interference with the victim's liberty must not have exceeded that which is ordinarily incident to commission of the intended offense. "The murder of the victim clearly exceeds the deprivation of liberty ordinarily incident to the harassment appellant claims to have intended...."

Harris finally contended that the trial court erred when it excluded mitigating penalty phase testimony by a clinical psychologist regarding Harris' mental condition because Harris had not given notice under KRS 504.070(1). The Court held that exclusion of the evidence was harmless error since other evidence of mental state was heard by the jury and since the trial judge heard the avowal evidence but chose to accept the jury's recommended verdict.

SPOUSAL PRIVILEGE/HEARSAY-EXCITED UTTERANCE EXCEPTION/WANTON MURDER/DEPOSITION EVIDENCE/EXCLUSION OF WITNESSES
Smith v. Commonwealth
37 K.L.S. 3 at 28
(March 15, 1990)

The defendant's wife was permitted to assert the spousal privilege at his trial. However, the trial court did permit the introduction of the witness' statement prior to her marriage to the defendant that the defendant had killed the victim. The Court held that the witness statement, made to a police dispatcher following the witness' discovery of the victim's body, was admissible under the "excited utterance" exception to the hearsay rule.

The Court held that an instruction on wanton murder was justified where the defendant had said that he did not mean to shoot the victim.

Finally, the Court held that no error was committed in the exclusion of medical records where the defense had failed to comply with the notice requirement of KRS 422.035. The videotaped deposition of a witness was properly introduced where the witness was unavailable and defense counsel was present at the deposition, and that the trial judge did not abuse his discretion in permitting a detective who had remained in the courtroom to give cumulative testimony.

SENTENCING-PRIOR CONVICTIONS/*BOOTH*
Templeman v. Commonwealth
37 K.L.S. 3 at 29
(March 15, 1990)

At Templeman's death penalty trial on charges of murder and robbery, the commonwealth was allowed to introduce evidence of prior convictions for offenses committed subsequent to the charged offense. Templeman contended this was error. The Kentucky Supreme Court disagreed. The jury was not permitted to consider the prior convictions as an aggravating factor but was instructed that if it found the robbery to be a statutory aggravating factor it could then weigh Templeman's prior record in setting a penalty. The Court endorsed this procedure.

The Court additionally held that *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 26 L.Ed.2d 440 (1987) did not apply to testimony by the victim's wife concerning the victim's character since the testimony was introduced at the penalty phase, and that the testimony was harmless since it "merely called to the attention of the jury that the victim...was not just a statistic."

SENTENCE FOR MURDER NOT SUBJECT TO PFO ENHANCEMENT
Offutt v. Commonwealth
37 K.L.S. 5 at 18
(April 26, 1990)

In this case the Court reaffirmed its holding in *Berry v. Commonwealth*, 782 S.W.2d 625 (Ky., 1990) that sentences for murder are not assessed under KRS 532.060 and therefore are not subject to enhancement under the PFO statute. The defendant's failure to object to the indictment's erroneous classification of the charged murder as a Class A felony rather than a capital offense did not open the ways for the prosecution to seek PFO enhancement. Moreover, because the defendant's conviction was for a capital offense, he was entitled to an instruction to the jury that he would be ineligible for parole for 12 years regardless of the sentence imposed. Justice Leibson dissented in part.

UNITED STATES SUPREME COURT

IMPEACHMENT
Michigan v. Harvey
46 CrL 2159
(March 5, 1990)

In this case the Court held that a defendant's statement obtained in violation of *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), which bars police from initiating interrogation of a formally charged defendant once he has invoked his Sixth Amendment right to counsel, may still be used to impeach the defendant so long as the state demonstrates the waiver of counsel to be voluntary. The majority analogized to its decision in *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) that statements obtained in violation of a defendant's *Miranda* rights may be used for impeachment. Justices Stevens, Brennan, Marshall, and Blackmun dissented on the grounds that the police violation was of the right to counsel, not of a mere prophylactic rule as in *Harris*, and therefore the defendant's statement should be unusable for any purpose.

HABEAS CORPUS-*TEAGUE*
Butler v. McKellar
46 CrL 2165
(March 5, 1990)

In *Teague v. Lane*, ___U.S.___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the Court held that new constitutional rules could not be announced in habeas corpus proceedings. Subsequently, in *Penry v. Lynaugh*, ___U.S.___109 S.CT. 2934, 106 L.Ed.2d 256 (1989) the Court stated that a decision announces a new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final." In *McKellar* the Court further enlarged its definition of what constitutes a "new rule." According to the majority, "[t]he 'new rule' principle...validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Justices Brennan, Marshall, Blackmun, and Stevens dissented, stating that under the Court's decision, a federal habeas petitioner can obtain review only "by showing that the state court's rejection of the constitutional challenge was so clearly invalid under then prevailing legal standards that the decision could not be defended by any reasonable jurist."

HABEAS CORPUS-*TEAGUE*
Saffle v. Parks
46 CrL 2193
(March 5, 1990)

Parks sought habeas relief based on his claim that a jury instruction at his death penalty trial that directed the jury to "avoid any influence of sympathy" violated the 8th Amendment. The majority held that the ruling Parks sought constituted a "new rule" and so could not be considered on collateral review under its decision in *Teague v. Lane*, ____ U.S. ____, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Justices Brennan, Marshall, Blackmun, and Stevens dissented on the grounds that Parks did not seek the creation of a new rule but the application of the rule recognized in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) that the sentencer not be precluded from weighing mitigating evidence.

LINDA WEST
Assistant Public Advocate
Appellate Branch
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POST-CONVICTION

Law and Comment

JAIL RELEASE POLICY IRKS CAMPBELL JUDGES

Three Campbell County judges want county officials to reconsider an agreement that allows the jailer to release prisoners before they complete their sentences.

Judges cannot tell if their sentences are being carried out if Jailer Earl Ping can release or refuse prisoners without a court order, District Judge Daniel Guidugli said. The policy also puts police at risk if criminals discover that a jailer is refusing to accept new prisoners, he said.

Guidugli and Judges R. Neil Lewis and Lambert Hehl sent a letter to the fiscal court objecting to a federal court agreement that allows Ping to release prisoners. The letter is the latest outbreak in a running dispute between the jailer and the district court judges. Previously, only the district and circuit judges in the county had the power to release prisoners early to relieve jail crowding, Guidugli said.

In August 1989, the district judges ordered Ping to accept all prisoners sent to the jail. They threatened to hold him in contempt if he failed to do so. But U.S. District Judge William O. Bertelsman signed a new order that gave Ping authority to release prisoners according to certain guidelines. In addition, Ping may refuse to accept new prisoners when the jail population reaches 38, according to the agreement. Campbell County Judge-Executive Ken Paul said the fiscal court, along with Ping, sought the order. Ping should have the right to refuse or release prisoners, Paul said.

Guidugli said the judges were upset that they were not notified about the new order, he said. "As far as we're concerned it's a major change in policy," Guidugli said. Ping said no prisoners have been released or refused since the order was signed on April 11. He refused to comment further on the agreement. Paul said

HOME INCARCERATION PROGRAM BEGINS IN PERRY COUNTY

Beginning this week some prisoners will spend their time at home, instead of in the Perry County Jail, as part of a new home incarceration program, according to officials. Persons meeting certain requirements, and willing to go on the program, will wear a leg mounted transceiver that will monitor their daily motions, via a computer. If they stray further than 100-foot from another transceiver, that is connected to their home telephone, officials will be alerted, according to Perry County Attorney Steve Tackett. Persons that intentionally violate the 100-foot range of the home telephone transceiver will be treated as jail escapees, Tackett said. Such escapes are considered felonies and can carry prison sentences.

Last week, court officials, with the help of prosecutors, screened several jail prisoners as potential candidates for the new program. Two of 51 jail prisoners, on Friday, met program criteria and wished to participate in home incarceration, according to Tackett.

The Perry County Jail has 52 beds, 33 of which are occupied by state prisoners or individuals awaiting trial for felony offenses. Perry Circuit Judge Calvin Manis has discussed the program with a firm the county is contracting with. East Kentucky Corrections Services, Inc. of Pikeville is furnishing equipment and monitoring facilities for the Perry program.

Persons involved in the program will be responsible for the $10 per day fee CSI charges, according to Tackett. "It will not cost the county anything," Tackett said. "I don't believe it will have a very large impact on jail populations," Tackett said. But, the local prosecutor acknowledges that the new program will give them greater opportunities to recommend jail sentences, court officials more freedom to impose incarceration.

Prisoners in the home incarceration have a trade off, Tackett said. With court approval they continue to work and can stay with their families. The trade off though is a sentence that is 3 times longer. Three days on the home incarceration program count the same as 1 day in jail. A 7-day drunk driving sentence would be a 21-day home incarceration sentence, at a cost of $210 to the prisoner. Fees paid for the home incarceration program are in addition to fines and court costs.

Most useful for misdemeanor offenses, Tackett said the program can, and has, been used in connection with some felony offenses. Misdemeanors include theft charges under $100 and minor assaults and drug and alcohol violations. Felonies include theft charges over $100. In district court the program can be used for both prisoners unable to make bond and as a punishment after a conviction. In circuit court the program is likely to be most applicable for prisoners unable to make bond. Similar programs are in operation in Knott and Letcher Counties. "They say it (home incarceration) isn't a whole lot better than jail," Tackett said.

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he is willing to discuss the issue with the judges. But he thinks the new agreement is a good idea. "If the jail is full, and there's no opening, the jailer has the right to refuse prisoners," Paul said.

The 85-year-old county jail has long been a source of lawsuits by prisoners complaining about its crowded condition. The state Corrections Cabinet and Judge Bertelsman previously have ordered that no more than 38 prisoners could be held in the jail.

The county is building a jail that will hold 130 prisoners. Paul said it should open in 6 months. Because the county now must hold prisoners waiting to get into state penitentiaries, it must pay to send its own prisoners outside the county, Paul said.

The state has the obligation to run the corrections system, and the county is considering ways to force the state to live up to that obligation, Paul said. He refused to disclose details. The jail costs the county $500,000 a year, Paul said. "The jail operation is draining the budget of the county," he said. "Before we let Campbell County go bankrupt because of the jail, we will take legal ways to protect the county treasury."

In Kenton County, Jailer Jim Knauf has the authority to grant prisoners early release because of overcrowding. Kenton County District Judge Wil Schroder said the fiscal court has approved guidelines for Knauf. Although Kenton County

judges are notified when prisoners are released, they have no authority in the matter, Schroder said. He said the jailer notifies the judges of at least 40 early releases a month.

In addition to the county jailer, the Kenton County Fiscal Court has given Judge-Executive Clyde Middleton the authority to pardon or release prisoners. But Middleton said he has no plans to use that authority. "I'm not going to release anyone," he said. Middleton said people who oversee the jail should handle the release of prisoners. The fiscal court only has a financial obligation, he said.

Paul said he's not sure any judge-executive can have the authority to release prisoners. Neither can the fiscal court adopt guidelines for early release, he said. That's why fiscal court members asked Judge Bertelsman to give Jailer Ping the authority, Paul said. He said a similar federal court order is in effect in Jefferson County. But Guidugli foresees problems. "Up to this point, there has been no problem," Guidugli said. "But we're getting to the warmer season, when we get more alcohol and drug-related arrests. If an officer can't make an arrest and put someone in jail, then he can't do his job."

PAUL A. LONG
Kentucky Post staff reporter
April 25, 1990
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NEW COLUMN

Starting with the August issue, *The Advocate* will introduce a new column authored by Mike Williams on pending appellate criminal cases, to keep trial lawyers apprised of issues that are before the Kentucky courts that will impact trial practice.

If you have any pending cases that others should be aware of, or that you think should be discussed, please let Mike Williams know by calling (502) 564-8006, or by writing him at: Department of Public Advocacy, 1264 Louisville Road, Frankfort, KY 40601.

THE DEATH PENALTY

General Assembly Bars Exceution of Mentally Retarded Offenders

Neal Walker

On April 11, Governor Wilkinson signed into law Senate Bill (SB) 172, thus insuring that Kentucky will not execute mentally retarded offenders convicted of capital murder. By enacting such a law, Kentucky became only the third state to prohibit the execution of retarded citizens. Georgia was the first state to enact such a prohibition and Maryland soon followed (The federal Anti-Drug Abuse Act of 1988, which provides for the death penalty for certain drug related killings, also exempts the mentally retarded from execution). A matter of weeks after Governor Wilkinson signed SB 172, the Tennessee legislature followed Kentucky's lead and also enacted a ban on such executions.

Passing a statutory prohibition on the execution of retarded offenders in Kentucky is a significant development in the effort to reduce the length of the executioner's grasp. Many commentators believed that it would be difficult, if not impossible, to enact such a law after the Supreme Court's decision in *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934, 106 L.E.2d 256 (1989). The Penry decision sealed off, at least for the present, a claim that the Constitution forbids the execution of mentally retarded prisoners. The Court's decision caused concern that state legislatures would be loathe to legislate bans on executing the retarded since the nation's highest court had found no constitutional barrier to such executions.

Indeed, although there had been a *de facto* moratorium on killing retarded prisoners following the Court's decision to address the constitutional issue, Alabama could hardly wait until the ink was dry on the *Penry* opinion before strapping Horace Dunkins, a mentally retarded offender with an IQ of 65, into the electric chair (his execution was a particularly grisly one; due to an improperly attached electrode, it took repeated surges of electricity to kill him). And Louisiana executed Dalton Prejean (with an IQ in the low 70's) on May 18.

Penry, with an IQ of 54, had contended that the 8th Amendment's ban on cruel and unusual punishment would be violated by his execution because it would be disproportionate to his degree of personal culpability. The Supreme Court disagreed, finding that there was no national social consensus that such executions are repugnant to the concept of justice. "While a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today." 109 S.Ct. at 2958.

Such a consensus is indeed emerging, and Kentucky, being the first state to pass an "MR" bill in the post-*Penry* era, has made a major contribution to a future 8th Amendment challenge to executing the retarded. Tomorrow, after all, is another day.

Speaking of consensus, there can be no doubt that there is an overwhelming consensus in Kentucky against executing retarded offenders. SB 172 passed both chambers of the General Assembly by stunning margins. Out of 138 legislators, only 2 voted against the bill. Other evidence of such a consensus exists in Kentucky. In December of last year a public opinion poll conducted by the University of Louisville's Urban Studies Institute questioned Kentuckians about their feelings on the use of capital punishment. *Attitudes in the State of Kentucky on the Death Penalty*, Vito & Keil (University of Louisville, December 1989). The researchers found that only 15% of Kentuckians supported the execution of retarded offenders.

Indeed, SB 172 was supported by an impressive array of organizations. Among the many groups which endorsed the legislation were the Association For Retarded Citizens and the American Association on Mental Retardation, the largest lay and professional advocacy organizations, respectively, for the mentally retarded community.

EXPANSION BILLS DEFEATED

The legislative news gets better and better. For not only was an MR bill passed, but several serious attempts to expand the scope of the death penalty and to constrict appellate review of death sentences were defeated in this session of the General

Kentucky Death Notes

Number of people executed since statehood	470
Number of people executed the electric chair	162
Number of people who applied for the position of executioner in 1984	150
Number of people now on death row	26
Number of Vietnam Veterans on death row	1
Number of women on death row	1
Number of juveniles on death row	1
Number of inmates who have committed suicide	1
Number whose trial lawyers have been disbarred or had their license suspended	6
Number of these lawyers who are now incarcerated	1
Number who can afford private counsel on appeal	0
Number sentenced to death for killing a black person	0
Percentage of death row inmates who are black	20%
Percentage of Kentucky population that is black	7%
Number of black prisoners who were sentenced by all white juries	1
Number of persons sentenced to death in Kentucky and later proven innocent	1

Assembly.

In a year in which the death penalty dominates political debate in our largest states and in which political candidates posture for TV campaign advertisements in front of huge photographs of executed prisoners, the Kentucky legislative successes take on added significance.

SB 172: PROHIBITION ON EXECUTING THE RETARDED

SB 172 provides that no one who is a "seriously mentally retarded offender", as defined in the Act, shall be executed. The modifier "seriously" should not be viewed as reducing the class of retarded offenders protected by the Act to an extraordinarily impaired sub-group of the mentally retarded population. It is not clear from the face of the bill why "seriously" is deployed. It is not a clinical term, and the definition of mental retardation used in the Act is one which would clearly protect all mentally retarded offenders.

Mentally retarded people are located in one of 4 categories: mild, moderate, severe, and profound. As one can see, there is no category of "serious" mental retardation. We will be most concerned with the "mildly retarded" category, which includes those who have an IQ between 55 and 70. Almost 90% of the entire mentally retarded population falls within this category. Note that the term "mild" is somewhat misleading. Mildly retarded people are in fact extremely impaired and disabled.

STATUTORY DEFINITION

Section 1 of the Act defines a retarded offender as someone "with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period." The bill goes on to define "significant subaverage intellectual functioning" as "an intelligence quotient of 70 or below."

The definition, then, sets out a 3 element test. The offender must exhibit both intellectual impairment and behavioral impairment. The final element concerns the timing of the onset of the disability.

This definition is virtually identical to that adopted by the American Association on Mental Retardation (AAMR), and is generally accepted across the country as the standard definition of mental retardation. For instance, it is the definition which the American Psychiatric Association employs in the revised third edition of the Diagnostic and Statistical Manual (DSM III-R). In fact, the AAMR definition is found elsewhere in the Kentucky Revised Statutes where it has been used for years in the context of involuntary commitments. See KRS 202B.010(1).

It is significant that the SB 172 definition of mental retardation is a virtual blueprint of the AAMR definition. This is because the AAMR has published a classification manual which defines in considerable detail just what is meant by such clinical terms as *"adaptive behavior" and "developmental period." See American Association on Mental Retardation, Classification in Mental Retardation* (H. Grossman ed. 1983). Accordingly, counsel should familiarize herself with this manual in order to divine the meaning of the clinical terms used in the Act.

SUBAVERAGE INTELLECTUAL FUNCTIONING

One part of the SB 172 definition which does not seem to necessitate a reference to the AAMR classification manual that the offender exhibits "significant subaverage intellectual functioning." The Act itself defines this term as meaning an IQ of 70 or below.

In fact, the AAMR classification manual also fixes the upper boundary of mental retardation at an IQ level of 70. However, the drafters of this definition acknowledge that "[t]his upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used." AAMR, *Classification in Mental Retardation*, at 11.

Inasmuch as the SB 172 definition of significant subaverage intellectual functioning would protect only those with IQ's of 70 or below, and not up through the 75 range, perhaps there is some logic in defining such offenders as "seriously" mentally retarded. In any event, counsel should not be dissuaded from initiating the protections of the Act simply because the client has an IQ score of 72 or 73 or even 76.

STANDARD ERROR OF MEASUREMENT

In fact, most IQ tests have a margin of error, known to clinicians as a "standard error of measurement." According to an authoritative psychiatric text, "there is a standard error of measurement, which is 3 to 4 points over or under the score obtained on the test." Kaplan and Sadock, *Comprehensive Textbook of Psychiatry*, Vol. II, p. 1729 (5th Ed. 1989). This 8 point bulge is referred to as the "zone of uncertainty." *Id.* This means, then, that an offender with an IQ score of 74 could still be diagnosed as mentally retarded because of the margin of error. Of course, such a diagnosis could not be reached absent additional clinical evidence of retardation. If the defense clinician diagnoses the client as mentally retarded, counsel should move to exclude the death penalty even if the score is in the low 70's and above the statutory threshold. The argument (in addition to the standard error of measurement) is that the arbitrary cut-off point contained in the legislation should not be followed where a qualified clinician, working from the AAMR classification manual, has reached a diagnosis of mental retardation.

Further, counsel should point out that the legislative intent was that the AAMR classification guidelines should apply, since the legislature saw fit to adopt a definition that amounts to a blueprint of the AAMR definition. Finally, counsel should exploit the absurdity of exposing a clearly impaired defendant to the death penalty simply because he scores 71 or 72 instead of 70. Should we really be splitting hairs in making these life and death decisions? Of course, even if the offender is not found to be within the purview of the Act, a low IQ is relevant at virtually every stage of litigation in a capital case (see below).

Counsel should be aware that the testing instrument itself can become a variable in the diagnosis. Two tests, the Stanford-Binet Intelligence Scale and the Wechsler Adult Intelligence Scale-Revised (WAIS-R) are the oldest and most carefully researched IQ tests. Other IQ tests, such as the Revised BETA, are not considered to be good instruments. If the prosecution expert uses such a test, you should be prepared to demonstrate on cross examination that such tests are not recognized as being appropriate instruments.

Counsel will sometimes encounter evaluators who administer an appropriate test, but in an inappropriate manner. It is not unusual, for instance, to find an evaluator who has administered, say, only two of the Wechsler subtests instead of the entire group. Also, be alert to any evaluator who uses a test designed for a different age group than your client.

Occasionally an evaluator will do little more than guess at an IQ score by drawing a dubious inference from other test data that have nothing to do with intellectual functioning. Any IQ score which is calculated from a score on a psychological test that does not measure intellectual functioning should be considered invalid.

It is essential that the evaluator have substantial training in the field of mental retardation (see *Competent Evaluations*, below).

BEHAVIORAL IMPAIRMENT

The second requirement in SB 172 is that of behavioral impairment. The bill requires that the intellectual impairment exist "concurrently with substantial deficits in adaptive behavior." Again, this is virtually identical to the behavioral prong of the AAMR definition. The DSM III-R, which also incorporates behavioral impairment as a diagnostic criterion, defines adaptive behavior as "the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group in areas such as social skills and responsibility, communication, daily living skills, personal independence, and self sufficiency." DSM III-R, at 31-32.

Scales such as the AAMR Adaptive Behavior Scales and the Vineland Social Maturity Scale can be used to determine a person's adaptive behavior. More commonly, the evaluator's clinical assessment is relied on.

Frankly, this requirement should not present much of a problem, for any impaired offender who commits a capital murder clearly has substantial deficits in adaptive behavior. Nevertheless, counsel should provide the clinician with reports from former teachers, classmates, friends, family members, etc., concerning the client's behavioral limitations. Did it take him 3 years longer than most children to learn to tie his shoes? This is the sort of thing you will need to explore. Keep in mind that, in an institutional setting like jail (where the meals may be delivered to the client, etc.) the client's behavioral impairments may not be obvious. This phenomenon makes it all the more important to explore the client's pre-institutional history.

ONSET OF DISABILITY

The final statutory requirement is that the disability must have manifested itself "during the developmental period." This simply means that the disability must have appeared before the age of 18. This element is typically demonstrated by securing the offender's school records, which will likely indicate failing grades and "social" promotions. Interviews with teachers and family members will also provide helpful information in this regard.

PROCEDURE

Section 2 of SB 172 requires that a defendant who seeks to demonstrate that he is a seriously mentally retarded offender shall raise the issue at least 30 days before trial. The Act guarantees the right to an evidentiary hearing, and it also provides that the prosecution "may offer evidence in rebuttal." The implication is that the prosecution may also have the defendant evaluated. In the event that this happens, make sure that you secure an order limiting the scope of the prosecution evaluation to the issue of mental retardation. *See Powell v. Texas*, __U.S.__, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989) (6th Amendment violation where state psychiatric exmination performed without notice to defendant or his counsel that exam would encompass issue of future dangerousness).

The Act further provides that the trial court must rule on the issue at least 10 days prior to the trial. In the event that the offender is ruled to be mentally retarded, the Act mandates that he not be "subject to execution" (all other punishments, including life without parole for 25 years, are available). In essence, a finding of mental retardation converts a death penalty case into a non capital prosecution.

EFFECTIVE DATE

Section 3 of SB 172 provides that the Act only applies to trials commenced after the effective date of the enactment, July 13, 1990. However, there is a compelling argument that every retarded offender sentenced to death before the effective date of the Act should also be spared from the death penalty. The argument is that the passage of SB 172 reflects a social consensus in Kentucky that executions of the retarded constitute cruel and unusual punishment in violation of Section 17 of the Kentucky Constitution ("...nor cruel punishment inflicted"). This is a particularly powerful argument in light of the fact that only 2 of 138 legislators voted against it. The public opinion survey, mentioned previously, is also relevant in establishing this consensus.

Indeed, the Georgia Supreme Court has accepted this very argument. In *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989) the court held that executing retarded offenders would violate the state constitutional ban on cruel and unusual punishment. The Court noted that the Georgia legislature's prohibition on executing the retarded would not by its terms apply to Fleming, who had been on death row for 10 years. Nevertheless, "[t]he legislative enactment reflects a decision by the people of Georgia that the execution of mentally retarded offenders makes no measurable contribution to acceptable goals of punishment. Thus, although there may be no 'national consensus' against executing the mentally retarded, this state's consensus is clear." 386 S.E.2d at 342. (footnotes omitted).

ADVERSE TRIAL COURT FINDINGS

As indicated, the Act provides that the trial court makes the determination as to whether or not the offender meets the legislative definition of mental retardation. However, Section 2 of the Act also says that "[t]he pretrial determination of the trial court shall not preclude the defendant from raising any legal defense during the trial." In the event of an adverse trial court ruling in a close case, counsel should exploit this language and argue that the defendant has a right to a jury determination on this issue, as well.

Certainly, an adverse ruling cannot bar the presentation of evidence of the defendant's impairment. *See Crane v. Kentucky*, 476 U.S. 688, 106 S.Ct. 2142, 2145, 90 L.Ed.2d 636 (1986) (trial court's exclusion of testimony at trial concerning circumstances of confession on ground that issue of voluntariness had been resolved adversely against him prior to trial "deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense").

Such evidence is highly relevant both to issues of criminal responsibility and mitigation of punishment. KRS 532.025(2)b7 specifically provides that mental retardation is a mitigating circumstance in capital cases. And the Supreme Court has held that "[i]t is clear that mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act." *Penry, supra*, 106 S.Ct. at 2957. Under some circumstances, mental retardation can even support an insanity defense. KRS 504.020(1).

But can the defendant actually relitigate the statutory prohibition in SB 172 at the trial itself? In Kentucky, the answer should be yes. The argument proceeds as follows. The statute itself provides that the court's adverse pretrial ruling may not prohibit the defendant from raising any "legal defense" during the trial. The statute itself also provides that a finding of mental retardation is a legal defense to execution. Thus, the offender should be entitled to a jury finding on the question of mental retardation. Counsel should prepare a special verdict form and instruction on the issue of mental retardation as defined by the statute. If the jury makes a finding that the client is retarded, the death penalty should not be an option. Under no circumstances should the jury ever be in-

formed of the trial court's adverse ruling.

In essence, the argument for submitting the issue to the jury (after an adverse ruling by the court) is that there is a right to jury findings on factual issues relevant to sentencing. Granted, the Supreme Court has recently made it emphatically clear that there is no 6th Amendment right to jury findings on sentencing issues in capital cases (such as the existence of aggravating factors). "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." *Clemmons v. Mississippi*, ___ U.S. ___, 46 Cr.L. 2210, 2212 (3/28/90). However, there is such a right under Kentucky law. In *Wilson v. Commonwealth*, 765 S.W.2d 22 (Ky. 1989), the Court "reversed the sentence of life imprisonment without parole for 25 years because the jury failed to find the existence of a statutory aggravating factor." On remand, "the judge refused to allow Wilson to be sentenced by a jury" and instead imposed a life sentence. *Id.* The Supreme Court remanded. "Clearly, under Kentucky law a criminal defendant has a statutory right to have his sentence set by a jury." *Id.*

COMPETENT EVALUATIONS

It is extremely important that your evaluator has had adequate training in the area of mental retardation. Keep in mind that a clinical psychologist may not necessarily be qualified to evaluate whether an offender is retarded. Mental retardation is very different from mental illness. It is for this reason that the ABA *Criminal Justice Mental Health Standards*, Note 4, 7-11 (1984) preclude mental health professionals from testifying, evaluating or participating in trials involving mentally retarded individuals if the professional's expertise does not include substantial training and expertise in the field of mental retardation.

Special education teachers and speech or language pathologists are often valuable in assessing mental retardation. On the other hand, psychiatrists and clinical psychologists are not qualified to do these assessments unless they "have received extensive, formalized, post-graduate education and training in identifying specific functional deficits or habilitation needs of persons with mental retardation or developmental disability." ABA *Standards*, note 4, 7-11, Commentary at 14.

Of course, the process of assessment itself must also be competent. This has been adequately addressed in preceding sections.

MENTAL RETARDATION AND CONFESSIONS

Space will not allow a thorough discussion of the full impact of an offender's mental retardation on all phases of the criminal process. We have already alluded to the issues of criminal responsibility and mitigation of punishment. Competency to stand trial is another area that can be impacted by mental retardation.[1]

One area that we will touch on briefly, though, concerns confessions. The "confession of a retarded suspect should always be scrutinized. First, mentally retarded citizens are abnormally susceptible to coercion and pressure. Thus, voluntariness of the confession can be an issue. Second, the mentally retarded client may confess to a crime he didn't commit out of a desire to please someone perceived to be an authority figure. Thus, reliability of the confession can be an issue. Also, mentally retarded citizens tend to answer affirmatively to leading questions. Sigelman, Winer & Schoenrock. *The Responsiveness of Mentally Retarded Persons to Questions. Education and Training of the Mentally Retarded*, 17, 120-124 (1982). Finally, a retarded suspect may not understand the *Miranda* warnings. Thus, the 5th and 6th Amendments may be violated during the interrogation process.

The following capital case addresses the inability of a retarded offender to understand the *Miranda* warnings. In *Smith v. Kemp*, 855 F.2d 712 (11th Cir. 1988) *vacated for rehearing en banc*, 873 F.2d 253 (11th Cir. 1989), *district court aff'd by equally divided court*, 887 F.2d 1407 (11th Cir. 1989) *(en banc)* waiver of *Miranda* rights was not shown to be knowing and intelligent where the accused had I.Q. of 65 and a mental age of 10 or 11. "[I]t would be very unusual with a person with this IQ to be able to intelligently appreciate what he is doing when his *Miranda* rights are read to him." There was nothing in the record to show that prior brushes with the law taught Smith anything, officers took no particular care with reading him his rights, and under stress Smith would likely not have understood them even then.

There is a helpful Kentucky decision from the last century on this subject. In *Butler v. Commonwealth*, 63 Ky. (2 Duv.) 435, 435-436 (1865) the confession of a boy "of crude and feeble mind and irresolute will" was held to be inadmissible when it was shown that the confession was made as an angry crowd threatened to hang the boy (and had already hanged another person for the crime).

FOOTNOTE

[1] A competency assessment instrument designed exclusively for retarded offenders is currently being field tested and will be published in 1991. One of the designers of the instrument, Dr. Caroline Everington, described the special problems presented retarded offenders and the need for a specialized competency instrument in a previous issue of *The Advocate*. Vol. 11, No. 4, p. 38-39 (June 1989).

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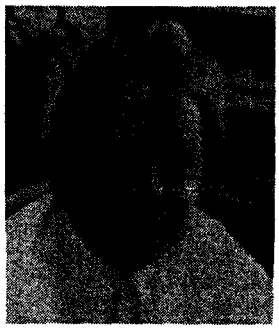
KENTUCKY DEATH PENALTY MANUAL

The Revised 4th Edition of the D.P.A. Death Penalty Manual is now available. Among other articles, it reproduces an excellent article by South Carolina Attorney John Blume about defending a mentally retarded client. Contact Patsy Shryock at 502-564-8006 for more information about obtaining a copy of the manual.

THE REST OF THE PENALTY

The Department of Transportation's Policies Regarding Suspension of your Client's Driving Privilege



Rob Riley

In order to effectively represent the client charged with traffic offenses, including DUI, it is necessary to be aware of more than those criminal penalties that are outlined in KRS. A crucial question in every traffic case is, What effect will this have on my driver's license? This is dependent upon the current policies and procedures of the Department of Transportation (DOT).

With this in mind, the Department of Transportation agreed to provide the following written answers to submitted questions. The submitted questions represent those problems I believe arise most often in a day-to-day traffic court caseload. In addition, the Department of Transportation has agreed to answer questions on a periodic basis and to allow *The Advocate* to print any future changes in policies.

Questions of a general interest may be forwarded to me, and I will direct them to the appropriate representatives of the DOT.

STANDARD SUSPENSION ISSUES

1)When a person is convicted of a DUI, KRS 189A.010, his/her license is suspended for a period of time pursuant to KRS 189A.070.

After the passage of the statutory period, what must the person do to reinstate his/her driving privilege?

The individual is required to pay a $30 reinstatement/relicensing fee as mandated by KRS 186.440(12) and 186.450(1) and submit to the written and eye examination as required by KRS 186.480(2).

Is this procedure the same regardless of the level of offense pursuant to KRS 189A.010?

Yes.

Does KRS 189A.080(3) mandate a different result for first offenders?

KRS 189A.080(3) requires the license surrendered to the court upon a person's conviction of a first offense DUI to be returned to them at the termination of the suspension period provided no other license suspension action is in effect at the time of the reinstatement application. The $30 reinstatement/relicensing fee and written and eye exam are still required.

2)189.040 specifically allows first offenders to reduce the suspension period from 6 months to 30 days by enrolling in an alcohol or substance abuse treatment program.

Must the person complete the program within 30 days to allow reinstatement?

Yes, completion in an approved Alcohol Driver Education Program is required prior to applying for reinstatement.

How is Transportation Cabinet notified of any failure to complete this program and what action does Transportation Cabinet take?

The individual must have successfully completed all phases of an approved Alcohol Driver Education Program prior to applying for reinstatement. Therefore, a failure to complete notice is not necessary.

Assuming the person has acquired a new license, following the 30 day period, how is he/she notified of any suspension for failure to complete and does he/she get a hearing?

N/A

3)KRS 189A.010 does not specifically refer to Transportation Cabinet in situations involving second or third offenders, although an alcohol or substance abuse program is required.

What is Transportation Cabinet policy regarding completion of these statutory programs in relation to reinstating the driving privilege after the passage of the KRS 189.070 statutory time periods?

Although completion of an Alcohol Driver Education Program may be required as a part of the criminal penalties imposed by the court on second or subsequent convictions of DUI, such completion does not affect the eligibility of an individual to apply for the reinstatement of their driving privilege.

MULTIPLE OFFENDER ISSUES (THE TWO FIRST'S PROBLEM)

1)Assuming a person with no prior convictions for DUI, KRS 189A.010, is arrested for 2 separate offenses. Assuming further that he enters a plea or is otherwise convicted at the same time on both offenses:

How would Transportation Cabinet treat these convictions?

The license suspension period for DUI begins on the date of conviction. In your scenario, since both convictions would occur on the same day, the suspension periods would run concurrently giving a total suspension period of 1 year (6 months for one offense, 1 year for the second offense).

Is the offender able to reduce his/her suspension period by attending an alcohol or substance abuse treatment program?

Yes, on the first offense only. However, since both convictions occur on the same date, the suspension period for these convictions would run concurrently. The offender would be eligible to attend an ADE Program on the first offense only. However, it would not benefit the licensee to attend an ADE Program since a 1 year suspension would be imposed for the second DUI conviction.

What would be the length of his/her reduced suspension, if any?

See above.

OUT-OF-STATE LICENSE ISSUES

1)If a person is convicted in Kentucky of DUI but has a driver's license from another state:

Does Transportation Cabinet record the conviction and how?

No.

Does Transportation Cabinet notify the other state and how?

Yes. The conviction is sent on to the state of record. However, no action is taken in Kentucky.

Does Transportation Cabinet consider any convictions from the other state in calculating any suspension period in Kentucky?

A recent Court of Appeals decision said the Transportation Cabinet could not enhance the license suspension penalties for a DUI conviction from out-of-state. Both Ky. Appeals Court decisions dealt with applying a Kentucky conviction to an out-of-state on the record. Others dealt with an out-of-state received where a Kentucky conviction is on the record. We are currently in the Court of Appeals for clarification of KRS 186.570(3) concerning how to apply an out-of-state conviction.

PROCEDURE IN RELATION TO OTHER LICENSE SUSPENSION ISSUES

In regard to habitual violators, as defined in KRS 186.642, how does the suspension time run for a DUI suspension or Driving on a Suspended Operator's License suspension when the person is already revoked as a habitual violator?

The suspension period for a conviction of DUI will begin on the date of conviction. All other suspension periods begin on the effective date of the withdrawal (the date the cabinet takes action against the individual's driving privilege). When an additional suspension period is imposed, the suspension period is not added to the expiration of an existing suspension. Each suspension is treated independently.

Do the suspension periods run concurrently or consecutively?

See Part 1.

How does the suspension time run if the person's license is suspended for DUI or Operating on a Suspended License and is later adjudicated as a habitual violator?

See Part 1.

Do the suspension periods run concurrently or consecutively?

See Part 1.

If a person is suspended pursuant to KRS Chapter 187 for failure to satisfy a judgment, how would any suspension period for DUI or Operating on a Suspended License be computed?

See Part 1.

REFUSAL ISSUES

1)Pursuant to KRS 186.565, the driving privilege can be suspended due to the failure of the suspect driver to consent to a breath, blood, or urine test.

In light of the fact that 186.565(1) refers to consent "for the purpose of determining the alcoholic content of his blood," what action does Transportation Cabinet take if the test is requested for substances other than alcohol, such as drugs, and the suspect driver refuses?

The same suspension would result regardless of whether the refusal action is a result of a request from an officer for the determination of the B/A level due to alcohol or other substances including illegal narcotics which might impair one's driving ability.

In light of 186.565(7), which *seems* to allow reduction of the 6 month suspension period for refusal by completion of the alcohol education program, what is Transportation Cabinet's position in this regard?

Based upon an Attorney General's opinion, currently under review by the Ky. Court of Appeals, the cabinet does not honor a completion in an Alcohol Driver Education Program in order to negate a suspension of the individual's driving privilege for refusal of the chemical test.

If a suspect driver refuses the test and faces suspension for refusing, and subsequently is found guilty of DUI and likewise faces suspension, how does Transportation Cabinet calculate the total suspension period, without regard to the purported reduction provision of 186.565(7)?

The DUI suspension period would begin on the date of conviction. The process on the RCT (refusal of the chemical test) would be somewhat different since it is an administrative action imposed by the Transportation Cabinet. Upon receipt of a perfected affidavit, the Division of Driver Licensing notifies the individual of their right to request a hearing. If there is no response within 15 days, a suspension is imposed beginning at the termination of this 15 day period. This suspension would be for the period of 6 months.

If the individual requests a hearing, the request must be in writing and received within the 15 day "request period." Once received, the individual is scheduled for a hearing as soon as possible. At this hearing, the facts of the refusal are discussed. These include:

1)Whether the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle in this state while under the influence of intoxicating beverages or other substances which may impair one's driving ability.

2)Whether or not the person was properly placed under arrest for that offense.

3)Whether the officer observed the licensee for a minimum of 20 minutes prior to requesting him to submit to the test.

4)Whether or not the person refused to submit to the chemical test after being requested to do so by the officer.

5)Whether the officer warned the individual of the consequences of their refusal and advised him of the Implied Consent Law.

6)Whether after doing so, the officer again asked the individual to submit to the chemical test.

7)Whether the individual again refused.

At the conclusion of the hearing, an order is written recommending either suspension for a period of up to 6 months of the individual's driving privilege or that "no action" be taken against the individual's driving privilege. This order must be signed by the Commissioner of the Dept. of Vehicle Regulation within 10 days of the date of the hearing. The individual is notified of the commissioner's ruling immediately thereafter. If the order is to suspend the individual's driving privilege, the 6 month suspension will begin on the date of the commissioner's final order. Any person aggrieved by the decision of the commissioner may appeal to the circuit court in their county of residence or Franklin Circuit Court within 20 days of the date of the final order.

If, in addition, there is also an Operating on a Suspended License conviction, how would that suspension period be calculated in relation to other periods?

All suspension periods for driving while suspended convictions begin on the effective date of the withdrawal (the date the cabinet takes action against the individual's driving privilege).

Q) List all offenses for which revocation is mandatory and the periods.

A): OFFENSE	1ST	2ND	3RD/ SUBSEQUENT
Driving under the influence	*6 months	1 year	2 years
Driving while suspended (Under KRS 186.620)	6 months	6 months	6 months
Driving while suspended (Under KRS 189A.090)	twice the original length of suspension		
	Also: Class B Misdemeanor	Class A Misdemeanor	Class D Felony
Manslaughter	6 months	1 year	2 years
Murder/Manslaughter	5 years	—	—
Driving a motor vehicle which is not a motor vehicle while under influence	6 months	1 year	2 years
Perjury/false application	6 months	1 year	2 years
Any felony in which a motor vehicle is used	6 months	1 year	2 years
Convictions or forfeiture of bail upon 3 convictions of reckless driving within 12 months	6 months	1 year	2 years
Conviction of driving a motor vehicle involved in an accident and failing to stop and disclose his identity	6 months	1 year	2 years
Conviction of theft of a motor vehicle or any of its parts	6 months	1 year	2 years
Failure to have in full force and effect the security required by subtitle 39 of KRS 304	none	1 year	2 years
Refusal of the chemical test	6 months	6 months	6 months
Conviction of fraudulent use of a driver's license or use of a fraudulent driver's license to purchase or attempt to purchase alcoholic beverages	6 months	1 year	2 years
Assault and battery with a motor vehicle	6 months	1 year	2 years
Failure to answer a citation or summons	Indefinite (until the citation paid)		
Unlawful operation of a motor vehicle	6 months	1 year	2 years
Conviction of being an habitual violator	2 or 5 years depending upon the driving record of the individual		
Unsatisfied Civil Judgment	15 years or until the judgment is satisfied		
State Traffic School	If an individual does not comply with the court order to attend State Traffic School, an indefinite suspension is imposed until the compliance is met.		

*Licensee is eligible to reduce this suspension to 30 days by completing an approved Alcohol Driver Education Program.

Q) List all offenses for which revocation is discretionary and the periods.
A):

	Suspension Period	Alternative	Is a Hearing Offered?
Accumulation of 12 "penalty" points within a 2 year period			
1st Offense	6 months	1 year probation	Yes
2nd Offense	1 year	2 year probation	Yes
3rd Offense	2 years	4 year probation	Yes
Racing/Eluding 26 miles per hour over the posted speed limit within a 5 year period			
1st Offense	90 days suspension possible	6 month probation	Yes
2nd Offense	1 year	2 year probation	Yes
3rd Offense	2 year	4 year probation	Yes

INCONSISTENT LAWS

The courts will decide whether Franklin County officials were negligent in releasing Alvin Dean Sons from jail in 1988, after he was arrested for public drunkenness. Mr. Sons left the regional jail and darted in front of a car on the East-West Connector and was killed. His blood alcohol level was 4 times the level at which a person is legally considered drunk.

However, no court ruling is needed to point an accusing finger at a negligent General Assembly which, for nearly a decade, has eased state laws against public drunkenness but has failed to replace the old statutes with clear laws governing what law enforcement officers are to do with people who are drunk in public places.

As a result of a task force study recommending the decriminalization of public drunkenness, the legislature in 1980 changed state law to provide that a person drunk in public be taken home by law enforcement officers, to a treatment program or, if neither was available, to a detention center. The General Assembly, however, did not provide funds to pay for treatment programs. The decriminalization law was amended in 1982 to require a person drunk in public to be taken to a treatment facility, but again, no money was appropriated for those facilities. In 1986, the legislature dropped a jail sentence for first and second offenders, but required that they be detained up to 8 hours unless someone picked them up at the jail, they posted bail, were released by the court or they could safely care for themselves.

There's the problem. Franklin District Judge Joye Albro says federal case law prohibits requiring bail or jail detention for crimes that do not carry a jail term, which Kentucky law does not for the first and second offenses. "A person's basic liberty not to be held in jail - if they could not be put in jail for that which they are charged - overrides an inconsistent statute," Judge Albro says. It is this inconsistency, beginning in 1980, that marks the history of decriminalization of public drunkenness by the legislature.

Nearly a decade ago, a task force determined - rightly - that alcoholism is an illness and should be treated not as a crime, but as a social and health issue. Kentucky's jails are crowded enough without adding to them people whose only offense is public intoxication. But, by failing to fund treatment programs called for by state law and giving law enforcement officials at best muddled instructions on how to handle persons drunk in public, the General Assembly has failed its responsibility. Certainly, it failed Alvin Dean Sons.

- *State Journal* Editorial.
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ISSUES NOT RELATED TO DUI:

How is the decision made? Does the person get a hearing?

The decision of whether or not to suspend an individual's driving privilege for any discretionary suspension is left up to the hearing officer. If the individual fails to request or does not appear at the hearing, the suspension is automatically imposed. A hearing is offered prior to the imposition of a suspension for any of these offenses.

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RIGHTS CARDS AVAILABLE

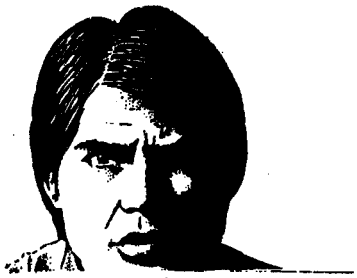
My lawyer has told me not to talk to anyone about my case, not to answer any questions, and not to reply to accusations. Call my lawyer if you want to ask me questions, search me or my property, do any tests, do any lineups, or any other identification procedures. I do not agree to any of these things without my lawyer present and I do not want to waive any of my constitutional rights.

$5.50 Covers Postage and Handling per 100 cards.

Send check or money order payable to the Kentucky State Treasurer to:

RIGHTS CARDS
DPA
1264 Louisville Road
Frankfort, KY 40601

ANGRY MEN LIKELY TO DIE SOONER, STUDY SHOWS



MONTEREY, Calif. - Do you get riled when the guy in front of you at the grocery checkout has 10 items instead of the 9 allowed? When the bank customer ahead of you doesn't fill out her deposit slip until she reaches the teller?

You probably suffer high levels of anger, hostility and mistrust - traits researchers now say may be the among the most important behavioral predictors of disease and death. Such hostility causes the body to release chemicals linked to heart disease and other ailments, new studies show.

One reveals that men who scored high on a "hostility scale" had a death rate more than 5 times higher than men with low scores. "Trusting hearts last longer," says Dr. Redford Williams, professor of psychiatry at Duke University Medical Center in North Carolina. Williams, a leader in the study of personality and heart disease, discussed his findings at the annual American Heart Association science writers' meeting.

His research shows a biological link to anger and behavior and appears to refine the controversial studies over the past decade of the "Type A" personality. Studies in the 1970s by San Francisco cardiologists Meyer Friedman and Ray Rosenman showed that Type A men - characterized by impatience, ambition, hostility and hurriedness - were twice as likely to suffer heart disease as their more mellow Type B counterparts. In recent years, however, researchers have questioned the Type A theory.

Williams found that only the hostility component of the theory actually is linked to higher disease and death rates. In a study of 118 lawyers he followed for 25 years, beginning with a personality test during law school, he found that those with the highest "Ho" scores - for hostility - died at a rate 4 times higher than those with low "Ho" scores. After 25 years, 20% who had scored in the highest quarter on the hostility scale had died, compared with 5% of those who had scored lowest.

Narrowing down the "Ho" scale, Williams and his colleagues discovered that very certain hostility characteristics were more closely associated with the higher death rates. Among them: a cynical mistrust of peoples' motives, frequent anger and the open expression of anger. The attorneys who scored highest on these 3 traits had a 25-year death rate 5.5 times higher than those with lower scores.

There is no evidence to support the common belief that people are better off expressing their anger rather than keeping it to themselves, Williams said. The study strongly suggests that other Type A traits - being a workaholic, hurrying, talking fast and frequently interrupting people - are not associated with higher risk of disease or death. "We're talking here about attitudes and beliefs such that if you are in a bank line that's moving slowly, you're immediately thinking, 'Why aren't people ready with their checks?'" says Williams. "You may not believe this, but there are a lot of people out there who don't have thoughts like this."

At his laboratory at Duke, Williams said his colleagues have found that people who score high on the "Ho" scale undergo much greater increases in blood pressure when they are harassed.

Because situations that annoy or harass are so common, he thinks the "more pronounced biological reactivity of hostile people" may be a mechanism by which their hearts and blood vessels are damaged. In fact, another of his studies shows that the branch of the nervous system intended to slow the heart during times of stress kicks in much later in hostile men. The stressful and hazardous chemical reactions caused by threatening situations last longer among these men.

"Trusting hearts may last longer because they're protected against the ravages ... of the nervous system," Williams says. Or, he adds, these protective responses among non-hostile men "may even explain why trusting hearts are trusting."

ELLEN HALE Gannett News Service, Information for this story was also gathered by The Associated Press.

6TH CIRCUIT HIGHLIGHTS

Donna Boyce

PROBABLE CAUSE

Ross v. Meyers

In *Ross v. Meyers*, 883 F.2d 486 (6th. Cir. 1989), the Court of Appeals for the Sixth Circuit upheld a jury's finding that a state highway patrol trooper had no probable cause to arrest, charge, confine and prosecute Ross for driving while intoxicated. The issue arose in an action involving claims of false arrest, false imprisonment, malicious prosecution and intentional infliction of emotional distress.

Around 2:30 a.m., Trooper Meyers arrived at the scene of a distressed motor vehicle with its front wheels lodged in a ditch off the shoulder of the highway. Ross, driver of the vehicle, had been involved in a single vehicle accident. Meyers observed that Ross had a moderate odor of alcohol on his breath, that he staggered as he walked, that his eyes were bloodshot and that he had difficulty speaking and understanding directions. Meyers arrested Ross, took him to the sheriff's office, charged him with DWI. Although Ross volunteered to submit to a blood alcohol test, Meyers refused to take him to the county hospital approximately 1/10th of a mile from the sheriff's office.

In this case, the existence of probable cause was an essential element of the malicious prosecution claim and an affirmative defense to the false arrest and false imprisonment claims. The Court noted that the jury was entitled to reject Meyers' testimony and, even if no counter-testimony had been offered, the jury was free to conclude that Meyers lacked credibility. The Court further noted that the evidence did not conclusively support a finding of probable cause. Ross may have only had one glass of beer 4 hours earlier and had only a moderate odor of alcohol on his breath. Lack of sleep may have accounted for his bloodshot eyes at 2:30 a.m. Ross provided an explanation for his lack of coordination and confusion, *i.e.*, that he was exhausted as a result of having expended hours in his effort to find help and/or extricate his vehicle from the mud. It was obvious that Ross' mud caked shoes, which were falling apart, impeded his ability to walk.

The court concluded that it was not clearly erroneous for the jury to conclude that Meyers acted without probable cause.

IAD

Norton v. Parke

In *Norton v. Parke*, 892 F.2d 476 (6th Cir. 1989), the Sixth Circuit held that a state prisoner's failure to strictly comply with the provisions of the Interstate Agreement on Detainers in trying to resolve charges pending in another state barred him from seeking federal habeas corpus relief on a speedy trial issue.

Norton, a Kentucky inmate, had charges pending against him in Ohio. While imprisoned in Kentucky, Norton filed a motion to dismiss the Ohio indictment due to a violation of his right to a speedy trial. The Ohio court denied the motion, ruling that the IAD applied and that Norton failed to avail himself of its provisions. Norton immediately filed a second motion demanding that Ohio either proceed to trial or withdraw the complaint against him. This time he expressly referenced the provisions of Article III of the IAD as incorporated under KRS 440.450. The Ohio court denied the motion because Norton failed to invoke the IAD with the prescribed forms.

Four years later, Norton filed a petition in federal court seeking habeas relief. Despite Norton's failure to formally comply with the IAD, the District Court found a trial delay of 7 years to be a denial of his Sixth Amendment rights. The Sixth Circuit reversed, holding that prisoners challenging extradition actions must pursue the remedies provided by the IAD before seeking habeas relief in federal court. The court found that Norton's failure to formally invoke the IAD — *i.e.*, his failure to use the required IAD forms — resulted in a failure to exhaust state remedies.

4TH AMENDMENT EXCESSIVE FORCE STANDARD

Lewis v. City of Irvine

The Sixth Circuit ordered a new trial in a case against an Irvine city police officer accused of using excessive force in fatally shooting the operator of an Irvine game room. *Lewis v. City of Irvine*, 899 F.2d 451, 19 S.CR. 8, 26 (6th Cir. 1990).

In 1984, Donald Lewis leased a building in downtown Irvine, Kentucky, which he converted into a family residence and a public game room. After he opened for business, local residents voiced complaints about the unruly behavior of some game room patrons. To remedy this, the City of Irvine adopted an ordinance regulating loitering and profane and loud talking on the sidewalks and streets in front of business places within the corporate city limits. The ordinance provided no definition for 'loitering.'

Soon after adopting the ordinance, the city of Irvine hired Mike Miller to serve as a City police officer. The confrontation underlying this suit occurred less than three weeks after Miller had been on the job.

On that date, Lewis was outside the game room sweeping the sidewalk and watching people leave church services. Miller arrived at the game room and instructed Lewis and others on the sidewalk to stop loitering. Lewis objected and directed Miller to contact the mayor to resolve the dispute regarding whether Lewis was, in fact, violating the loitering ordinance. Miller summoned the mayor over his radio, and then resumed his patrol route until he was informed that the mayor was on his way. Miller returned to the game room and stepped out of his car. The sidewalk was clogged with people, including Lewis and his son Tim who stood with his hands clenched in the pockets of his pants. Tim walked slowly toward Miller, who in turn grabbed or hit Tim. Tim then swung at Miller, prompting Miller to draw his gun from its holster either to keep it from Tim's reach or to

threaten Tim. Lewis responded by grabbing for Miller's arm. A struggle ensued in which Miller's gun discharged a single bullet from close range into the back of Lewis's neck. Lewis died instantly.

At trial, the magistrate granted the City's directed verdict motion. The claims against Miller were submitted to a jury which returned a verdict in his favor.

New Trial in Suit Against Officer

A 3-judge panel granted a new trial to an Estill County woman, Patricia Ann Lewis and her son, Timothy who lost a multi-million-dollar civil suit she filed against Irvine police officer, Mike Miller who fatally shot her husband, Donald Lewis, 41 in the neck in October 1984 during a fight in front of the pool room the elder Lewis operated.

Miller was tried for Lewis' murder in 1985, but found innocent. He resumed his job on the city police force.

The Kentucky Post. Reprinted with permission.

The 6th Circuit held that a new trial was necessary to resolve the excessive force claim against Miller because the jury instructions introduced inappropriate state of mind factors and employed an incorrect legal standard.

Specifically, the Court found that the instructions regarding the excessive force claim against Miller improperly framed the issue in 14th Amendment substantive due process terms when the claim properly should have been analyzed under the 4th Amendment and its reasonableness standard.

Additionally, the instructions repeatedly referred to Miller's state of mind — a factor that has no relevance in the constitutional excessive force inquiry. An officer's subjective good faith has no bearing on the existence or absence of a constitutional violation for the use of excessive force. The inquiry is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

DONNA L. BOYCE
Assistant Public Advocate
Frankfort

DYING IN THE UNITED STATES

The 1988 Vital Statistics Report, National Center for Health Statistics revealed that 9 preventable chronic diseases are responsible for 52% of the deaths in this country. Nationwide in 1988, homicide deaths ranked 11th as a cause of death:

	CAUSES OF DEATH	# OF DEATHS
1.	Heart Diseases	767,400
2.	Cancer	488,240
3.	Cerebrovascular	150,300
4.	Accidents	97,500
5.	Lung	81,960
6.	Pneumonia-flu	77,330
7.	Diabetes	39,610
8.	Suicide	30,260
9.	Liver Ailments	26,080
10.	Atherosclerosis	23,700
11.	Homicide	22,190
12	Aids	16,210

HOMICIDE

Homicide rates were the highest in the 25-34 year old category with 16 deaths per 100,000 persons.

A study released by the Injury Prevention Center at John Hopkins University on March 1, 1989 determined that more very young children die from murder than from any other category of injury causing death.

From 1980-1985 a total of 1,250 children under one year of age died of homicide, 1/3 due to "child abuse", 11% from strangulation or suffocation, 3% from drowning, 3% from stabbing and 5% from firearms; 6.5% died from neglect and abandonment.

MOTOR-VEHICLE DEATHS

Motor vehicle-related accidents killed the most children. In the 6 years studied 22,174 children died, that is 37% of all injury-related child deaths.

A study done by Dr. Robert J. Brison of the Kingston General Hospital, Kingston, Ontario said that children 5 years of age or younger are more likely to be killed in parking lots or by their parents backing out of the driveway than in traffic accidents. By the same token, older children are injured and die from darting out into traffic.

In 1988, 837 people in Kentucky died in traffic accidents and 46,645 people died nationwide.

HEART DISEASE

Heart disease, strokes and breast cancer are illnesses for which smoking is considered a risk factor. Lung cancer kills 126,000 Americans each year. Breast cancer kills 41,000 people per year.

Along with smoking, an over-weight condition, high blood pressure, drinking and lack of exercise were other preventable risk factors.

The average state expenditure on chronic disease control and prevention is 66 cents a person per year.

Smoking in the United States went down from 34% of the population to 29% in 1987.

EVIDENCE IN CRIMINAL CASES

Looking at the New Evidence Code- Part II

David Niehaus

This is the second part of a series of articles about Kentucky's proposed evidence code.

PROCEDURAL RULES

Since the last column, the Ky. Supreme Court decided an important case, ***Drumm v. Commonwealth***, Ky., 783 S.W.2d 380 (1990). This case adopts a portion of the Federal Rules of Evidence concerning business records [FRE 803-(4)].

In addition, concerning DNA testing, I received and forwarded to the main office of the Department of Public Advocacy a copy of an article by Joel E. Cohen, in the *American Journal of Human Genetics*, Vol. 46, p. 358 (1990), which in detail examines the statistical and mathematical assumptions underlying the predictions of non-coincidental match in DNA testing techniques in use today. The article concludes that the statistical projections made by the proponents of DNA testing may be erroneous by "many orders of magnitude." This is an important component of showing the lack of scientific acceptance of DNA testing and should be employed in any DNA testing case.

Also in this article I continue a review of the proposed *Kentucky Rules of Evidence* (KRE) and focus on the procedural rules that will govern objections, preservation of error and control of court proceedings.

ADOPTION OF FRE 8.03(4)

Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990) is a case that presents several issues of evidence law. The major problem presented by the case, according to Justice Leibson, was admission of statements of the children pursuant to KRS 421.355. This statute allows presentation of out-of-court statements of child victims of physical or sexual abuse upon determination by the trial court that "the general purpose" of the evidence is such that the interest of justice will be served by the admission and the statements are found to be reliable based on a number of considerations. Justice Leibson noted that this particular statute "requires none of the traditional reasons for making exceptions to the hearsay rule." *Drumm*, at 382. The Court decided that questions of preservation of the issue were not important in this case because the statute "in its entirety" was an unconstitutional exercise of "judicial rule-making power by the General Assembly" and should not have been used in the first place.

This case is a forceful articulation of the present Court's understanding of its rule-making power under Section 116 of the Constitution of Kentucky. The Court notes that before 1975, "the line between judicial and legislative power was not clearly defined". However, the Court now holds that Section 115 and 116 establish judicial rule-making power and that, in particular, Section 116 gives authority to the Supreme Court to prescribe the rules of practice and procedure for the Court of Justice. The Court specifically declines to extend comity to the statute because it fails the "test of a statutorily acceptable substitute for current judicially mandated procedures." In particular, this statute [421.355] fails because exceptions to the hearsay rule "are grounded not just on need, but on guarantees of trustworthiness which are the substantial equivalent of cross-examination." *Drumm*, at 382-383.

After disposing of the statute, the Court determined on pages 384-385 that FRE 803(4) should be adopted. The text of the rule is set out in the opinion and provides that statements made for purposes of medical diagnosis or treatment, describing medical history, past or present symptoms, pain, sensations or the inception or the general "cause" or external source thereof is not hearsay so long as it is "reasonably pertinent to diagnosis or treatment." In *Drumm*, the Court noted that statements made to a physician consulted solely for the purpose of testifying as a witness have less reliability than evidence admitted under the traditional treating physician rule. Therefore, under the approach adopted by FRE 403 (exclusion on grounds of confusion, unfairness or prejudice), the trial court in this case was directed to decide the hearsay question on each out-of-court statement. The Supreme Court relied on a 4th Circuit case, *Morgan v. Foretich*, 846 F.2d 941 (4th Cir., 1988) as a basis for the ruling. An explanation of the underlying purpose of FRE 803(4) is found in *U.S. v. Pollard*, 790 F.2d 1309, 1313 (7th Cir., 1986). *Pollard* also establishes the point that statements made with an intent to "facilitate" diagnosis or treatment do not qualify nor do statements of fault.

Drumm is an important case not only for child sexual or physical abuse cases, but also for the application of rules concerning uncharged misconduct, statements to physicians, and statements found in medical records. The case states the philosophy of "comity" cases. It is worth noting that 3 justices dissented from the adoption of FRE 803(4), primarily because it was adopted outside of the rules committee process. The dissenting justices also noted the strong legal policy underlying the distinction between treating and examining physicians. However, the Federal Rule received 4 votes, and it is now the law to be applied in criminal trials.

PROCEDURAL MATTERS

Most procedural matters are covered by Articles I and VI of the proposed Rules of Evidence. A few general observations made at this point will make the remainder of this survey a bit easier to comprehend. Probably the key provisions of the FRE and the KRE are Rules 401, 402 and 403. These rules govern the admission of practically every type of evidence that can be conjured up. Under the scheme of the Kentucky Rules, any kind of relevant evidence is admissible unless it is either excluded by a specific provision of the rules or the trial judge in the exercise of discretion given him under Rules 402 and 403, decides that the admission of evidence will be prejudicial, will confuse the jury, or will take too much time. The same basic principle applies with respect to witnesses. Under KRE 602, anyone who can show personal knowledge of the

subject matter about which he or she is supposed to testify may testify. The only person specifically excluded as a witness under the Rules is the trial judge. [FRE 605; KRE 605]. With few exceptions, these 2 general principles govern admission or exclusion of evidence in any trial or proceeding conducted under the rules. These concepts are significant enough to warrant a separate article sometime in the future, but it is important now to realize that these principles act as kind of a final check against the admissibility of evidence.

The subject of the remainder of this article, however, is the somewhat mundane examination of *rules of preservation, objection and presentation of evidence to the jury*. As noted above, these rules appear in Articles I and VI of the proposed rules. There are a few differences between the Kentucky and Federal Rules which will be noted. However, in keeping with the Federal Rules approach, the governance of the trial is pretty much left up to the trial judge who will not be reversed except for showing of an abuse of discretion.

ORDER OF TRIAL

KRE 611 recognizes that the trial court has authority to control the mode of interrogation of witnesses and the order of their appearance. The Court has 3 guidelines or goals to aim for in making the rulings.

First, the Court is to order proceedings so as to make the presentation "effective for ascertainment of the truth." The Court is also directed to avoid needless consumption of time and finally, the Court is directed to protect witnesses from harassment or undue embarrassment during the course of examination. The Commentary, or page 63 of the proposal, notes that the trial judge customarily has been allowed to determine whether to allow narrative testimony at various stages of trial, whether to allow witnesses to appear out of order, whether to allow questions or redirect or recross that should have been asked earlier, and finally, whether to allow recall of witnesses. The Committee made a point of noting that KRS 421.210(3), which governs the order of appearance in civil cases, is unaffected by this rule.

The second part of KRE 611 restates the Kentucky "wide-open" rule of cross-examination which allows a party to cross-examine a witness or any matter relevant to any issue in the case, including matters of witness credibility. The only limit on this is a statement that "in the interest of justice," the trial court may limit cross-examination to matters raised on direct examination. As to leading questions, the rule provides that a party may not use leading questions on direct examination except as necessary to develop the witness's testimony. On cross-examination, leading questions are always available except as to matters not raised on the direct examination. The underlying theory here is that on those matters, the witness somehow becomes the witness of the cross-examining party, and it is therefore unfair to give an advantage to the party. However, as noted in the next portion, if the witness is hostile, is an adverse party, or is a witness identified with an adverse party, the examining party may use leading questions.

KRE 614

The next rule governing the control of trial is KRS 614 which allows the Court on its own or on the suggestion of a party to call a witness as the Court's own witness. Under these circumstances, all parties are entitled to cross-examine. Apparently, this grew out of the common law right of the Court to do so. Such actions are so rare in Kentucky, that I have been unable to locate any instance in recent times where a court has done so. Graham, in *Evidence: Text Rules, Illustrations and Problems*, 2d Rev.Ed. (1989), states that in federal court trial judges almost never call lay witnesses on their own. It is more common to call experts on behalf of the Court, a procedure that also is authorized under this rule.

This rule provides that the Court may interrogate any witness as necessary to prevent misunderstanding of the evidence or to make the evidence clear. Also, this rule specifically authorizes submission of jury questions during the course of trial. These questions must be submitted in writing to the judge who will decide in his sound discretion whether or not the questions may be asked. This provision will standardize practice in Kentucky.

In the Jefferson Circuit Court, where there are 16 divisions, the right of the jury to ask questions depends on the division in which the case happened to land. Now, at least, the jury will be allowed to ask questions, but the final decision is in the hands of the trial court. Because of the sensitive nature of any objections that might be made to any of the procedures authorized by Rule 614, it provides that any objections can be made out of the hearing of the jury at the "earliest available opportunity." I think this is a recognition of those trial situations in which the judge determines to do something and will not allow contemporaneous objection. Under this rule, the party has to raise the issue at the earliest opportunity, but that opportunity is not necessarily when the prejudicial act is happening.

KRE 615

Separation of witnesses is governed by KRE 615. This rule provides that at the request of a party, the trial court shall order witnesses excluded so that they cannot hear the testimony of others. If no party makes such a request, then the trial court may do it on its own motion. There are 3 types of persons or entities that cannot be excluded under this order.

A party who is a natural person cannot be excluded. An officer or employee of a party that is not natural person (corporation or Commonwealth) may not be excluded if that person is designated as a representative by the attorney for that party. Finally, the Court may not exclude a person whose presence is shown to be necessary for the presentation of the party's case.

There is nothing particularly new in this rule, except for the requirement that the trial court must exclude witnesses from the hearing on the request of a party. [Compare: RCr 9.48].

OBJECTION, PRESERVATION, AND PRESENTATION

The basic rules for presentation of evidence are found in Article I. KRE 103 deals with making and preserving objections to rulings on evidence. Rule 104 assigns duties of determining the admissibility of evidence to the trial court, primarily, and in certain instances, to the jury. The last major rule is KRE 105 which restates the limited or multiple admissibility rule and explains the supposed effectiveness in admonitions in dealing with it.

KRE 103

Under this rule, a party cannot allege error on a ruling that admits or excludes evidence except when he shows that a substantial right of his has been affected and he has either made a timely objection or motion to strike stating the specific grounds of objection (unless the grounds are apparent of record) or, if the evidence is excluded, making the substance of the evidence known to the Court by an offer of proof. This rule makes a major change in Kentucky law. This rule proceeds from the assumption that rulings on the admission of evidence generally are harmless and should be deemed so (as long as they do not involve constitutional issues) unless the defendant can meet certain requirements. The first of these requirements is showing that the ruling affected the defendant's "substantial right." A substantial right is not defined in the Commentary or in any of the federal commen-

taries or cases. However, it must be considered to be a right on the order of the right to present a defense or the right not to be convicted on irrelevant or incompetent evidence. Most of the discussion about this issue centers on what the trial or the appellate courts are supposed to examine when determining whether substantial rights have been affected. In general, a substantial right is affected by an error if that error had a material effect or substantially swayed the deliberations of the jury. [Graham, *Evidence*, 2d Rev.Ed., Chapter 16 (C)(1), p. 533; 551]. Of course, where a constitutional right is infringed, the reviewing of the court must be convinced beyond a reasonable doubt that the jury deliberations were not materially affected or swayed. [Graham, at 554]. The purposes of the rule are set out in the Commentary. The purposes are to offer counsel an opportunity to address inadmissibility issues and take corrective measures when needed, to provide the trial judge with sufficient information to assure correct rulings, and to provide a sufficient record for the appellate court to rule on the issue. [KRE 103, Commentary, p. 3-4]. These purposes accord with the often cited statement found in *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 724 (8th Cir., 1976). The Commentary notes that these purposes can be met with an offer of proof or a timely objection or motion to strike.

The specificity required of a motion to strike or an objection is of some concern since we have operated in Kentucky for years under the "general" objection rule. A general objection under these new rules will not suffice to preserve error. KRE 103(a) is going to require considerably more skill than formerly required at trial. A general objection can still be made and can still preserve error if it is apparent from the context of the record that everyone knew what the objection was about. This is what the plain language of the rule says. However, this seems to be a very dangerous way to practice law. What is apparent at the trial level in the heat of battle is not apparent to someone reading a typed transcript or watching a video tape some months later. The only safe way to practice under the new rule is to be as specific as you can if you know what the objection is. If the general objection is made and the ground is not apparent from the record, the only issue preserved by the objection will be relevancy. [Graham, *Evidence*, 2d Rev.Ed., p. 536]. Of course, if a general objection is upheld, it will be upheld on review if any proper ground for it can be squeezed out of the record.

Even making a specific objection poses some dangers. The rule has been that if a specific objection is overruled, failure to raise a new ground will constitute a waiver of any other ground not stated. [Graham, *Evidence*, 2d Rev.Ed., p. 535]. If a specific objection is erroneously sustained, it will be upheld on appeal if any valid ground for it exists unless the error could have been "obviated" by a correct objection. [Graham, *Evidence*, 2d Rev.Ed., p. 535]. Under the new rule, there is just no substitute for knowing what the law is in the circumstances of your case.

The seeming harshness of this rule may be alleviated somewhat by the innovative motion *in limine* rule that also appears in KRE 103. But before getting to that, it is important to note that the avowal rule will no longer exist in Kentucky. Rather, under KRE 103, to preserve the issue by offer of proof, the lawyer will have to say only what he intended to ask the witness and what he expected that answer to be. The trial court may require preservation in traditional avowal question and answer format, and may make comments in order to establish the record on appeal in a useful manner. [KRE 103(b)].

Subsection (d) of the Rule provides for a motion *in limine* to be made before trial. The trial court is allowed to rule on the issue at that point or to defer the decision until the evidence is offered at trial. The important point here is that a motion *in limine* that is "resolved by order of record" is considered sufficient to preserve the error for appellate review. This rule is a not-so-subtle hint to attorneys to identify the problems in their cases early and to present them to the trial judge at pretrial conference or before the jury is sworn. The purposes of the rule stated in the Commentary are (1) to facilitate trial preparation, particularly with regard to determining trial strategies, (2) to reduce distractions during the trial, (3) to produce smoother presentation to the jury, (4) to "enhance" the possibility of settlement without trial, and (5) to avoid the situation in which an important evidentiary decision has to be made in the presence of the jury in the middle of trial. It is important to notice that this rule does not require pretrial *in limine* motions. Because the Evidentiary Rules are supposed to supersede Criminal Rules that may conflict with them, it will be interesting to see whether the *Commonwealth v. Gadd* rule requiring pretrial disposition of objections to prior convictions will still be valid law after enactment of the new rules. Of course, KRS 500.070(2) prohibits a trial court from making a defendant give notice of most defenses before trial, and the enactment of this rule should not operate to change that provision. However, as a matter of trial strategy or tactics, and as a way to make sure that a likely evidentiary issue on appeal is sufficiently preserved, motions *in limine* will tend to be more common as attorneys get used to practice under the new rules. The only thing to remember, according to the Commentary, is that the "order of record" settling the issue must satisfy the rule of specific objection sufficient to advise the trial court and the appellate court of the basis for the request.

An important provision of the rule, KRE 103(c), imposes an obligation on the judge to guard against indirect presentation of inadmissible evidence to the jury. The burden is on the trial court, when objection or motion is made, to make sure that the attorneys for the parties do not suggest improper evidence to the jury under the guise of making the motion or offer of proof. This obligation, as shown by the language, does not impose an ironclad duty on the judge. The judge is supposed to do his or her best under the circumstances. The drafters make a special note that an admonition should be sufficient in most instances to deal with any prejudice resulting from a violation of this rule. The drafters note that mistrial should be reserved for serious and irreparable breaches of the rule.

The last part of KRE 103 is a Kentucky version of the plain error rule. Subsection (3) provides that a palpable error in applying the rules of evidence which affects the substantial rights of a party may be considered by the trial court on a motion for new trial or by an appellate court on appeal even though it was insufficiently raised or preserved for a review. The second part of this rule is that relief may be granted only upon determination that manifest injustice has resulted from the error. The Commentary notes that the purpose of this rule is to avoid a "plain miscarriage of justice" and is designed for occasional use in extraordinary cases. The drafters noted the similarity between this provision and the plain error rules in the Civil and Criminal Rules. The main thing to be on the lookout for here is the 2-part analysis. If the record reveals an error that affects the substantial rights of a client, it should be considered on the merits by the court, either in a motion for new trial or on appeal. However, the Court is allowed to grant relief only upon a determination that manifest injustice has resulted from the error. The language of this rule suggests that the defendant should not have to show great prejudice or injury in order to get review of the issue on the merits. The language of the first portion of this part talks about the same substantial right mentioned in subsection (a). The only difference here is that in a subsection (a) issue, the nature of the error is delineated. In a subsection (e) case, the error must more or less jump off the page to be apparent on video tape to

merit recognition. However, once the defendant shows this and shows that a substantial right of his was infringed, review should follow. Grant of relief will be much more difficult because relief cannot be granted in the absence of a determination of manifest injustice.

KRE 104

Rule 104 deals with the duty of the trial judge to rule on admissibility of evidence. In the ordinary run of issues, subsection (1) places the duty to determine the qualification of the person to be a witness, the existence of privilege, or general admissibility of evidence, in the hands of the court alone. Thus, issues arising under KRS 602 (witness competency), 702 (expert witnesses qualifications), and 501 (privileges) are placed in the hands of the trial court. According to the Commentary, this allocation is made on the basis that the trial judge, as a trained lawyer and professional, can handle these issues with less commotion and confusion, and the jury will be shielded from information that may be required to hear on issues of admissibility, but which would not necessarily be admissible in chief.

The second important part of subsection (a) is the provision that the trial court is not bound by the rules of evidence except the rules of privilege. This follows the modern federal trend which realizes that the trial judge will not have the ultimate duty of finding facts and is a "professional" who may be more amenable to disregarding inadmissible facts in making his limited determination of sufficiency of the evidence.

Subsection (b) deals with those situations in which the relevancy or admissibility of some evidence depends on the establishment of other facts. One of the most often given examples is found in Martin, *Basic Problems of Evidence*, 6th Ed., (1988), which discusses a situation in which the defendant is charged with murder. The Commonwealth wishes to introduce an insurance policy on the dead person made payable to the defendant. However, the existence of this policy is irrelevant unless the Commonwealth can show that the defendant knew about it. Oftentimes the state is not able to put its case on in a logical progression of witnesses. Therefore, subsection (b) authorizes the trial court to admit the evidence subject to the later linking up by other witnesses. This is not anything new in Kentucky practice, but it is a clear statement of the rule. The trial court's determination here is simply that there is or there will be enough evidence that the jury could find the existence of the necessary supporting fact. It is important to remember in this instance that the Court may consider only the evidence admissible before the jury because that is the decision he makes in determining admissibility of the evidence under subsection (b). [Graham, *Evidence*, 2d Rev.Ed., p. 518].

When preliminary questions are considered, the trial court is authorized to hold hearings out of the presence of the jury or, in some situations, in the presence of the jury. KRE 104(c) requires the Court to hold hearings on the admissibility of confessions or the fruits of "searches conducted under color of law" outside the jury's presence. This second requirement is a cross-over from RCr 9.78. Also, when the defendant is a witness at a preliminary hearing and requests that it be out of the hearing of the jury, the trial court must do so. However, the only other limitation on the trial court in this subsection is that the hearing be conducted outside the hearing of the jury "when the interests of justice require". However, it is important to remember that KRE 103(c) directs the trial court in every instance to take reasonable steps to make sure that the jury does not inadvertently hear inadmissible evidence or evidence that may prejudice the defendant in the ultimate determination of guilt or innocence. The custom in Kentucky on issues of importance is generally to have the hearing outside the presence of the jury. Certain foundation matters like qualification of experts many times are conducted in the jury's presence. The thing to remember in these instances is that if you think that there is going to be a problem with inadmissible evidence being brought before the jury, you should request a hearing outside the presence of the jury, reminding the judge of his duties under FRE 103(c) and 104(c). The argument must be pitched in terms of state law or state constitutional law because *Watkins v. Sowders*, 449 U.S. 341, 101 S.Ct. 564, 66 L.Ed.2d 549 (1981) still states the general principle that due process of law does not require hearings not dealing with confessions to be held outside the presence of the jury.

The final 2 portions of this rule, subsections (d) and (e) deal with matters that have been well-established in Kentucky. Subsection (d) restates the principle that a defendant may not be cross-examined on matters other than facts relating to the suppression issue if he chooses to testify at the suppression hearing. Subsection (e) is a rule enactment of the principle set out in *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), which says that the due process clause and the Sixth Amendment of the U.S. Constitution require courts to allow presentation of facts and information developed at a suppression hearing at the trial of the case for the purpose of casting doubt on the credibility or reliability of the evidence.

KRE 105

KRE 105 is a limited admissibility rule. In Kentucky, it was formerly called the multiple admissibility rule and simply provided that evidence that is admissible for a legitimate purpose is not necessarily inadmissible because it may prejudice the defendant in some other way. The Commentary shows that the implicit principle underlying this rule is a belief that admonitions concerning the proper use of evidence ordinarily will be effective. However, it is the lawyer's duty to object to the use of the evidence and to point out that under the balancing test of KRE 401-403, the evidence cannot be used without a significant risk of prejudicial effect to the defendant's substantial rights. The main purpose of Rule 105 is to place squarely on defense counsel the obligation to ask for an admonition concerning the proper use of evidence if the objection to admissibility is overruled. There can be no doubt under this rule that failure to ask for an admonition constitutes waiver of the issue forever unless the use of the evidence constitutes palpable error under KRE 103(e). If the evidence that the defendant wants to get in is excluded, defense counsel has a burden under KRE 105(b) to make the required offer of proof and state expressly the legitimate purpose for which the evidence was to be introduced. Failure to do this will result in waiver of the objection.

CONCLUSION

Articles I and VI of the proposed code introduces several innovations to Ky. law. The discretion of the trial judge is affirmed in a number of these rules. The duty placed on the objecting party is increased in almost every instance. To some degree, the harshness of the specific objection rule can be ameliorated by wise use of the *in limine* rule. To the extent that the *in limine* rulings will constitute sufficient preservation of error, criminal trials under the new rules of evidence will less and less resemble the ambushes that they often are in practice today. Presumably, such practice will also increase the use of RCr 8.09 conditional pleas and this might be counted as one of the reasons underlying the introduction of the motion *in limine* rule.

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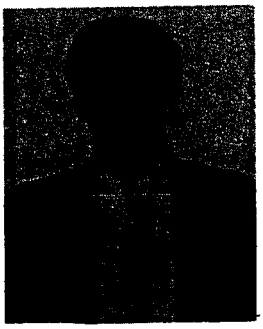

A Look at the Relationship between ANGER & AGGRESSION

JOHN RANSEEN

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ANGER

Anger is defined as an intense emotional state induced by displeasure.

This emotional arousal generally results from some real or imagined provocation. It involves feelings within the body (rapid heartbeat, tenseness, etc.) coupled with thoughts of being mad, upset, or indignant.

Anger is a common emotional reaction. In fact, studies[1] have generally found that many normal people become mildly to moderately angry on a daily basis and some admit to being angry several times a day.

It is a myth to believe that anger is merely a disruptive emotion. It plays many beneficial roles. For instance, anger can help mobilize behavior to confront some injustice. (We dare say the average prosecutor probably mobilizes a fair amount of anger for this purpose). Many in the counseling professions have noted that the lack of anger expression can lead to problems within important relationships such as marital, parent-child, between friends, etc. This is because emotions are a critical aspect of interpersonal communication and anger is a normal and frequent emotion. An absence of anger expression often means that it is being denied or repressed. Consequently, it will not likely be handled in a straightforward and clear manner resulting in confused communication within important relationships.

ANGER AND AGGRESSION

It is anger's relationship to aggression, however, that is of interest of those involved in the legal profession.

Aggression has to do with hostile, injurious, and destructive behavior which can result from the emotion of anger. Again, most anger does not result in an aggressive response. It must also be pointed out that extremely aggressive acts can occur without any evidence of anger (*i.e.*, a calculated contract killing).

Nevertheless, under most circumstances there is some relationship between the emotional experience of anger and the behavioral response of aggression. The question of interest is *why do some people seem so prone to resorting to aggression in the face of angry emotions while others walk away or cope in some healthy, appropriate manner?* It is this issue that we will try to address.

In a general sense, research suggests that anger leads to aggressive behavior depending upon the severity of the provocation, situational constraints, expected outcomes, and the person's usual manner of coping with anger based on his/her learning history.[2] That is, probably all of us have the capacity to respond to our feelings of anger with aggression if severely provoked. Few of us would resort to aggression, however, without fully evaluating the situation: the nature of the threat, our ability to act aggressively, the appropriateness of such a response, and the likelihood of retaliation of punishment for such an act. Aggression is more likely when the expected outcome is seen as favorable if such a response is utilized.

How one makes these determinations is a result of complex factors involved with their personalities and learning histories. Some individuals are more likely to see a wide variety of events as threatening and so evaluate many trivial provocations as serious matters. Others have limited capacity to correctly evaluate situations and expected outcomes particularly when they are angry. Further, they may have little concern or interest in the outcome of their aggression, even if this might be something distinctly punishing such as a lengthy jail term or even a death sentence. Finally, some people have unfortunately learned that aggression is an acceptable way to deal with their angry feelings. For example, parents modeling aggressive behavior can teach children to behave aggressively.

GENERAL FACTORS PREDISPOSING TOWARD AGGRESSION

A variety of biological, psychological, environmental and cultural factors can be identified which predispose an individual toward anger leading to aggression. These factors overlap and are interrelated but we will separate them for simplicity. While each of these factors is related to anger and aggression, they are not necessarily causative. That is, none of these individual factors cause aggression but they tend to increase the likelihood of aggression occurring particularly within the face of angry emotions.

BIOLOGICAL FACTORS

Biological factors which increase the likelihood of aggression seem to share a common tendency to increase aggression by making the individual more impulsive when angered. That is, such factors render a person more likely to act rather than think, this being the essence of impulsivity. Although thinking may lead one to the conclusion that an aggressive act is called for, more likely, the tendency to think about a situation will allow the individual to consider alternative and more appropriate ways of dealing with a difficult situation in which he finds himself angered. Consequently, the impulsive individual is more at the whim of his/her emotions rather than rational thought processes.

The most common biological factors related to aggression are alcohol and/or drug use and various neurological events, the most common being head injury and seizure disorder. In a very general sense substance abuse leads to increased aggression by disinhibiting emotional and behavior responses in certain individuals. That is, normal coping processes which are used to inhibit anger and aggression are reduced.

Further, under the influence of alcohol

and drugs the individual is less able to examine alternate (and more appropriate) courses of action when aroused by anger and is less able to anticipate negative outcomes to an aggressive response. Consequently, the individual who is under the influence of a psychoactive substance or craving one, due to withdrawal, is more prone to experience angry emotions and respond in an impulsive, aggressive manner.

Unfortunately, alcohol and drug use behaviors are very difficult to change. The rewarding properties of these substances such as feeling better physiologically, reducing anxiety, and possibly feeling a heightened sense of well being and control in one's life far outstrip the potential punishing consequences of substance use. Although these potential punishing consequences are often more devastating (*i.e.*, medical complications, traumatic accidents, interpersonal disruption secondary to aggression), they are usually less immediate than the rewards.

Neurological problems may also render the individual prone to experiencing angry emotions coupled with greater impulsivity. The 2 most common neurological problems linked to aggressiveness are traumatic head injury and seizure disorder. These two problems are not mutually exclusive as head injury is a common etiology of seizure disorder.

Studies have consistently found a high prevalence of head injury and seizure disorder in juvenile delinquents and prison populations, particularly those incarcerated for violent crimes.[3]

Again, there is very little evidence to indicate that specific types of brain injury or seizure disorder are, in any way, directly causative of anger and aggression. Rather, these problems render the individual less able to adequately cope with a variety of situations particularly when aroused by anger. Such individuals often have very poor frustration tolerance and, because of their injuries, are continually placed in frustrating circumstances.

A mediating factor is the fact that head injury and seizure disorder often lower one's level of cognitive functioning (*i.e.*, intellectual ability, memory and learning, judgement, etc.). Consequently, the person with such difficulties typically has less ability to manage anger with appropriate coping techniques (interpersonal problem solving, displacement of aggression, etc.). Additionally, they may have less ability to profit from experience and learn new coping techniques.

PSYCHOLOGICAL FACTORS

Psychological factors involve traits, predispositions, and attitudes which render the individual more prone to act aggressively when aroused by angry emotions. Although there are many psychological theories of personality development, probably the most helpful in understanding the development of aggressive tendencies is social learning theory. Stated simply, this means that people tend to behave within interpersonal situations according to what they have learned or experienced in their lives, particularly within the context of important relationships.

Of importance for our topic is what people have learned about the emotion of anger, how to deal with it, and how to respond within angry interpersonal situations. Again, stated rather simply, some people have unfortunately learned that aggression is a common and appropriate response to feeling angry. They have also learned that there can be immediate rewards to becoming angry and aggressive. For example, some have learned that aggressive behavior can be used to quickly and effectively control or manipulate others.

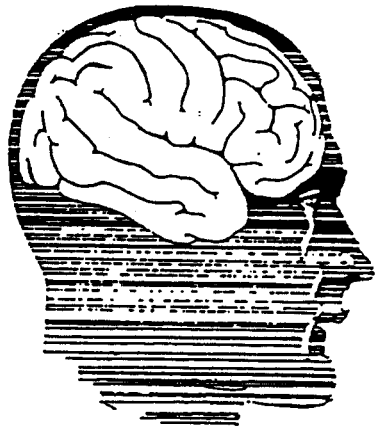

Illustration by Mike Reedy

Consequently, it is not surprising that many individuals who resort to aggressive acts have learned this style of responding within their family of origin. Again, in very simple terms, this behavior has been directly modeled by parents or significant others. Often the person prone to aggression has been a recipient of aggression within an abusive family. In addition to experiencing or witnessing child abuse or neglect, many children witness spouse abuse. This modeling teaches aggression as a means of handling frustrating interpersonal situations. It gives the message that aggression is an acceptable way of dealing with anger. In many cases aggression is so common that it becomes a way of life.

Beyond simply learning that aggression is appropriate and also not learning appropriate responses to angry feelings, the child subject to aggressive acts (including emotional abuse) begins to believe he/she is of little value and feels powerless, particularly in relationships. This contributes to future acts of aggression. Everyone has a need to gain a sense of efficacy, self-worth, and control over their environment.

The abused child may learn that aggression is a simple and effective way to accomplish the psychological task of gaining control and mastery in their world. The child subject to aggression also learns that people are threatening. This attitude may generalize to many people in a variety of relationships. Understandably such individuals view themselves as victimized, are often on guard, and often look for subtle evidence of provocation and threat.

As noted earlier, a provocation leading to anger and aggression cannot always be readily identified—it can be more in the imagination of the person who feels threatened. This, then, reflects having to learn about people within an environment in which the interpersonal cues signalling threat and provocation were subtle, confusing, or even nonexistent. Within psychiatric nomenclature, we often refer to such people as paranoid.

Although not explanatory, psychiatric classification helps to categorize various interpersonal styles and their relationship to anger and aggression. Within children and adolescents, the category of conduct disorder denotes a general behavioral pattern of resorting to unsocialized behavior including aggressive acts. Not surprisingly, studies find that factors predisposing to conduct disorder include abusive behavior within the family, parental rejection, family instability, and parental alcohol abuse.

Some adolescents who exhibit conduct disorder will display this pattern of behavior into adulthood, often intensified and in greater conflict with societal norms. Such individuals may be diagnosed as antisocial personality disorder. This denotes an individual with a pervasive inability to conform his behavior to societal standards, a tendency to handle anger with aggressive acts, and a lack of remorse and concern with the consequences of such acts. In essence, these people have an incapacity to cope with anger in an appropriate manner since they fundamentally lack the ability to appraise the likely outcome of aggression, partly because there is a lack of normal concern or guilt with such acts.

Antisocial personality disorder is distinguished in psychiatric classification from intermittent explosive disorder which involves isolated incidents of impulsive, aggressive behavior with extended periods of socialized nonaggressive functioning. It also indicates that the aggressive acts are not within the context of severe cognitive impairment (organic or mental retardation diagnoses), loss of contact with reality (psychotic diagnoses) or related to a mood disturbance (bipolar affective diagnoses).

By its very nature, antisocial personality disorder is a diagnosis often given to an individual who is within the context of legal proceedings. Consequently, it is a diagnosis with many connotations and implications both within psychiatry and the legal realm.

As noted by Dorothy Lewis,[4] it is not a diagnosis which should be given in a cavalier manner since it tends to imply resistance to psychiatric treatment and a need for strong societal interventions. It is fair to say that psychiatrists and psychologists may not pay sufficient attention to the implication of rendering an antisocial personality diagnosis (less judicial sympathy, harsher sentences, etc.). Conversely, the legal system often does not seem to understand that antisocial personality disorder is a label for a class of behaviors, albeit undesirable, rather than an explanation of these behaviors.

Again, it is our premise that aggressive acting-out of angry emotions usually involves learned behavior as described in previous sections. Individuals diagnosed as antisocial personality disorder have not only learned to disregard societal norms, they have also not learned to empathize with others nor feel adequate remorse for the consequences of their aggressive actions. Such lack of remorse may also have been taught in the family of origin which did not teach caring for others nor the feeling of sorrow and remorse. These caring behaviors and emotions were usually not displayed to them with any consistency. Abusive treatment within the family may lead a person to a point where he cannot invest in or commit to others and only care about his own needs and desires.

ENVIRONMENTAL/CULTURAL FACTORS

The learning of aggression in response to angry situations occurs within a specific environment and cultural context. It is well documented that the United States offers its citizens a violent culture. The evidence of physical and sexual abuse of children, domestic violence, spouse abuse, and abuse and exploitation of the elderly is overwhelming. Some say these problems have reached epidemic proportions. A culture's acceptance or rejection of these aggressive behaviors is critical in terms of the frequency and intensity of their manifestation.

A variety of culturally sanctioned attitudes and behaviors contribute to this problem. Too often women and children are considered as property to be used by men. This includes being used as a target for the venting of frustrations. Thus, we find that until recently marital rape was not a felony in our state. Too often victims are viewed (and treated) as the ones who provoke violence thus condoning the violent act. Too often police refuse to investigate domestic violence, in part, based on a cultural attitude that family matters should be handled within the family. Too often we find that corporal punishment of children is condoned and encouraged and that children are not believed when they accuse adults of violent acts. Rarely do we consider abuse of the elderly a problem—an attitude that adults can fend for themselves. All of these attitudes support aggression by tacitly conveying a message that it is acceptable.

The fact that there is a tendency for aggression to be more evident within the context of poverty cannot be overlooked. The reasons for this are complex and, in part, related to the fact that substance abuse, family violence, and lower education tend to be more prevalent in poor subcultures within our society. Further, within the context of poverty there is often a lack of hope for improvement. This fatalism leads to a great deal of anger and frustration, the seeds of aggression.

Although the issue of gun availability is controversial, the fact that guns are a frequent fixture in many U.S. homes unfortunately provides an environment in which the means for anger to quickly and impulsively spill over into aggression and violence is readily available. Although the emotion of anger may be chronically present in some individuals, its expression in aggressive acts tends to be short-lived and impulsive in nature. The access to guns too often provides the means to quickly express anger in a single, impulsive act. Guns are part of our culture and their use is often modeled within the family. It is also modeled on television and in movies, often in a glorified manner.

APPROACHES TO ANGER MANAGEMENT

There are no easy solutions to the problem of managing anger appropriately. For most people the management of anger is not a problem. For those who engage in aggressive behavior it usually is.

An assessment of an individual with problems controlling anger must consider all of the factors which render that individual prone to aggression—what biological, psychological, environmental, and cultural variables are involved. In regard to biological factors, neurological and neuropsychological evaluations are occasionally helpful to delineate neurological deficits and effects upon cognitive and emotional functioning. Psychological evaluation may be of some value in assisting a determination of the degree to which a person's aggressive actions are the result of specific environmental influences versus long-standing (and more treatment resistant) characterological patterns.

It is with some hesitancy that we write about treatment strategies for individuals prone to aggression. Some believe[5] that there are psychotherapeutic approaches to individuals with a characterological (*i.e.*, antisocial) pattern of reacting to a variety of situations with anger and aggression. Many view incarceration as the treatment of choice. For those who are not antisocial, however, aggressive behavior may be very situation specific such that environmental changes may succeed. In others, anger and aggression may result from the intensity of stressors specific to that time in their life. Consequently, anger management strategies and counseling may be quite beneficial.

Essentially, psychotherapeutic strategies try to help the individual understand the genesis of their angry emotions and reinterpret previously provoking events to be nonthreatening. The individual is taught basic strategies of coping with angry feelings which don't rely on aggressive action. Often there needs to be assistance in building self-esteem and gaining control in one's life. Individuals with a healthy sense of self-esteem simply do not resort to aggression to deal with frustrating circumstances, unless they are severely threatened or subject to intense stress.

Finally, we are convinced that if we really want to make a difference in terms of treatment, effort should be placed toward strategies of *prevention*.

Legislation aimed toward gun control is

needed. Most importantly, legislation aimed at reducing the vast amount of violence within families is essential, since it is usually within this context that a pattern of anger linked to aggression is formed. There is a need to facilitate early detection and identification of families at risk for abuse, education of parents to learn effective child-rearing practices, and treatment of both victims and offenders.

FOOTNOTES

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THE MAN-MADE DISASTERS ON DEATH ROW

The case of Robert Alton Harris, who was at least temporarily spared execution at San Quentin prison, has sharpened the debate over whether people who were themselves victims of severe physical and emotional abuse will predictably victimize others. Mr. Harris, who was convicted of the 1978 murder of 2 teenagers, was to have been the first person executed in California in 23 years. The Federal Court of Appeals in San Francisco stayed the execution and the U. S. Supreme Court declined to lift the stay. His lawyers now hope to win a hearing at which to present the results of neuropsychological testing as evidence that Mr. Harris suffers from an organic brain disorder, fetal alcohol syndrome, and from post-traumatic stress disorder as a result of being severely abused as a child. The lawyers hope to have Mr. Harris's sentence reduced to life in prison without parole. "Robert Harris wasn't born evil; he wasn't born a monster," said Michael Laurence, a lawyer for the American Civil Liberties Foundation who is one of 3 appellate lawyers representing Mr. Harris. "If anyone had intervened when he was a child, I don't think he would be on death row today."

Such arguments have gained little sympathy for Mr. Harris among a public that was horrified because of the youth of his victims and the bizarre callousness of his crimes. After kidnapping two 16-year old boys from the parking lot of a fast-food restaurant in San Diego, Mr. Harris forced them at gunpoint to drive to a remote place, saying he panned to leave them and use their car as a getaway vehicle in a bank robbery. Instead he first wounded one victim, Michael Baker, and then chased the second, John Mayeski, through the underbrush, shooting him 4 times and killing him. He then returned to Mr. Baker, who was praying. A witness said he told the terrified youth, "God can't help you now, boy. You're going to die," and then shot him in the head.

The 2 boys were not Robert Harris's first victims. At the time of the killings, he had recently been released from prison after serving 2 and 1/2 years for voluntary manslaughter in connection with the 1975 beating of a neighbor. Mr. Harris threw lighted matches on the man as he lay dying, court records said. As horrible as the killings were, many experts say that those who commit such crimes are often people who have suffered injury to certain portions of the brain and also were subjected to violent childhood abuse. By all accounts, Mr. Harris's early life was a nightmare of physical and psychological terror at the hands of his parents. He was born 3 months premature to an alcoholic mother who delivered him after being repeatedly kicked by his father. For years, he suffered severe beatings at the hands of his father, who also threatened to shoot him and sometimes choked him until he convulsed, witnesses said.

In the first clinical investigation of the neuropsychiatric status of criminals condemned to death, a team of researchers headed by Dr. Dorothy Otnow Lewis, a professor of psychiatry at New York University's School of Medicine reported in 1986 that every convict they studied had a history of head injuries, often inflicted by abusive parents. It is possible, the report concluded, "that death row inmates comprise an especially neuropsychiatrically impaired prison population." Dr. Lewis also found that many of her subjects had suffered other kinds of severe physical abuse including burning and being beaten with horse whips. But Dr. Lewis and others stress that the degree to which physical abuse and its resulting injuries can be linked to the development of violent behavior is uncertain. One study of adults who were victims of severe abuse as children found no difference in the histories of family violence of murderers and nonviolent offenders. Conversely, another study of convicted murderers found that 67% had histories of being severely punished as children. Most such studies show an association between early victimization and subsequent aggressive, although not necessarily violent, behavior.

The key, some experts believe, may be the combination of injury to the brain and a history of suffering and witnessing severe abuse. "Brain damage by itself is not the reason people kill," said Dr. Ernest T. Bryant, a neuropsychologist who is director of neurology at the Kaiser Foundation Rehabilitation Center in Vallejo, Calif. Dr. Bryant, who has studied violent repeat offenders in California prisons, said that coping with family abuse has taught them to act on their anger, sometimes homicidally. With certain brain injuries, control of impulses become affected. "When such people have an angry feeling, they can't step back and get objective distance," he said.

What might be called Mr. Harris's neuropsychological defense is made possible by a 1985 Supreme Court ruling in *Ake v. Oklahoma*. In that case, the court held that a defendant is entitled to psychiatric assistance when the jury is considering the death penalty based on the prosecution's argument that the defendant will continue to be dangerous.

Charles Sevilla and Michael McCabe, the 2 San Diego lawyers who represent Mr. Harris and paid for his recent neuropsychological testing, argue that the psychiatrist appointed to aid the defense had failed to perform psychological tests commonly accepted at the time.

In issuing the stay of execution, Judge John T. Noonan Jr. said that he could not determine whether Mr. Harris had received competent psychiatric assistance during the penalty phase of his trial. He recommended a hearing on the issue at the District Court level. On May 14, Mr. Harris's lawyers will attempt to convince a 3-judge appellate panel to order such a hearing.

KATHERINE BISHOP, *The New York Times*, April 8, 1990

HABEAS CORPUS

ABA President's Statement Before the Committee on the Judiciary

L. Stanley Chauvin, Jr.

The following is the statement of L. Stanley Chauvin, Jr., President, American Bar Association, before the Committee on the Judiciary of the United States Senate concerning Habeas Corpus, February 21, 1990.

Mr. Chairman, and members of the committee:

I am L. Stanley Chauvin, Jr., President of the ABA. The subject of your hearing today is so important to America's lawyers that I have chosen to appear personally to present their views. Rightly or wrongly, the public assesses our legal system—and hence our legal profession—by its perception of how well the criminal justice system is functioning. Capital cases are the most visible and notorious of all criminal cases. Our legal system is not doing a good job handling them today.

The ABA's Criminal Justice Section appointed a task force that studied this topic intensively from November 1988 through October 1989. This study was conducted under a grant from the State Justice Institute. The task force included 5 judges (trial and appellate judges from both state and federal systems), a prosecutor, a defense attorney, a law professor, a law school dean, and a federal court administrator. All had substantial experience with death penalty litigation.

A member of the task force, John Greacen, Clerk of the United States Court of Appeals for the 4th Circuit and a former Chair of our Criminal Justice Section, is here with me this morning. We are accompanied by the task force's reporter, Professor Ira Robbins from the Washington College of Law of American University. Mr. Greacen has asked me to state that he appears before the committee as an individual and that his views do not necessarily represent those of his court.

The task force held 3 public hearings and heard testimony from 82 witnesses, including a United States senator, a governor, state legislators, state and federal trial and appellate judges, victims advocates, prosecutors and attorneys general, defense attorneys, and representatives from death penalty resource centers, state bar associations, and other public interest groups. The transcripts of its hearing contain the most complete information on this topic ever assembled.

After much debate, the task force members issued, in November 1989, a 380 page report containing 16 recommendations. The views expressed in that report are those of the task force and do not necessarily represent the official position or policies of the study grantor, the State Justice Institute.

All task force members did not agree with all 16 recommendations. Three task force members dissented. Two of these thought the task force did not go far enough in restricting the availability of federal habeas corpus review. The other one thought it went too far. Another member, although not dissenting, also thought that the unprecedented restrictions went too far.

The ABA Criminal Justice Section used the task force's report and its recommendations to craft a policy statement on death penalty habeas corpus. The section's recommendations to the House of Delegates made one change in the task force's proposal concerning the appointment and qualification of counsel. The section's recommendations are now the policy of the ABA and the basis for my statement to this committee. They are the views of the association and do not necessarily represent the official position or policies of the State Justice Institute. A copy of this adopted policy and its accompanying report is attached.

What did the ABA Criminal Justice Section task force find?

It found a legal process stood on its head. Inadequate, often grossly inadequate, resources are devoted to state court trials, appeals, and postconviction review of capital cases. Six states have a maximum fee of $1500 or less for appointed counsel to try a capital case. Only 1 or 2 provide full compensation. Many states provide no counsel for state postconviction proceedings, relying entirely on volunteers. The task force heard overwhelming evidence of incompetent representation in death cases—lack of knowledge of death penalty law, overlooked objections, failure to present evidence in mitigation, no brief on appeal, and similar failings.

In contrast, massive resources are applied to federal habeas corpus review, initially by volunteer lawyers; and now by compensated counsel under federal law.

The result has been that the federal courts have overturned more than 40% of the post-1976 death sentences they have reviewed. This shows the importance of continuing rigorous federal habeas review. It also dramatizes the inadequacy of current state death penalty proceedings.

The association believes that the focus of death penalty litigation should return to the state courts, and that the trial should once again become the "main event" in a capital case. That will not be possible until the states begin to provide competent counsel at all stages of capital litigation.

The task force found a chaotic process. In many states even volunteer postconviction counsel is not available until an execution date is set. State and federal habeas corpus proceedings are rushed through, at the last minute, under the gun of a pending death warrant. The association believes that every death penalty conviction should be reviewed in an orderly, lawyer-like process during one round of state and federal habeas corpus review.

The task force found a protracted process, with an average of 7 years from sentencing to execution. Some cases go on for 13, 15, or more years. The principle of *res judicata* has never applied in federal habeas corpus jurisprudence. The association supports severe, but not absolute, restrictions on subsequent habeas corpus proceedings, called "successor petitions," after the first full round of state and federal postconviction review.

Finally, our task force found that despite all the time and endless litigation involved, the current process fails to decide many constitutional issues on their merits. The association believes that an inmate is entitled to have some court address every non-frivolous constitutional claim.

The current system is badly flawed. What reforms do we recommend? For the most part, our recommendations parallel the provisions of S. 1757. But the bill does not go far enough in one critically important area. That area is adequate legal representation.

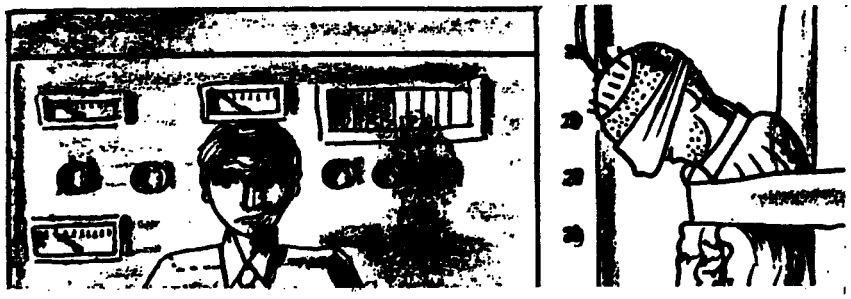
Our policy's most important recommendation calls upon all states to provide counsel at all stages of capital litigation. We call for specific, mandatory qualification standards for counsel, based upon the guidelines for qualification and performance of counsel in death penalty cases adopted by the association in February 1989. What do the ABA guidelines provide?

-They call for each state to establish an independent appointing authority to develop qualification and compensation standards appropriate for that state, to recruit and train lawyers to handle capital cases, to certify them as competent in this specialty area, and to make the actual appointments of counsel in all capital cases.

This is the essential component of our counsel recommendations. So long as state court judges continue to make capital case assignments from the regular list of attorneys for appointment in criminal cases, the current problems will continue. Unskilled attorneys will continue to make errors during trial; subsequently appointed counsel will leave no stone unturned in their efforts to get death sentences reversed because of those errors; and state and appellate courts, and federal habeas corpus courts, will bear the brunt of correcting them. The only long term answer is to do it right the first time.

-The guidelines set objective qualification standards, describing experience needed for trial, appeal, and postconviction lead

DEATH APPEALS



A proposal to streamline death penalty appeals should be changed to provide greater legal protection for people accused or convicted of murder, the federal judiciary's policy-making arm recommended.

The 27-member Judicial Conference of the United States proposed modifying a plan by a committee appointed by Chief Justice William H. Rehnquist and headed by retired Supreme Court Justice Lewis F. Powell.

The conference adopted the report at a private meeting. David Sellers, a spokesman for the conference, said the judges were divided over the issue. He declined to reveal the vote.

The announcement was hailed by civil libertarians who have attacked the Rehnquist committee's plan. Leslie Harris of the American Civil Liberties Union said the proposed changes were "a stunning departure" that could go a long way toward protecting the rights of defendants in capital punishment cases.

Senate Judiciary Committee Chairman Joseph R. Biden Jr., D-Del., called the decision to modify the committee's proposal "an extremely important step forward."

He said the version adopted by the conference was similar to one contained in a crime bill he is sponsoring and which is set to be debated on the Senate floor.

The Judicial Conference urged that any state choosing to adopt the streamlined procedures must adhere to a proposed national standard for determining which lawyers are qualified to represent defendants in capital cases.

The judges endorsed a proposal by the American Bar Association, which recommended softening the impact of the Rehnquist committee's plan.

The judges, whose views are expected to carry considerable weight in Congress, also proposed changing the plan to make it easier for death row inmates to file repeated appeals challenging their death sentences.

The Rehnquist committee proposed the states limit death row inmates to 2 rounds of appeals in state and federal courts. One round would challenge a condemned individual's rights.

If the plan is approved by Congress, states that decide to go along would be required to assure legal help to death row inmates at taxpayer expense throughout the appeals process. That is not the case now.

The ACLU and other groups that attacked the original plan said its promise of more legal help for death row inmates is an empty one because it offers no assurance that state-appointed lawyers will be competent.

There are more than 2,200 convicted murderers on death rows nationwide. Only 121 executions have occurred since the Supreme Court reinstated capital punishment in 1976.

The average delay between conviction and execution is more than 8 years.

The judicial conference also announced it is giving news organizations more time to present their views on letting television cameras into federal courtrooms. The conference will postpone until September its report on televising federal court proceedings.

"Basically, the door is still open on this issue," Sellers said. The conference has opposed such televised coverage.

and co-counsel.

-They recognize realistically that a state may not have sufficient attorneys with those qualifications available to try all capital cases. If so, a state appointing authority may apply less stringent, but nonetheless high, qualification standards.

-The guidelines call for states to make expert and investigative services available to the defense.

-Finally, they require adequate compensation for appointed counsel—"a reasonable rate of hourly compensation commensurate with provision of effective assistance and reflective of the extraordinary responsibilities inherent in death penalty litigation."

The incentive for a state to comply must be strong. The procedural default rule, the presumption of correctness of state factual findings, and the doctrine of exhaustion of state court remedies would not apply to proceedings in which adequate counsel is not provided.

Attached to this statement, as part of the report and recommendations to the House of Delegates, is suggested statutory language to implement these recommendations. We have previously provided the committee with copies of the task force report, including its dissenting and concurring statements.

Let me summarize these recommendations on counsel, which are the most important parts of the ABA policy, and which are not addressed adequately in any of the bills the committee is considering. Standards for both qualifications and compensation would be set and applied in each state by independent state appointing authorities. Those standards would have to be at least as stringent as those provided by federal law. The states would have 2 years to establish appointing authorities, train lawyers if necessary, and certify them for capital case representation.

Critics claim that these provisions would introduce a whole new era of habeas corpus litigation—did the defendant's attorney possess the qualifications required by law? This is specious. In fact; these provisions greatly simplify the current process, which today involves the issue of ineffective assistance of counsel in almost every case. It can be expected that each state's appointment process, and its qualification and compensation standards, would indeed be challenged in one of the first cases to which the new law would apply. Once the state's procedure were upheld, however, the authority's individual certification and appointment decisions would thereafter be immune from challenge. The actual performance of a certified attorney would be subject to challenge only under the current, limited *Strickland v. Washington* standard. Since the accused would have competent representation, litigation concerning ineffective assistance of counsel would decrease substantially. Appeals and postconviction proceedings could focus instead on the merits of the other legal and constitutional issues presented.

I will review more quickly the remaining parts of the association's policies.

To eliminate the last minute chaos of the current process, we recommend an automatic stay, imposed by the federal court if necessary, to enable one round of state and federal postconviction review at an orderly pace. These recommendations are the same as Section 2257 (a) and (b) of S. 1757.

To address the problem of endless delay, it is proposed that there be a 1-year statute of limitations on filing federal habeas corpus petitions, tolled during the pendency of state and federal court proceedings. The ABA recommendation is the same as Section 2258 of S. 1757. Further, we proposed that there be stringent limitations upon successor petitions, even though filed within the 1 year statute of limitations. Our standard for successor petitions is the same as that contained in Section 2257 (c) of S. 1757. It is critically important that federal court jurisdiction to entertain successor petitions not be limited to petitions claiming innocence of the capital crime committed. Innocence is rarely at issue in death penalty cases. The real issue is the appropriateness of the death sentence. If federal jurisdiction to entertain successor petitions is limited to questions of innocence, there would be no federal remedy for a *Brady* violation by a state prosecutor who knowingly withheld mitigating evidence that might have convinced a jury to sentence the defendant to life rather than to death. That result would apply even though the defense had no basis for knowing the evidence existed and first discovered it only after the first habeas corpus proceeding had ended. The ABA finds that result unacceptable. So should the Congress.

Finally, we include 2 recommendations to assure that constitutional claims are addressed on their merits. We recommend that federal law be amended to recognize an attorney's "ignorance or neglect" as sufficient cause to enable a federal court to address a defaulted claim on the merits. The inmate would have the burden of proving that the default was the product of ignorance or neglect, rather than a tactical choice. A federal court could also address a defaulted claim if failure to do so would result in a "miscarriage of justice," a limited standard currently applied by the Supreme Court in this area. This recommendation is the same as Section 2259 (c)(2) in S. 1757.

The second of these recommendations addresses retroactivity of new constitutional doctrine, limited last year by the Supreme Court in *Teague v. Lane* and *Penry v. Lynaugh*. Those cases produce the arbitrary rule that a new constitutional interpretation will be applied only to cases pending on direct appeal.

A death row inmate whose case is pending in habeas corpus review is now denied the benefit of a new constitutional rule that applies to another inmate, perhaps even a co-defendant, whose case has not proceeded so rapidly. It produces an incentive for defense counsel to stall their direct appeals and initial Supreme Court petitions for *certiorari*. S. 1757 acknowledges this problem.

The ABA believes its standard would be easier to apply than that currently included in Section 2262 of S. 1757. The ABA policy would apply a new constitutional rule retroactively if "failure to apply the new law would undermine the accuracy of either the guilt or the sentencing determination."

The ABA House of Delegates was aware that the policies proposed by the task force differ significantly from those of the Powell Committee, on which S. 1760 is based. The recommendations of the Powell Committee, however, fall far short of an adequate, appropriate and complete response to the current problem.

The ABA Task Force had the benefit of Powell's Committee's report; but that committee did not have the benefit of the ABA task force's work product at the time it issued its report. Our report contained testimony from state judges and lawyers actively involved in death penalty litigation. The Powell Committee report's recommendations need to be bolstered in several areas:

1. It does not address the root cause of the problem—the inadequacy of state trial and appellate representation. Its recommendations begin with the state postconviction process.

2. It allows states to opt in or out of its provisions. Reform will come only when reluctant states are given incentives to provide the resources necessary to address the root causes of this problem. State Legislators and Bar Presidents gave consistent testimony to our task force on the difficulty of obtaining adequate appropriations for defense of capital cases.

3. It leaves entirely to the states the questions of the qualifications and compensation of counsel, without the guidance of a minimum standard.

4. It takes not position on the serious problems of current law governing procedural default and retroactive application of new constitutional doctrine.

5. Its statute of limitations is only 6 months. There has never been a limitation on habeas corpus. We should move cautiously in establishing one.

6. Its only exception for successor petitions is factual innocence. Federal courts must be able to address egregious errors in the sentencing phase of the trial as well.

The ABA believes its recommendations constitute a balanced and comprehensive approach to the solution of very serious problems affecting the functioning of our justice system. They take account of the legitimate rights of persons sentenced to the ultimate penalty of death. They recognize the rights of the majority of the citizens of those states that have decided that capital punishment is a necessary and proper part of their criminal laws. Moreover, they recognize the paramount requirement of a civilized system of justice that the sentence of death will not be carried out until it has been subjected to extraordinary scrutiny. Unique among all legal decisions, this one cannot be corrected after it has been carried out.

My colleagues and I appreciate very much the invitation to appear before the committee to address this important issue. We will be glad to answer any questions the committee may have concerning our recommendations.

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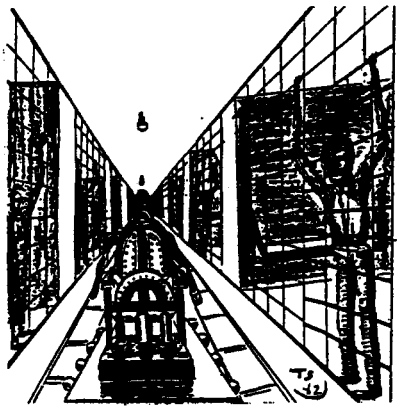
LAWYERS FOR DEATH ROW



The recent stay of execution granted to Robert Alton Harris, the double murderer who was scheduled to die in California's electric chair last Tuesday, has angered many people. They see the stay as further proof that the capital-punishment appeals process in the United States has become a system to frustrate justice through endless, duplicative petitions.

In the 11 years that Mr. Harris has sat on death row, his sentence has been upheld repeatedly by both the state and US Supreme Courts. But on Monday the US high court blocked the execution pending further hearings on Harris's psychiatric condition.

Harris's case isn't unusual. On average, the post-conviction appeals process takes eight years.

Does the appeals process in capital cases need streamlining? Chief Justice Rehnquist thinks so, as does a committee he appointed chaired by retried Supreme Court Justice Lewis Powell.

The Powell committee recommended last year that habeas corpus petitions - the device by which an inmate challenges the constitutionality of his conviction and sentence - be limited to one of the state courts and one in the federal courts. Constitutional claims not raised in those two "collateral" challenges would be lost. But the limits would apply only in states that provide competent lawyers to capital defendants during the state collateral proceedings (lawyers already are provided to a capital defendant for trial and other appeals).

Last month a panel of senior federal judges softened the Powell committee's recommendations. As revised, they are more consistent with proposals made by the American Bar Association and in a bill sponsored by Sen. Joseph Biden (D) of Delaware. The ABA and Biden plans also would limit habeas appeals, but not as drastically, and they go further in addressing the great need for more-qualified lawyers at all levels of the death-penalty process, especially the trial itself.

The ABA and Biden proposals are certainly better than the chief justice's, especially in their emphasis on more-competent lawyering in capital cases (most capital defendants, being poor, are defended by inexperienced court-appointed lawyers, over-burdened public defenders, or part-time volunteers).

But to the extent they would limit defendants' rights in the name of expediency, all the proposals are wrong. The bugaboo of the clever lawyer manipulating gullible judges to buy time for killers is a myth. Ask any death-penalty lawyer if it's easy to get a sympathetic hearing from judges on second and subsequent habeas petitions. Most judges skeptically think that if a lawyer didn't raise a constitutional issue the first time around, it probably doesn't have merit anyway. When, as in Harris's case, defendants are granted several bites of the habeas apple, it's because truly serious new issues are raised.

We don't need to shorten the route to the hangman's noose. Our tradition of due process is far too precious to play political games with.

What we really need - until we take the wisest course and abolish capital punishment altogether - is better lawyers for capital defendants (which would itself reduce the number of appealable issues). And we need congressional reversal of recent Supreme Court decisions that limit the retroactive application of newly established constitutional rights. Those rulings have made capital punishment faster, but even less fair.

Christian Science Monitor, April 6, 1990. Reprinted by permission from the Editorial Page of *The Christian Science Monitor*

MORGAN COUNTY PRISON

EASTERN KENTUCKY CORRECTIONAL COMPLEX

STATE-OF-THE-ART INSTITUTION

Eastern Kentucky Correctional Complex, the Corrections Cabinet's newest facility, began accepting inmates in February, 1990. The medium security institution, located in Morgan County, will house 530 men in its first phase with the second 530-bed phase under construction. This facility will provide a full range of services, including an academic program from ABE to a bachelor's degree through Morehead State University. A separate kitchen for Food Services Management classes is also provided.

The vocational educational program will offer computer literacy, industrial technology, and vocational building trades. The prison industries component will have two plants. The Phase I plant will manufacture fine furniture and wood products.

The state-of-the-art electronics systems include microwave, motion sensors, video camera, a 3-phase locking system, and a computer enhanced fire control program. The "Man-Down" System, in which staff wear transmitters, will trigger an alarm in the control box if the wearer is bent over for a certain period of time, and will pinpoint the location of the wearer.

The dormitories are designed to function as self-contained units, thus providing flexibility in housing different classes of offender.

CONTROLLED INTAKE

INCREASED NUMBERS AND COSTS

While attention is focused on the overcrowded conditions of prisons, a more volatile situation exits in our local jails. The number of state inmates in county jails, referred to as controlled intake, continues to escalate, in spite of the increased use of community programs. When state inmates are housed in a local jails as a result of no bed availability in the state institutions, there are increased costs in travel, staff overtime, and medical costs. These costs are the Correction Cabinet's responsibility, with the most significant being the medical costs. These costs have risen from $260 per inmate in FY 84-85 to $653 in FY 88-89.

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ORAL INTERVIEW WITH WARDEN MICHAEL O'DEA

Corrections Secretary John Wigginton announced the appointment of Michael O'Dea as warden of the Eastern Kentucky Correctional Complex, a medium security prison on June 16, 1989.

What are your most critical concerns about managing this new prison?

First is the initial start-up. Then the biggest concern is double-bunking. This is an institution designed for 530 inmates. Starting in July, we're adding another 400, bringing the total to 930 inmates. We will be able to handle this increase better than any other institution in the state because of our modern technology and the amount of space allotted per inmate. Still the ideal is to manage it at a 530 level.

As Warden, what are your goals and visions?

Well first of all, and I guess it's pretty primary, just to get the institution up and running. Long range goals would be to, take advantage of the excellent program space. Now when I say program space,

Michael O'Dea

we're talking school, literacy programs, adult basic education, GED, college and vocational. Also included in this area would be groups, for example, AA which is Alcoholics Anonymous, Narcotics Anonymous, and other self-help organizations. I think that this institution can be by far tops in the state in that area.

Is it your intention to rehabilitate the inmates in your prison?

Well we're not the changing factor. We're only the catalyst. In other words, we have the means whereby a man can rehabilitate himself. We do have some "carrots" but that's pretty much the extent of it. Our whole system is really built on a positive/negative reinforcement system.

How does it make sense to spend $89,900 to build a cell at the Eastern prison?

The $89,900 figure which you quoted represented construction of 512 cells plus 48 segregation cells. So a total of 560 beds. This cost also represents support services: the administration building, food services, gym, maintenance, vocational schools, all of which will be utilized by Phase II and not duplicated.

When Phase II is complete the total cost of the institution will be almost $73 million. That represents a total cost of ap-

proximately $70,000 per cell rather than the $89,900 first quoted.

What's the projected date on that?

June of next year Phase II is scheduled to be complete. The projected population in July of 91 will be 1,500 inmates. This will further redduce the cost per bed since double-bunking was not anticipated in the original cell cost.

In what ways are Wardens most misunderstood?

I don't know, you might need to ask my staff that one. As far as being misunderstood, I think we're beyond the television image of a prison warden.

Do most of the inmates that you work with have a good relationship or rapport with you ?

I try to be fair, yes, I'm do not always tell them what they like to hear I have a job and the number 1 priority is security, and I keep that primary in my mind. Then after security, we start working on programs for inmates to rehabilitate themselves. Quite a few inmates, though people don't realize it, do get out and don't come back.

Another priority is good community relations. We try and be as open with the public as possible. I think the image years ago was, what went on behind prison walls stayed behind prison walls, but modern day prisons are involved in the community or have the communities involved in them through volunteers.

From your perspective what are the causes of crime?

I'm amazed over the years how much alcohol has had an effect upon crime. And also this recent wave of drugs is a major problem.

We're seeing a lot more violent crime. Years ago, when I was in minimum security, a lot of people we had in minimum never enter prison now.

How can we prevent crime?

Education at the lowest level.

Do you see inmates coming into your prison as having educational deficits?

According to the last study we've done, quite a few have G.E.D.'s and above - more than we thought in the beginning. But yes, many do have a lot of learning difficulties which may have led to negative experiences in school in the past. Maybe they felt "marked as a loser." Now what we've seen of prison is that our whole system is geared toward more individual learning, and a lot of positive reinforcement. Many inmates realize what they missed as a teenager by dropping out once they've been part of the academic program in prison.

Do you have any thoughts on the use of positive reinforcement versus negative reinforcement?

My background is psychology tells me we have both in prison. For example we've got good time that we give inmates for good behavior. On the other hand, if an inmate has a disciplinary action, we take the "good time" away, which is negative behavior. We also have what we call segregation cells where we put a man in isolation. We have other positive reinforcement areas, such as TV, recereation and telephone privileges. So our whole system is built on a positive/negative reinforcement.

And do you think that balance contributes to the success of the system?

Yes Naturally positive reinforcement is more important than negative, but sometimes if positive doesn't work, you have to utilize the negative.

Do you feel alternatives to prisons should be used more in Kentucky?

Yeah. Well, I say yes; right now Kentucky's rate of locking people up is less than other states in the area or region. People would think, well you're overcrowded, you're locking up too many. But we are locking up fewer than other states. I believe we are using different alternative program from half-way houses to private prisons to local jails to home incarceration. Until we solve the numbers problem, we're going to have to try and deal with all of these by working together.

You're a person with, as you said 18 years of experience, do you think we can build enough prisons to lock up our offenders?

Whatever we build we'll fill. I think we have quite a back-up in the jails even since we opened in February.There are some 1,500 inmates now backed up in jails. I guess we do need to look at alternatives to prisons.

Do you feel there should be a distinction made between property crimes and violent crimes?

Yes, but to a certain extent. When you say property crimes, what if this is the third or fourth time this man's committed this crime? Many times that is the case. Do you keep putting him back out? There's always going to have to be some type of limit.

The Kentucky population is 8% black and yet there are 32% blacks in Kentucky prisons. Why do you suppose that is?

I don't know. But it's pretty standard. We've been fluctuating for the last several years between 30 - 33%.

Do you have any other thoughts you'd like to share with us?

No, but I think that if you have an opportunity sometime, I think it would be beneficial for you to see the institution. I think that Kentucky's come a long way. Our prison system is an excellent system. Kentucky is known for its modern prison system. Our education programs are rated tops in the country. We rank at the bottom

Construction & Operating Statistics For Eastern Kentucky Correctional Complex

	PHASE I	PHASEII	TOTAL
Staff Complement	242	93	335
Total Cost	$45 million	$28 million	$73 million
Scheduled Completion Time	39 months	24 months	2Years, 3 months
Cost Per Cell	$89,900	$51,000	$70,450
Personnel Costs	$4.8 million	$1.8 million	$6.6 million

Officer inmate ratio not yet available

or close to the bottom in public education, but rank at the top in correctional education. That says a lot for the system alone. We hope we're helping those inmates who sometime in life say, "hey I'm ready. You know I'm tired of this type of life."

WARDEN MICHAEL O'DEA
Eastern Ky. Correctional Complex
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The 40-year-old O'Dea began his corrections career in 1972 as a correctional officer at the Blackburn Correctional Complex in Lexington. Working his way up through the corrections ranks he assumed the position of acting warden at Blackburn in 1980 before leaving to take the warden's job at the Roederer Farm Center. He was warden at Roederer Farm Center in LaGrange when tapped for the warden's position at Eastern Kentucky Correctional Complex.

During his 9 years as an Oldham County resident, O'Dea served on the Board of Directors of the United Way and as the 1988 campaign chairman for the county. He was a member and president of the local Rotary Club and served on the Board of Directors of the Oldham County Humane Society.

A graduate of the University of Kentucky, O'Dea received his bachelors degree in psychology in 1972.

DPA MOREHEAD OFFICE EXPANSION, AND CLOSENESS

The Morehead Office of Public Advocacy has become a very close group [literally]. The 2 secretaries share an office; an attorney and a paralegal share an office, and the new attorney and investigator that are to arrive shortly will have to fight over space in the library. We hope to be in our new office facilities within 60 days. Because of the addition of Carter County and the new prison, the legal staff at the Morehead Office will increase to 6 attorneys, 1 paralegal, 1 investigator, and 2 secretaries.

Phase I of the new Eastern Kentucky Correctional Complex [EKCC] at West Liberty, Kentucky will house 500 inmates and over 400 have arrived at the time of this writing. Paralegal, Lynn Toy, was stationed at the prison even before the prisoners arrived, and she'll be our main intake person at the prison. Attorney Anthea Boarman, brand new to the Department, but with a wealth of prior legal experience, including some experience at Eddyville years ago, will be our main attorney for post conviction at the prison. Anthea is both assisting and advising Ms. Toy in screening these prisoners as they arrive from other prisons and some directly from county jails. Primarily they will find out the status of each prisoner's case. If the prisoner is already receiving help from some other office, our own or some of the larger areas office or private attorneys, those offices and private attorneys will be contacted and a decision will be made as to whether we should enter our appearance as counsel in a case, or merely assist the other offices or private attorneys in communicating with the prisoners. Each case will be reviewed to see if there is merit in the case for an RCr. 11.42 appeal or belated appeal under CR 60.02. If the prisoner is already doing a *pro se* appeal, we will merely listen and advise unless new facts convince us that the appeal has merit and should be revised. We will also help on detainers filed at the prison from courts in other states and from courts in Kentucky and assist on federal habeas corpus actions on occasion. In new cases, if the case has no merit for appeal, we will so advise the prisoner and have a prison legal aide assist him on his *pro se* action.

Ms. Boarman is working on a plan so that no inmate will be deprived of legal counsel and she is in the process of printing a brochure listing all agencies in the area that the prisoners can contact for free legal advice on civil matters since we are not to handle civil matters. We feel that this brochure will divert a number of questions from the prisoners on civil matters that have slowed us down.

All of the attorneys in our office will be cross trained on post conviction work and will be asked to assist in that work from time to time. At the present time, Hon. Steve Geurin has handled circuit and district court for Rowan County and Hon. Jean Arena is handling Morgan and Elliott Counties, both circuit and district courts. Both attorneys have been doing a terrific job in spite of large caseloads.

At this writing, we are still 2 attorneys and 1 investigator short, and this has caused severe caseload pressures for all of the attorneys. As the directing attorney, I've had to handle Carter County and we are finding that the volume of cases in that county appears to exceed the caseloads in the other 3 counties of Rowan, Morgan and Elliott. Because of my involvement in Carter County, I have not been able to fully direct and assist in other areas of concern for this office. As soon as a new attorney arrives to handle Carter County, this problem will be solved, at least temporarily. At this writing, and with over 2 months left in this fiscal year, we are 300 cases above the previous year and we believe this is because of the addition of Carter County since December of '89. Our 2 secretaries, Bev Thompson and Arlene Howerton, have done a good job handling the extra caseload and now the new prison records.

All of the attorneys and staff are in good spirits down here in Morehead, but togetherness is definitely overrated. We're all eager to get into our new offices where we can breathe a little and we won't be so close.

HUGH J. CONVERY
Assistant Public Advocate
Director DPA
Rowan/Morgan/Elliott/
Carter County Office
P.O. Box 638
Morehead, Kentucky 40351
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INMATE POPULATION

As of February 23, 1990, there were 6437 inmates in our state institutions :

Maximum Security
Kentucky State Penitentiary,
Eddyville 798

Medium Security
Ky. State Reformatory,
LaGrange 1398
Luther Luckett Correctional Complex,
LaGrange 1013
Northpoint Training Center
Burgin 887
*Eastern Ky. Correctional Complex,
West Liberty 91
**Ky. Correctional Institution for Women,
Pewee Valley 292
Roederer Farm Center,
LaGrange 125
Western Ky. Farm Center,
Fredonia 320
TOTAL 6437

Minimum Security
Frankfort Career Development Center,
Frankfort 178
Blackburn Correctional Complex
Lexington 377
Bell County Forestry Camp,
Pineville 193
*Marion Adjustment Center,
St. Mary 449
TOTAL 1197

*Minimum security prison operated by a private vender under contract

*Effective 2/14/90 Eastern Kentucky Correctional Complex (EKCC) was added to the system. EKCC added 536 beds.

**Kentucky Correctional Institution for Women houses all state female offenders.

There were also 11,243 probationers and parolees under supervision.

Cameras Replacing Court Reporters

Judicial mistakes come in almost inexhaustable variety, but Judge Ellen B. Ewing found a novel one: She erased the only record of eyewitness testimony in a manslaughter case. Ewing is the chief judge of the Louisville circuit courts, the only major court system in the nation that has completely eliminated paper and gone to videotape for trial transcripts.

When Ewing forgot to turn off the videotape during a noon recess soon as the system was installed in 1985, the cameras whirred steadily as she ate lunch, then automatically rewound and accidently taped over the morning's record with new testimony in the afternoon. Ewing's inadvertent erasure represents only one of the perils of video courtrooms, which have spread from Kentucky to 60 courtrooms in 11 states in the past 5 years. Judges have forgotten to turn on the cameras, testimony has been inaudible, appeals have taken months to prepare as lawyers struggled with unfamiliar video records and court reporters have lost their government jobs, but the use of video transcripts is growing dramatically from Maryland to Hawaii.

"I don't feel as if any system is perfect," said Judge Laurence Higgins, who has been on the bench 14 years, "but this is the greatest thing that has happened to me as a trial judge in my lifetime."

Kentucky, having worked out many of the bugs in its trailblazing system, preserves the official record of 40% of all trials on videotape. It saves money, provides faster service and produces more accurate transcripts, according to Kentucky Chief Justice Robert F. Stephens. The number of video courts is growing as fast as Kentucky finds $50,000 per courtroom to install the equipment.

In Kentucky courts where it is used, videotape provides the only official record; when a case is appealed, the appellate lawyers hand the state Supreme Court tape, not paper.

Virginia has a pilot project underway in one courtroom in Roanoke. And Maryland has installed cameras in the Prince George's County circuit court of Judge Darlene Perry. The District is not using video. However, 4 federal courts around the nation are expected to begin an experimental program within weeks.

The National Center for State Courts, after an exhaustive survey, concluded that "video recording is a viable method of court reporting that compares favorably with traditional court reporting."

But as a steadily growing number of state and federal courtrooms are wired for cameras, some appellate lawyers and judges question whether videotape is too time-consuming and cumbersome to review. And court reporters - fighting hard to save their jobs - are demanding that the supposed advantages of video be seriously examined.

"If a court is having personnel problems, just bringing in a machine is not a creative approach," said Marshall S. Jorpeland, communications director of the National Shorthand Reporters Association. "Video is just another tool, it looks great and sounds fantastic, but 50 years from now reporters will still be needed and courts will still have the human element involved to make sure everything's working."

To be sure, there have been problems. Curtis Clay, convicted of slaying his live-in girlfriend in Lexington, Ky., won the right to a new trial in 1989 when courtroom videotape ran out unnoticed while he was being questioned by his lawyer and cross-examined by prosecutors. The judge ruled that a reconstruction of his testimony did "not constitute a record of sufficient completeness for appellate consideration."

U.S. 6th Circuit Court of Appeals Judge Gilbert S. Merritt called his first experience handling the appeal of a burglary conviction using a Kentucky videotape transcript a "dismaying encounter." He said it did not provide an "adequate basis for review ... it was marginally audible." Because of the lack of a written transcript, "the parties could not engage with the bench in resolving simple factual questions about what happened at trial," Merritt said. "Oral argument about the events of the trial became, at times, an exercise in futility," he said.

"I think we jumped into this a little too soon," said Kentucky Court of Appeals Judge Charles B. Lester. "I think this can be developed eventually." Right now, however, he said, "It takes a lot more time to sit and watch a trial than to scan a typed transcript.... It has shifted costs up to our level; we are paying lawyers to sit and watch television. We just have to grind through and waste an awful lot of time.

Further, Lester said in an interview, because the voice-activated system focuses on the loudest noise, "Everytime a spectator walks in, I get a beautiful segment of doors. I could prepare quite a beautiful ad for doors, every kind of door that exists in a trial courtroom."

Ewing, in accidentally erasing testimony, provided novel grounds for appeal. But the Kentucky Supreme Court refused to grant a new trial, saying that a narrative statement reconstructing the record from trial notes was sufficient to give the convicted man a "full and fair appellate review."

Kentucky officials say updated equipment in the voice-activated system was eliminated many of the mechanical and sound problems. Human error has been minimized, they say, by new devices that prevent erasures and alert the courtroom audience when the cameras are not operating by the installation of two lights on the front of the judge's bench. Even so, the Curtis Clay case still occurred.

"My feelings have changed over the

years," said Frank Heft, chief of the appeals division of the Public Defender office in Louisville. "In the beginning, there were a lot of technical problems. It was particularly difficult hearing bench conferences. Most technical problems are now resolved.... The biggest problem is the time involved in reviewing transcripts. We've adjusted."

Three factors fuel the move to video - money, time and convenience. The National Center for State Courts found that Kentucky which paid low court reporter salaries before the introduction of video, reduced court reporting costs by 15% in actual dollars over a 4-year period, not counting the fact that salaries would normally have increased with inflation over the period. The state has spent the savings on video equipment for new courtrooms and hiring law clerks to help the judges.

Other states, which have kept more detailed cost records, say video recording costs are "roughly one-half as much as traditional reporting," according to the National Center for State Courts.

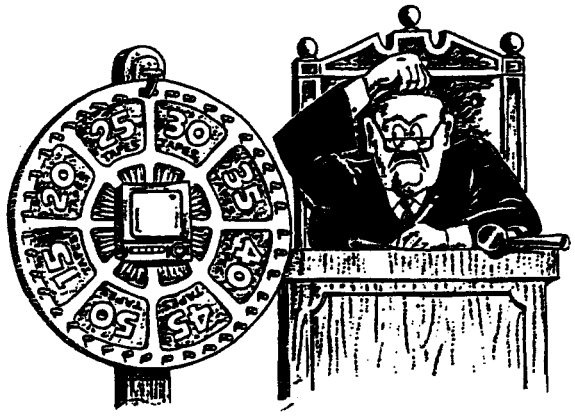
Court reporters say both costs and delays have merely been shifted around among the parties involved in litigation: "Court reporters are much less expensive" than video, said Laura Kogut, immediate past president of the Kentucky Shorthand Reporters Association. If a case is appealed, "you're paying attorneys $150 hour to watch TV."

Court Reporters say that instead of having to wait for transcripts to be prepared, delays have been shifted to the appeals process as attorneys take longer to study video records to prepare their briefs. "Attorneys have been cited by the [state] Supreme Court for not getting their briefs in in a timely matter," said Teri Hockersmith, a Louisville court reporter.

Higgins said Kentucky became a trailblazer in courtroom video because "necessity is the mother of invention." Higgins said he volunteered to have cameras installed in his courtroom and turned them on one morning after he had delayed a trial for 3 days because of the absence of a court reporter. It was not the first time video recording had been tried - it had been started and abandoned in Ohio and Tennessee- but new, unobtrusive, inexpensive equipment that could be operated by a judge made it a more attractive proposition. "It wasn't done out of spite or meanness," he said.

ADS OF THE KENTUCKY SHORTHAND REPORTERS ASSOCIATION

WHEEL OF APPEAL



You may have heard that video in the courts is "no gamble."

You should know that many see video as extremely unappealing.

Such as one appellate judge wrote:

"The record is replete with difficulties, not the least of which being its presentation as a videotape... we wish to call attention to the acute difficulties (video) presents..."

And an attorney who said in court:

"I spent 132 hours in front of the video terminal watching the trial... the real difficulty is trying to access the video record."

Are you willing to take a spin on the "Wheel of Appeal"?

The choice is yours.

GONE VIDEO

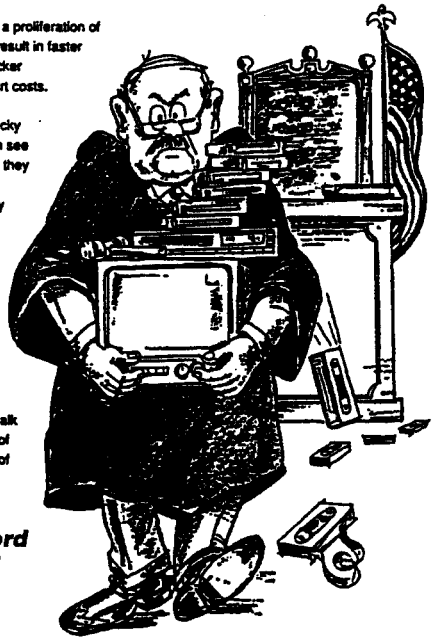
Many Kentucky trial courts have "gone video."

That's bad news for those who believe in the benefits of courtroom computerization.

A recent study noted that a proliferation of computerized courts will result in faster trials, fewer mistrials, quicker appeals and reduced court costs.

On the other hand, Kentucky appellate judges will soon see their efficiency decline as they review more and more videos on appeal (ever try to watch a three week trial on videotape?).

How will video affect you, the attorney? Are you ready to give up computerized litigation support, instant access to transcripts and other benefits of computerization? Would you rather walk out of court with a batch of 90 minute tapes instead of a transcript or a floppy disk?



Can you afford to go video?

The choice is yours.

This message sponsored by:

The Kentucky Shorthand Reporters Association

ASK CORRECTIONS

Shirley Sharp

TO: CORRECTIONS

My client is presently incarcerated, and I am sure that an out of state detainer will be lodged against him. How will my client know that he has the right to petition the courts for a dismissal or trial per the terms of the Inter-State Agreement on Detainers Act?

TO: READER

When the detainer is received from the out-of-state jurisdiction, your client will be given a copy of the detainer and at that time will also be given a Form I advising him/her of his right to petition the courts for an attorney and advises the client who to contact to file the forms.

TO: CORRECTIONS

My client is presently incarcerated and is wanted as an out-of-state witness. What provisions are made for an inmate to testify as a witness out-of-state and is my client protected from being prosecuted on a charge while there?

TO: READER

When a person who is incarcerated is subpoenaed as a witness for a trial in an out-of-state jurisdiction, it is required that the Judge of the Court of the out-of-state jurisdiction file a certificate in the District Court (the institution where the inmate is incarcerated - county location). The certificate advises that the Prosecutor has informed the courts that there is reasonable cause to believe that this inmate has information that is material and relevant to the action and that his attendance is needed, and that it would not cause undue hardship to appear and testify. They also promise to board, lodge, and retain inmate in their custody, bear all costs and promptly return him to our custody when the trial is completed or his testimony has been completed. This process is coordinated through the County Attorney and the District Court Judge. The inmate has a hearing, where his rights are explained, and a representative of the out-of-state jurisdiction or the County Attorney on that jurisdiction's behalf explain what his rights are, and advise him that he cannot be tried on charges while there, and assure him that he is to be taken for testimony only. The court then enters an Order of Summons based on the information.

TO: CORRECTIONS

My client is 62 years old. Is there a Geriatric Unit among the Corrections Cabinet Institutions, and if there is, how can my client be placed in that Unit?

TO: READER

There is a Geriatrics Unit which is located at Kentucky State Reformatory, LaGrange, Kentucky. A client cannot be placed in this unit just because of age, but because of medical need. If a client is in jail and has medical needs, he may be admitted to the Geriatric Unit, but the waiting list for this unit is based on medical priority need.

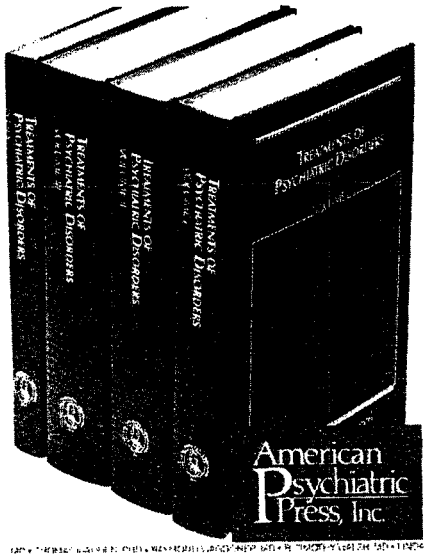
FUND RESOURCE AVAILABLE

A compendium of authorities supporting an indigent defendant's right to funds for experts, counsel, transcripts and witnesses is available for $10.00. Send a check payable to the KY State Treasurer to:

Ed Monahan
DPA
1264 Louisville Road
Frankfort, KY 40601
(502) 564-8006

BOOK REVIEW

Treatment of Psychiatric Disorders
American Press, Inc.
May, 1989
$250.00
(800) 368-5777



According to one count, some 450 varieties of psychotherapy are being practiced in the United States today. With that many approaches available to attempt to cure the 200 or so recognized psychiatric disorders, it is not surprising that mental-health-care professionals have been hard pressed to decide which therapies are effective in treating which illnesses. The choice of treatment is entirely up to the practitioner, "The patient is at the mercy of whoever's office he walks into," T. Byram Karasu, a professor of psychiatry at Albert Einstein College of Medicine, told me during an interview.

In all of medicine, psychiatry is the only specialty in which there are no generally accepted treatment guidelines. To remedy this situation- to bring some order to the field of mental-health care- the American Psychiatric Association [APA] several years ago began an ambitious review of the scientific literature with the object of producing a comprehensive overview of psychiatric treatments; the document has finally been completed and will be published this month. Somewhere along the way, however, many APA members began to entertain serious doubts about the project. They worried that this reference work would restrict their professional freedom and expose them to malpractice claims for treatments the volume did not condone. Psychiatric groups in the United States and Canada voted to urge the APA not to endorse the book, and a petition drive was launched among the APA membership to force the association to suppress it altogether. In the end the APA sought a compromise. The work, which runs to 3,000 pages, in 4 volumes, has turned out to be not so much a treatment manual as a lengthy discourse on treatment issues: a critical survey of the literature. And, despite the original intention, the report is no longer considered to be an official APA document. Rather, it is an "approved" APA task-force report, and APA members are in principle free to take its recommendations or leave them. Proponents of the work believe that even without the APA's imprimatur, it will substantially help to define the accepted boundaries of psychotherapeutic treatment; opponents fear that the proponents will be proved correct.

Treatments of Psychiatric Disorders (American Psychiatric Press, $250) has come to symbolize a major debate in psychiatry which boils down to this: Is psychiatry mostly a science or mostly an art? Supporters of the book come down on the side of science, saying that enough is known about the workings of the human mind to develop guidelines fixing it when it does not work. Opponents take the side of art, claiming that knowledge about human thought and behavior is too sketchy to begin restricting the methods used to manipulate psychological processes. Watching the debate with interest are patients, insurance companies, and malpractice lawyers, who merely by showing an interest in the proceedings have subtly influenced the direction they have taken.

The quest for a psychiatric treatment manual began in 1982, when Daniel X. Freedman, who is currently a professor of psychiatry at the University of California at Los Angeles, and who was the APA's president at the time, set up the Task Force on Treatment of Psychiatric Disorders. Freedman was motivated largely by concern that there was no clear, cohesive description of prevailing treatments, and that such a review was needed both to help psychiatrists assess their practices and to suggest directions for future research. In addition, officials of the federal government's Medicare program and administrators of private insurance companies had been periodically asking the APA for a list of treatment guidelines so that they, in turn, could develop more-restrictive reimbursement procedures. Freedman picked Byram Karasu to head the project, and Karasu persuaded some 400 of his colleagues to help write, rewrite, and review the reference work's dozens of chapters.

"It's time to get the quacks out of psychotherapy, to bring psychiatry up to date with the rest of medicine," Karasu says. "Right now the public's view of psychiatry is that anything and everything goes. Most psychiatrists are ethical and do not practice that way, but there are a number of mental-health-care professionals, especially those who are not psychiatrists, who through either ignorance or arrogance treat patients with ineffective forms of psychotherapy. That is what I hope to put an end to with this book."

Basically, that was the argument made by those in favor of publishing the work as an official APA manual, a document that, together with the *Diagnostic and Statistical Manual of Mental Disorders*, Third Edition, Revised, was meant to be the APA's official word on the diagnosis and treatment of psychiatric disorders. Advances in neurochemistry and pharmacology, they say, are now driving the study of human behavior, and it is time for the profession to wake up to this fact. Psychotherapies will always play a role in the treatment of mental disorders- but only those psychotherapies that can pass clinical trials. Just as a physician cannot use a new drug or surgical technique without its first being proved effective so should mental-health care be limited to those psychotherapies that have been proved effective. This approach, proponents of a manual say, will not limit the ethical treatment of patients, nor will it restrict the development of new techniques, which can still be tested experimentally, much as new drugs are.

Karasu is an articulate and persuasive spokesman. He never seems to get angry with the project's detractors, and he says he understands their concerns. But he blames ignorance for those concerns. The book is far from being the therapeutic cookbook that many imagine it to be, he says. It never once gives a hard and fast therapeutic rule like "For condition A, treat with therapy X, Y, or Z; all other

therapies are wrong." Rather, the book raises diagnostic issues relating to condition A, reviews the various therapies that have been tried and the results obtained, presents pertinent details from unusual individual cases, and only then discusses which treatments can be considered effective, under what circumstances. These are presented as preferred treatments, alternatives, adjuncts, and second-order treatments; taken into consideration are the needs of patients in different age groups and phases of personality development, and of those with more than one psychiatric disorder. The book also includes a thorough discussion of what is not known about various conditions and what questions need to be addressed to resolve the uncertainties that do exist.

"We haven't tried to write the definitive text on psychotherapy that sets forth rigid rules and regulations, but rather, we've tried to establish principles of treatment that can serve as guidelines," Karasu says. "This is a professional document designed to *suggest* useful treatment approaches for clinicians. In fact, it is designed to demonstrate the complexity of the treatment-planning process and its application, and the need for the individual psychiatrist to consider several approaches when treating a patient. I don't see how people will think this book is unreasonably restrictive, unless they practice far beyond the bounds of what is reasonable."

Proponents of the book also argue that its format will make it an important reference work for mental-health-care practitioners, particularly those who are in practice by themselves. Robert Cancro, the chairman of the department of psychiatry at New York University Medical Center and the author of the book's section on schizophrenia, says that he tried to write something that would be useful to a student or to a practitioner who does not have the advantage of being on the faculty of a major medical school. "Those of us in academia forget what it's like to be a psychiatrist in some small community where it may be harder to keep up on the latest in drug therapy, or where you can't refer a patient to a colleague when you aren't too familiar with that patient's problem," he explains. The pro-manual faction believes that the therapy guide will improve the education of new psychiatrists. Among other things, it provides multiple perspectives on psychotherapy, not the single perspective, reflecting an author's particular school of thought, that pervades most textbooks.

With a compendium of state-of-the-art knowledge now available, practitioners will no longer be able to say they did not know that a certain treatment might prove especially promising- or that some other treatment was distinctly beyond the pale. Karasu acknowledges that, in part for this reason, *Treatments of Psychiatric Disorders* will probably bring an increase in malpractice suits against psychiatrists. But he does not think this is necessarily bad. "Why should we be interested in protecting someone who is incompetent from malpractice suits?" he asks. "Our professional behavior will come under tougher scrutiny, but I don't believe that competent, ethical practitioners have anything to worry about."

Overall, Karasu is proud of the book. He feels that it is a big step in a continuing process of improving psychiatric medicine. "I hope that in 5 years this book will be outdated and the APA will have to prepare a second edition," he says, "and 5 years after that a third, and so on."

"This book isn't going to strengthen psychiatry, it's going to weaken it severely," says Seymour Gers, the director of medical education at the Manhattan Psychiatric Center and the principal spokesman for the anti-manual contingent within the APA. "Whether or not it is called a manual, or whether or not it has the APA imprimatur, this book is going to stifle psychiatric treatment. It is going to decrease the quality of patient care. And it is going to spur an increase in malpractice suits against both good and bad psychiatrists."

Those who oppose *Treatments of Psychiatric Disorders* argue that although psychiatry has made considerable progress in recent decades, its practitioners remain far short of consensus on what constitutes proper treatment and what does not. "Very simply, we do not know enough right now. We do not have enough of the answers," Gers says. Many of the book's opponents feel that treatment guidelines, no matter how broad, will retard or suppress the development of innovative therapies. James B. Wirth, the clinical director of inpatient psychiatric services at Johns Hopkins Hospital, in Baltimore, says, "We need the freedom to try new things." Wirth and others make the point that psychiatrists are treating individuals, not groups of individuals like those on which clinical studies are based. "Research looks at populations of people, and thus can only draw general conclusions," Wirth says. "We should take into account what population studies tell us about appropriate treatment for a given psychiatric problem. Still, we should not be restricted by those population studies in using our clinical judgment to decide how to treat an individual patient with his own unique problem." According to this view, behavioral problems are so much more variable than other medical maladies that the psychiatrist requires much more latitude than other physicians. The book's opponents argue, along similar lines, that the interaction between doctor and patient is an essential part of psychiatric treatment. Maladapted behavior may be caused by faulty brain chemistry, but treatment guidelines will never be able to account for patient-physician chemistry.

The original objections to the project had as much to do with its official nature as with its content. So why are Gers and many of his colleagues still upset about the book? "Even though it no longer will say 'official policy of the APA' on it, this book will still be ripe for misuse," Gers says. "All the disclaimers in the world will not prevent the book from being used in ways for which it is not intended, and anyone who thinks otherwise is foolish. Aren't they practicing psychiatrists? Haven't they found out by now that telling a person not to do something doesn't always get him to stop?"

Chief among those who Gers fears may pervert the good intentions of *Treatments of Psychiatric Disorders* are malpractice lawyers and litigious patients, who, as he puts it, "will now have ammunition in the form of authoritative, documented checklist standards against which psychiatrists' treatments will be measured by judges and juries."

And what about insurance companies? Imagine a claims adjuster who reads in *Treatments of Psychiatric Disorders* that treatment X should alleviate condition A in 6 to 8 months. Eight months have come and gone for a particular patient and he is still not "cured." Should the insurance company continue paying for treatment? Such scenarios scare Gers and many other APA members. "Insurance companies and malpractice lawyers should not control the treatment patients receive, yet that is exactly what is going to happen,"

Psychiatrist worry also that the reference book will take away their business. Psychologists and other providers of mental-health care will undoubtedly buy the report and will be able to use the information in it to bypass psychiatrist altogether, particularly when drug therapy is warranted. A psychiatric nurse, for example, could ask any doctor to prescribe a recommended drug. (However, non-psychiatrists, too, worry that the manual will take away their business: they object that it is too drug-oriented and thus discriminates against them.)

But above all, Gers believes, the book represents an unfortunate trend in mental-health care. "By setting forth these kinds of guidelines, I think we're dehumanizing psychiatry," he says. "Contrary to what the APA thinks, I don't think this is a step in the right direction, at least not with our current understanding of psychiatric disorders. Psychiatry is still an art; it still takes a great deal of interaction between patient and physician. This book de-emphasizes that interaction, and therefore I see it as something bad for the profession and bad for patients."

The one thing that is unarguable is that the American Psychiatric Press, Inc., a wholly owned subsidiary of the APA, will make *Treatments of Psychiatric Disorders* available in time for the APA's annual meeting, this month, ensuring brisk sales. Should the APA be proud of itself? The book is almost certainly 25 years ahead of its time. Science has answered many questions about the roots of human thought and behavior; the pace at which further questions are being answered is breathtaking. But the quantity of what we do not know is more breathtaking still. It will be decades, at least, before doctors can minister to the mind as precisely as they now can to the rest of the body.

And yet scientists are always publishing interim reports on the current state of the art; they really have no choice. If chemists had to understand every last detail about atoms in absolute certainty before publishing results, there would be no chemical literature and little if any progress in chemistry. Similarly, if physicians had to understand perfectly the connections between behavior and heart disease before writing about them, then there would be no literature on the hazards of smoking or overeating. The drawback, of course, is error, but error can be corrected- indeed, errors are being corrected all the time in science texts.

In all likelihood, the new volume of treatment guidelines will not be the evil that many fear, nor will it rid mental-health care of all the quacks and bad practitioners. Its greatest effect will be to stimulate discussion about the treatment of human behavioral problems. In the long run, whether that treatment is an art, a science, or a bit of both, discussion is bound to improve patient care.

JOSEPH ALPER *The Atlantic* P.O. Box 52661, Bowder, Colorado 80322-266 1-800-525-0643 *May, 1989, Reprinted with Permission.* **Editor's Note:** A review by William D. Weitzel, M.D. of the *Treatment of Psychiatric Disorders* appeared in the April 1990 *Advocate* at pp. 62-63.

THE MENTALLY ILL AND THE STEREOTYPE OF DANGEROUSNESS

The mentally ill are not one of the most dangerous groups in our society. Some predictably and demonstrably dangers persons are not preventively detained or handled with concern for public safety. For example, about 50% of all fatal auto accidents involve drunken drivers. Our society demonstrates a truly astonishing tolerance for this group of dangerous persons.

A person who is found to be mentally ill and dangerous can be involuntarily committed to a mental institution. Saleem Shah, a psychologist specializing in studies of crime and delinquency at the National Institute of Mental Health, has pointed out serious issues in preventive detention and the prediction of dangerousness.

Typically, an individual cannot be involuntarily confined to a mental institution simply because of anticipated- or even demonstrated- dangerousness. First, there has to be a finding of mental illness and then of an associated propensity or predicted likelihood for engaging in dangerous behavior.

Since involuntary civil commitment represents an exercise of State power that may deprive individuals of their liberty and also compel them to undergo psychia-tric treatment, it raises a fundamental question: What potential harms to society or to the individual are sufficiently serious to justify resorting to coercive confinement?

The question involves public policy, sociopolitical and legal issues, not medical, psychiatric, psychological, or mental health issues. In the existing situation, however, public policy and legal issues are confounded with psychiatric and mental health concerns.

It is difficult to discern how the link between mental illness and dangerousness behavior came about and why it continues to be maintained with such enduring zeal. Several studies have examined the arrest records of patients discharged from mental hospitals. These studies do not support the stereotype of the mentally ill as highly dangerous and unpredictable. Although persons diagnosed as seriously mentally ill (those likely to be hospitalized) are not any less dangerous than persons not so diagnosed, the evidence also points to the conclusion that the mentally ill do not constitute one of the most dangerous groups in our society.

It should be noted that some of the most predictably and demonstrably dangerous persons are not preventively detained or handled with greater concern for public safety. For example, numerous studies have shown that about 50% of all fatal auto accidents involve drunken drivers. Our society demonstrates a truly astonishing tolerance for this group of dangerous persons.

Given the numerous court proceedings in which the dangerousness of a mentally ill person is at issue and grave decisions affecting life and liberty must be made, one might assume that some reasonable accurate means of predicting dangerous behavior are available. This assumption is false. No instrument has been developed that can predict violent and other dangerous behavior accurately or satisfactorily. In fact, no test has been developed that can adequately identify such behavior retrospectively- let alone predict it.

HELEN WILLIAMS
Director of Volunteer Services
Mental Health Association of Northern Kentucky
605 Madison Avenue
Covington, KY 41011
(606) 431-1077

Helen Williams has been the Director of Volunteer Services for 3 1/2 years. Prior to that she worked for 2 years with Parents Anonymous with parents that abused children or were mentally ill. She attended a 3 month training by the Mental Health Association in Cincinnati in all mental health issues. She is a 1964 graduate of the Art Academy of Cincinnati with a Bachelors in Fine Art. She taught 2 years for the severely-behaved handicap.

The Mental Health Association of Northern Kentucky provides advocacy and outreach to a 3 county area - Boone, Kenton and Campbell. Among their programs are: self-esteem workshops with elementary school children, nursing home residents; a jail "listening-ministry;" a support group called "Just Friends" for persons with long-term mental illness; a Christmas day dinner for the homeless, mentally ill or lonely; health fair; guide book for mental health services; a teen crisis telephone number card; a newsletter that focuses on housing and legislation; daily referrals to agencies and doctors. All of these services are provided on a volunteer basis. Training of the volunteers is a large part of the organization's time and efforts. Two Advocates are employed on a part-time basis to assess the needs of mentally ill individuals.

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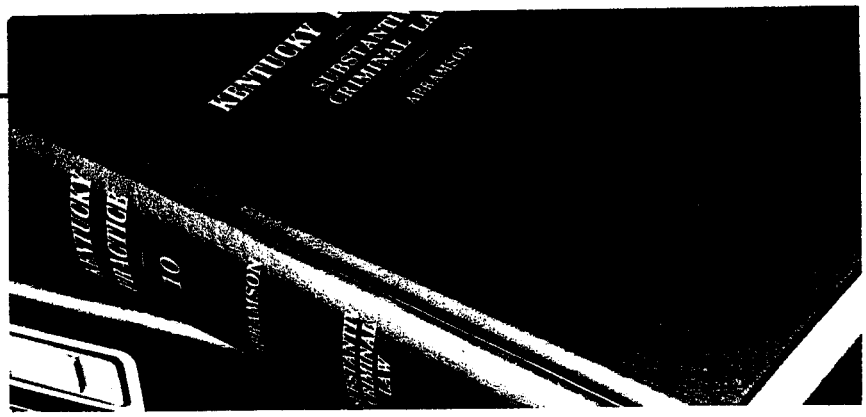
BOOK REVIEW

Kentucky Practice,
Volume 10 (1990)
Substantive Criminal Law ($85.00)
West Publishing Company
P.O. Box 64526
St. Paul, Minn. 55164



We've Shrunk the Constitution

Criminal defense work is probably the world's only recession proof growth industry.

Each year, every month, and it seems every day, the job of the criminal defense attorney becomes more demanding and difficult as the public urges more punitive criminal sanctions. Many politicians vote without hesitation for greater criminal liability and harsher terms of imprisonment.

On top of this pile of revenge, the decade of ultra conservative politics continues its influence in many state and federal courts, as constitutional protections are interpreted into oblivion.

The movie, *Honey, I Shrunk the Kids,* has become in real life *Citizens, We've Shrunk the Constitution*!

Volume 10, Kentucky Practice: Filling the Constitutional Guarantee Void

As constitutional protections evaporate under the hot air of the courts, defense advocates are more and more compelled to arm themselves with other sorts of weapons. *Kentucky Practice, Substantive Criminal Law,* Vol. 10 (1990) by Leslie W. Abramson, U of L Professor of Law is one more for our arsenal.

This work on substantive criminal law is the best available not because it is the only current work in this area of this breadth but because it provides us with well organized, up-to-date, thorough resources which we can apply in a most practical way to our court battles.

The work's 29 chapters include nicely done chapters on each Kentucky criminal offense within and without the Kentucky Penal Code from the run of the mill theft, DUI, burglary, robbery crimes through the more exotic tax, commerce, agriculture, elections, environmental and labor and human rights crimes. The later crimes are not discussed much anywhere else.

We are also blessed with chapters on defenses, drug offenses (with a very practical drug chart on pp. 587-89 originally developed by DPA and distributed via *The Advocate*), constitutional aspects of offenses (burden of proof, vagueness, equal protection, etc.), and an analysis of the law of mental states.

CONCLUSION

If we're truly interested in restoring the constitutional guarantee void and if we're really interested in prevailing on behalf of our fellow citizens accused of crime, we cannot afford to be without Volume 10 of the *Kentucky Practice Series*, a brand new legal assault weapon (not imported).

ED MONAHAN
Director of Training

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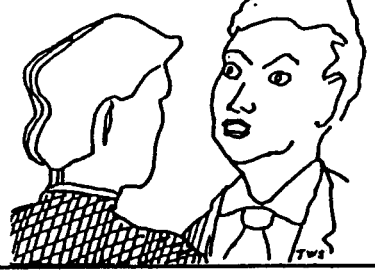
CRIME PAYS

by Ed Monahan

Did you see that Justice Rehnquist is starring in a movie?

Yeah, I heard the title is, "*Citizens, I Shrunk the Constitution*"!!!!



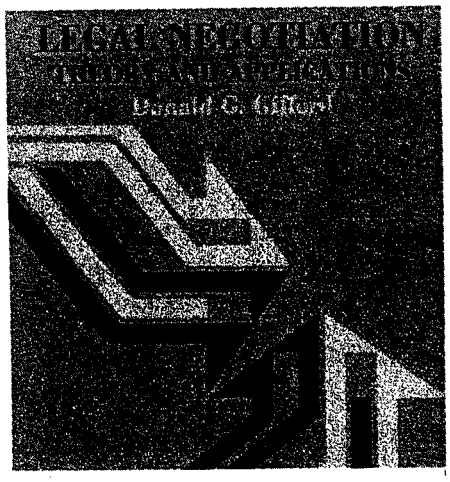
CITIZENS, I SHRUNK THE CONSTITUTION

BOOK REVIEW

LEGAL NEGOTIATION: THEORY AND APPLICATIONS

Donald G. Gifford
West Publishing Co.
1989, 225 pp.
$14.95 (softbound)

In this concise, well-written, and amply annotated book, Dean Donald G. Gifford of West Virginia University College of Law has created, in his own words, "a comprehensive overview of legal negotiation for law students and lawyers studying their negotiating behavior." Recognizing that different approaches are required for different negotiation situations, *Legal Negotiation: Theory and Applications* analyzes both competitive and collaborative approaches to negotiation and a variety of negotiating strategies and tactics.



Available from West Publishing Co., 50 W. Kellogg Blvd., P.O. Box 64526, St. Paul, MN 55164-0526.

Dean Gifford sees the negotiation process as consisting of six phases: negotiation planning, initial orientation, initial proposals, information bargaining, narrowing of differences, and closure. He shows how competitive, cooperative, or problem-solving approaches might be used in each of these phases, and often illustrates how a specific tactic might be used in a given situation by providing readers with a sample dialogue between the negotiators.

Dean Gifford makes very specific, useful suggestions with regard to each phase of, and approach to, negotiations. For example, in discussing competitive tactics, he deals with such important considerations as agenda control, the selection of and physical arrangements at the negotiation site, the timing of negotiations, the number of negotiators, the presence of the client, and bargaining with credentials.

The book strongly emphasizes the importance of determining the client's interests and working with the client during the negotiation planning phase, a crucial part of the process which all too often receives scant attention. In choosing this emphasis, Dean Gifford presents useful information on client counseling conferences prior to, as well as during and after, the negotiation. The book also briefly discusses the alternative dispute resolution movement, mediation, and other dispute resolution processes, but its principal concern remains with the negotiation process itself.

One of the outstanding features of *Legal Negotiation: Theory and Applications* is that it succinctly describes the research and theories of a variety of experts on negotiation, including the psychological and ethical factors involved. Dean Gifford has done an outstanding job of presenting, in an easily understood manner, the often divergent views of other authors regarding approaches to negotiation. As he states, "Claims that any particular negotiation strategy is superior to the others all of the time, or even most of the time, promise too much. It is the thesis of this book that the answer to which negotiation tactic is most effective is: it depends." Given this practical, even-handed approach, if a lawyer seeking useful information to improve his or her negotiation skills were limited to a single text on the subject of negotiation, this would be the book to choose.

The strength of the book is that in a very few pages it imparts a wealth of useful information, provides new ideas for law students, and affords an organized approach to re-examining the negotiation process for lawyers. Moreover, with its extensive use of footnotes, the text permits the reader to go to the original sources if further explanation is desired.

I have already adopted this book for use in my law school course on interviewing, counseling and negotiations. I am certain that it would make equally valuable reading for any practitioner, new or experienced, who is looking for expert guidance on the negotiation process.

NORBERT S. JACKER

Norbert S. Jacker is Professor of Law at DePaul University College of Law in Chicago, where he teachers Interviewing, Counseling & Negotiations, as well as Professional Responsibility. Author of Effective Negotiation Techniques for Lawyers (NITA 1983) and a well-known lecturer in negotiation skills, he has presented seminars and workshops on legal negotiation to law firms, corporate legal departments, and bar associations throughout the United States and Canada.

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(More information on page 63 of this issue)

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STEELE (Continued from Page 3)

Funding of defense services is critical. I don't know why a criminal defense attorney should be asked to donate his services when neither the judge nor the prosecutor is taking a pay cut to try to the case. The word "professionalism" (or rather, the lack of it) is applied to criminal defense attorneys by courts and members of the government when they want a lawyer to work for nothing. Their own sense of professionalism hasn't kept them from pay raises and increased funding which has monumentally outstripped the public defender system since its inception.

EXPERTS

Science has grown and so has the law in response to it. What used to be an indictment on Monday and arraignment on Wednesday and a trial 2 weeks from that date is a thing of the past. Under current statutes, laws, and constitutional laws, that procedure would not be countenanced as due process.

The Commonwealth can call up the Forensic Pathologist and discuss matters any time he or she wants- no charge, no problem. That same pathologist perceives himself as a witness/advocate for the prosecution and typically declines to accord the same courtesy to defense attorneys. Prosecutors have access through the Attorney General's office to special funds for experts, as well as access to the F.B.I. lab, which at government expense, not only tests, but provides expert testimony at trial. The lab also prepares exhibits for trial. The defense is usually unable to obtain its own expert, even if solely for consultation.

"If I want a pathologist, I have to go through the whole routine. The Commonwealth doesn't."

In a recent public defender sexual abuse case, I was unable to obtain a psychologist locally to administer testing to my client because the psychologist was afraid he might have to testify for somebody accused of some form of sexual perversion. He was worried about his image and the effect his identification with the client might have on his own business. We ultimately had to rely on a court appointed expert which is generally unsatisfactory.

Defense experts make a difference. Recently in a highly publicized murder case in Northern Kentucky, an accused who could afford to obtain expert witnesses was able to successfully mount his defense.

It bothers me when psychologists and psychiatrists want to withhold the "grace" of their services from somebody that they apparently believe is undeserving of their help. The way I look at it, the accused has only been charged, he has not been convicted yet.

DEFENSE-PRONENESS

A lawyer's personal beliefs don't necessarily prevent him or her from being a zealous advocate. I've heard lawyers speak at seminars and say a lawyer has to be be philosophical attuned- *in this instance I'm speaking about capital punishment*, in order to represent a client well. I disagree. I've seen the old "lions" of the criminal defense bar who were pro-capital punishment leave no stone unturned and fight hard when a client's life was at risk, even though it differed from their personal beliefs. They believe in the death penalty- but not for *their* clients.

David is married to Molly and has two sons, Aaron, age 14 and Adam, age 8.

CRIS BROWN

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