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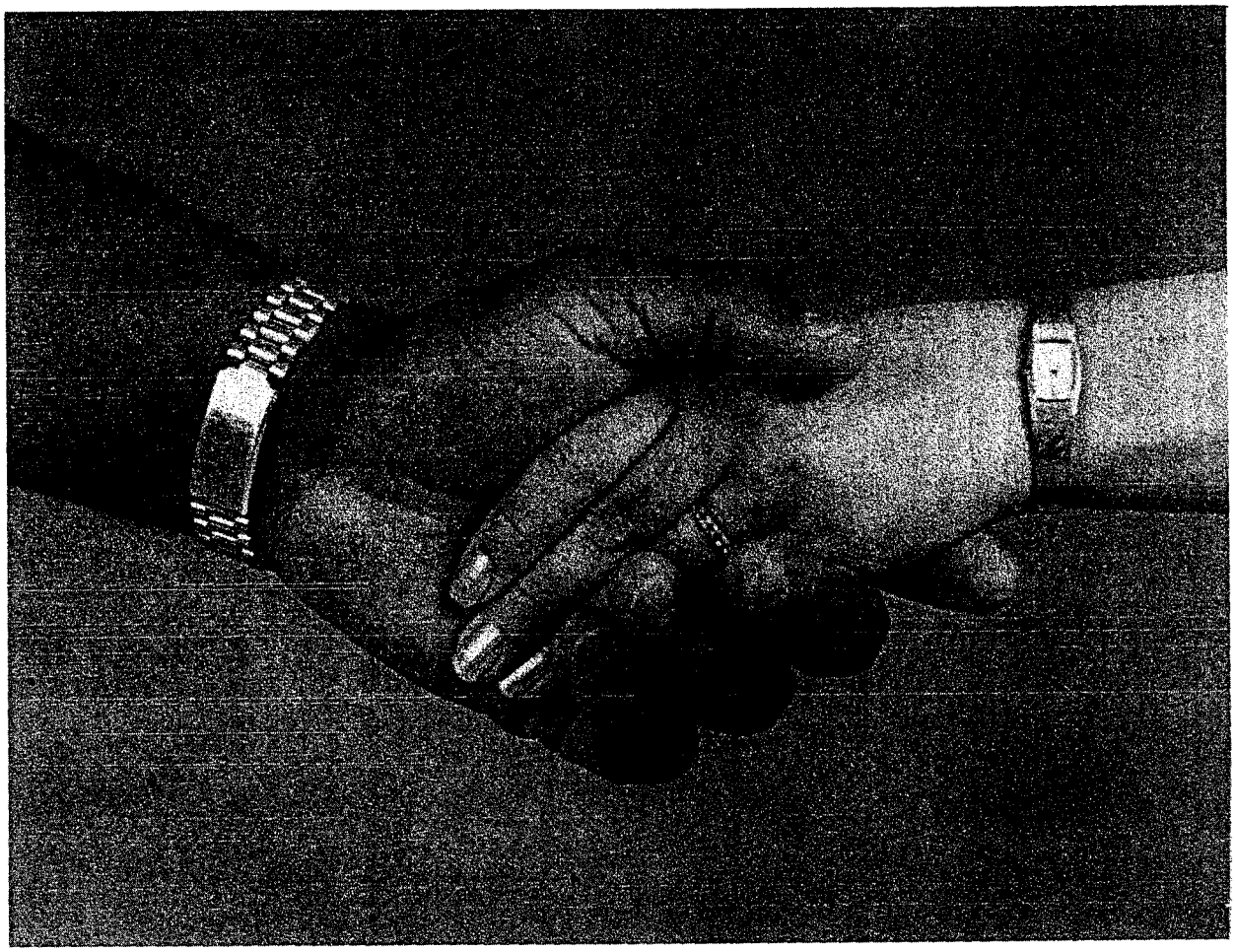

MAKING PEACE

Celebrating the 200th anniversary of our *U.S. Bill of Rights* on December 15, 1991
Celebrating the 100th anniversary of our *Ky. Bill of Rights* on September 28, 1991

Victims

We again focus an issue on victims in the criminal justice system, the victims of crime, the victimization of offenders by society.

We also focus on how victims and offenders can reconcile themselves under a concept of restorative justice.

It can be done. It is being done in this country. We can help it to happen more.

Edward L. Monahan

The Advocate is a bi-monthly publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. 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 Editor.

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

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THE ADVOCATE FEATURES

Paul Stevens - A Survivor Ministering to the Needs of Kentucky's Death Row

Left to Right: Mr. Paul Stevens, Mr. Chris Walls, Bishop John McRaith, Father Frank Roof (a former Eddyville Chaplin)

Weekly, I've seen his friendly smile for the better part of 4 years. Mr. Paul Stevens has brought his caring and sharing behind these walls, actually living his Christ-like faith. Retired, but also a Eucharist Minister, Paul has assisted 3 priests and other Chaplains ministering at Kentucky State Penitentiary. Everyone on death row respects Paul and knows in their hearts that he's a special man.

"When we forgive, we quicken healing energy within."

Married to his wife in 1942, Ruth and Paul raised 7 children. Part of their family struggle included enduring their child's, Cindy, death. She was only 20 when a robber shot and killed her at work. Paul wanted the state to give his daughter's killer death. Instead, after some years served, he was released.

Paul's a real friend. And God-sent I think at times, coming every week, even when Father is away. Bringing Communion to us Catholics is only a small part of the work he does here. He has a way of really sharing God's love, be it listening to one of our problems or some small talk. Usually he'll give some deep- hearted fatherly advise like, "don't worry about what he hollered, he's probably having a bad day and needed to blow off some steam." He just has a way about himself that makes it easy to *forgive and forget* after talking to him about a troubled situation.

Making the trip to Frankfort is nothing strange to Paul either. He's been in front of the legislative body more than once, trying to convince them to change the laws governing the death penalty. Paul's come to be against it. He and others with his dedication have made a difference, and his faith won't let him stop yet.

Sharing Paul's deep faith has really been a blessing to me. Many times we have asked each other for their prayers, especially in times when loved ones are hurting or in the hospital. We pray together about everything.

His coming to death row opened a new dimension to our voices, singing at Mass. One might say he had a big enough basket to help us carry a tune of praise.

Getting to know Paul was easy. His being here sharing our changes has been food for all of us. Changing places we celebrate Mass, from on the walk to the New Chapel, watching different ones leave, with shared happiness. But most of all, maturing in faith with Paul as part of our faith community is a real plus.

PAUL KORDENBROCK
Death Row
Kentucky State Penitentiary
P.O. Box 128, 4-215
Eddyville, KY 42038-0128

SIXTH CIRCUIT REVERSES CAPITAL CASE

On November 21, 1990 the Sixth Circuit in an *en banc* decision granted Paul Kordenbrock Writ of Habeas Corpus as to both criminal liability and sentence. Seven of the 13 members of the Court concurred and one judge concurred as to the sentence.

In a 94 page opinion, the Court reversed and remanded for a new trial due to the police's intentional violation of Kordenbrock's *Miranda* rights.

As the Court stated:

> As in many death penalty habeas corpus cases, the problem presented here is not whether the prisoner is innocent of a homicide-- the killing is conceded-- but is whether he received the full benefit of fair rules of constitutional procedure and a fair opportunity to offer to the jury mitigating circumstances that might dissuade them from imposing the sentence of death.
>
> It is not the Court's duty to determine whether Kordenbrock deserves or does not deserve the death sentence for his crime. The Court's duty is to insist upon the observance of constitutional norms of procedure.

Except for the trial court, each Court that has reviewed the confession issue has found *Miranda* violated. It has taken 10 years for a federal court to find the constitutional violation enforceable against the state.

There has never been any doubt that Paul Kordenbrock did not receive a fair trial. There will now be the opportunity for a *fair* resolution of this case.

Eddyville Prison Chaplain Relies on Forgiveness, Humor

EDDYVILLE - A picture of Pope John Paul II forgiving Mehmet Ali Agca, the man who shot the pope in 1981, sits on the Rev. Pat Bittel's desk at the Kentucky State Penitentiary at Eddyville. "The picture means a whole lot to the inmates," Bittel said. "Working here in the prison, and especially on Death Row, a lot of guys respect the Catholic Church and myself for taking a stand against capital punishment. 'You can't repent for what you've done if you're dead. I know people in here have done some heinous things, but no more heinous than people killing babies or selling drugs to kids."

Bittel is 1 of 2 chaplains at the prison, and his office overlooks Death Row, where he works closely with the inmates. He says working in a prison is something he was destined to do. "I've always been interested in reading Scripture," Bittel said. "The Scripture reading that says, 'I was in prison and you never came to visit me' has always bothered me. When I got involved in prison ministry, I became comfortable talking to inmates and listening to their stories. 'Now I feel fulfilled."

Although he is a priest, Bittel is not exempt from a daily dose of verbal abuse from inmates, and a regular routine of physical threats. "But what can you expect from guys who have no respect for themselves or society?" he said. "When your life has been nothing but crime, you don't want anything to do with someone who's good."

Bittel has counseled some inmates who never knew fathers or families. Several inmates tell him the deepest secrets of their lives. "Some tell me I remind them of the dad they never had," he said. "Guys on Death Row may tell me things they never tell anyone else."

Still, such openness is not always a blessing. "I have to be careful because I don't always know what they're up to." Inmates often try to earn the trust of the staff for their own benefit, and try to turn the staff against each other, Bittel said. "You can let an inmate be a friend to you, but you have to be cautious what kind of friend you are to him," he said.

The day-to-day stress often leaves Bittel with little to give at the end of the day. "The stories they tell drain me. To listen to how someone murdered or raped a child, or killed his parents, and not judge them takes a lot of energy," he said. "If I ever start judging them, I'll have to get out of prison ministry."

But Bittel's sense of humor helps him get through the day. "I've got to laugh off a lot of things to keep my sanity around here. Inmates are always watching me. That makes me feel tense when I feel something is going to happen." To relax, Bittel fishes and gardens, talks with some friends and prays.

All of that probably helps him prepare for Thursdays, his toughest days. He arrives at the prison at 3:30 a.m. to monitor the Muslims, who get up an hour before dawn to eat and then read the Koran for an hour. At 7 a.m. he has Mass for protective custody inmates, who wear green uniforms to signal they could be in danger if put in with the general population. At 1 p.m., he has Mass for Death Row inmates and the general population.

And although there are not a lot of success stories in prison, each one means a lot to Bittel. "I was one guy's godfather when he was baptized. He got out on parole, but was picked up again on drug charges. It didn't bother me; I expected him to."

Bittel is pastor at St. Paul's Church in nearby Princeton and chaplain for the Western Kentucky Farm Center in Eddyville. Conflicts sometimes occur, but his devotion to the inmates is always evident. "I work for the state," he said, "so unless someone is dying in Princeton or Paducah, the inmates have to come first."

Lexington Herald Leader, May 29, 1989. Reprinted by permission.

Letters to the Editor

Dear Mr. Monahan,

Thank you for the training and preparation materials. As a consequence,"I believe, the Commonwealth agreed to amend/dismiss the felony/PFO I charges down to a misdemeanor, to which the defendant agreed.

I would also like to compliment you on *The Advocate*. I have found it a rarticularly valuable source of information on current developments in criminal law. For example, John Blume's *Mental Health Issues in Criminal Cases* was the inspiration, and primary argument, in a dismissal motion I have pending in the U.S. District Court pursuant to *Brady v. Maryland* and Fed. Rule.Com. Pro 16 (3) (2) where insanity is at issue.

Thank you for your efforts,
Very truly yours,

Michael M. Losavio
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(502) 584-4047

Dear Mr. Monahan

I am a part-time public advocate and do appellate briefs for DPA. Since I have been receiving the *Advocate* I have found it to be an outstanding source of information for currgnt developments in criminal law. In my opinion it is the premier digest of criminal law in our Commonwealth. Keep up the good work! Your work is a lifeline to us out in the field and to our clients. Thanks.

Sincerely,

Paul J. Neel, Jr.
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Making Peace in Criminal Cases

Just Settlements from Victims Peacefully Confronting Offenders

A lot is made in death penalty cases of the importance of the penalty phase. It is no less true in defending routine misdemeanors, let alone routine felonies, that the heart of presenting a defense most often lies outside the trial, both in deferring prosecution and in sentencing.

A national leader in helping defense counsel construct alternative dispositions of criminal cases is the National Center on Institutions and Alternatives, 814 North Saint Asaph Street, Alexandria, VA 22314, tel. 703-684-0373. Its journal, *Augustus: A Journal of Progressive Human Services*, is a storehouse of valuable information about how to create novel resolutions to criminal cases, about who has done it, and about conferences and such where attorneys can learn and find support. The center's director is Jerome Miller, famous for having converted juvenile training schools to community-based non-secure treatment in Massachusetts. He and the Center are highly inventive about creating alternative sentences to incarceration.

Closer to Kentucky, I am organizing the 5th International Conference on Penal Abolition (ICOPA V), to be held at Indiana Univ. in Bloomington May 21-25, 1990. Ed Monahan at the DPA (502-564-8006) has details for the asking, and so do I.

THE MEANING OF PENAL ABOLITION

The biennial International Conference on Penal Abolition (ICOPAs) have met, respectively, in Toronto, Amsterdam, Montreal, and Kazimierz Dolny, Poland. Although informally organized, ICOPA has become hub of the leading network of practitioners and academicians committed to making peace in criminal cases. For ICOPA V we have identified 8 traditions whose adherents will be featured on the conference program: academicians and theorists, activists and reformers, feminists, lawmakers, mediators, traditional native North Americans, people of color, and prisoners.

Originally, ICOPA stood for the International Conference on *Prison* abolition. But it was soon recognized that our participants were involved in creating alternatives to punishment at all states of criminal cases. For instance, an active participant at ICOPA IV in Poland was John Palmer, creator of the Night Prosecutor Program in Columbus, Ohio.

As one of the founders of ICOPA, Dutch law professor Herman Bianchi, puts it, penal abolition is embodied in the Hebrew Biblical concept of justice--*tsedeka*. *Tsedeka* is measured by the fruits of human action rather than by the motives of the actors. Never mind how good and lawful the judge was, does the disposition of the court really heal the victim's suffering or aggravate it? This is the kind of question one asks to evaluate whether *tsedeka* has been done.

Penal abolition is no mere academic matter. Hoosier that I am, I am particularly proud of Indiana's strong tradition. One center of the Hoosier tradition has been the Mennonite Church, which founded the national network of Victim Offender Reconciliation Programs (VORPs) in Elkhart (to be featured on the ICOPA V program). As a matter of personal religious choice, Mennonites refuse to meet violence with violence, and in cases of crime seek to reconcile victims and offenders in a process of mediation. Some of us in the lawmakers' tradition believe that we would do well to legislate a requirement that some judges now have for divorce--that a complainant and an accused try mediation as a condition precedent to prosecution.

We who advocate use of VORPs find that victims in a fair and peaceful confrontation with the persons who have hurt them are often healed, first by having a safe opportunity to confront offenders with their anger, and then by encouraging both parties to create and agree to a just settlement for the pain caused. Here the victim and offender define the issues rather than being tools of the trial process.

Mediation is just one of the many means ICOPA participants consider and use for making peace in criminal cases. Given the high probability of plea bargaining in our courts, and the speed and simplicity of most trials, trying the issue of guilt or innocence is largely beside the point in the bast majority of criminal cases. Defense counsel have 2 major opportunities: to make arrangements to defer prosecution, as by VORPs, or to create sentencing plans which give offenders a chance to be responsible for offending rather than locking them away. This is more of a political than a practical problem.

I have a friend now doing time in Kentucky who has killed 5 people in my home state, 3 of them in prison. I nonetheless feel completely safe with him. As long as I am not a bully, my major problem is to avoid complaining about anyone else he might try to take care of for me. We could hire a team of people to stay with him around the clock, ideally in a peaceful setting like an Amish community, and he--who happens to be a strong and skilled mechanic--would present far less threat than he does in prison. (Indiana doesn't want him back.) It could cost substantially less than keeping him in prison. The obvious political problem is that people are so wedded to punishment that no official would dare be seen letting him go until his sentence runs out, or preparing him for his inevitable release. Once again, he will probably be kept until his sentence has run entirely, then released without eligibility for parole, with no official guidance or support.

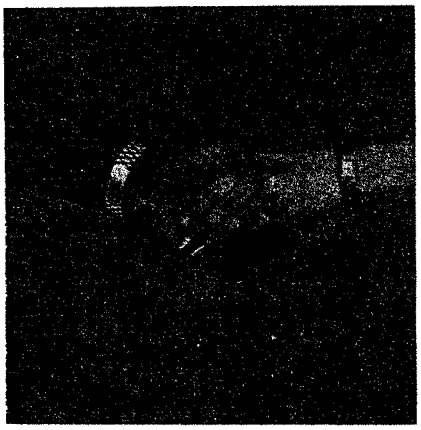
WHY DO WE PERSIST IN PUNISHMENT?

I have done studies of crime waves in the U.S., and in Britain, China, Norway and Tanzania. Everywhere I see the same pattern. Wars on crime are a tried-and-true way for politicians to let citizens

vent anger and frustration over injustice and suffering at safe targets. Characteristically, the targets are the same group--underclass young men--politicians let citizens vent anger and frustration through in other wars, by making them soldiers at the front. The rhetoric of wars on crime, the tactics and strategy, are identical in wars on crime and other wars. The entire history of the United States is one of achieving political leadership through warfare. Our first President and our latest one in a long line are military heroes. Strength, we are told, lies in obedience to a strong Commander-in-Chief, who points out underclass young men for us to rally to fight from the Iraqi border to the U.S. Inner city.

We have alternated between foreign wars and wars on crime in U.S. history. Incarceration rates have only leveled off or dropped during major foreign wars since the mid-19th century, most recently during Vietnam. The current incarceration wave began as a response to the twin crises of political legitimacy--Watergate and the pull-out from Vietnam--in the early 1970s. We now have an average daily population of inmates of roughly 500 per 100,000 population in the country. One of every 12 black men in his twenties is spending today in jail or prison; twice again as many are on probation or parole. Willie Horton and Latino drug dealers personify the enemy in this war. Still the population in prison, jail and juvenile detention climbs dramatically. It remains to be seen whether history will repeat itself; if American blood begins to flow freely along the Saudi-Kuwaiti-Iraqi border, perhaps the trend will turn. But over the 150 years incarceration fights have been kept, every succeeding peak and valley of incarceration rates has risen steadily higher.

There may be more crime these days than ever, I don't know. I have studied crime reporting in Minneapolis, Indianapolis, Sheffield, England. I have concluded that crime reporting tells us a lot about the politics of policing and how crime reporting is organized--even in the case of murder--than about trends in crime itself. This I do know. Crimes of the power elite of any society occur far more often and more seriously than crimes of the poor. That should be no surprise. Crime is a matter of power, and so by definition more powerful people have more opportunity to kill and steal and get away with it. In *Myths That Cause Crime*, Paul Jesilow and I show for instance that if the police patrolled and investigated hospital records with the same rigor and standards they apply to inner city streets, there would be at least 50,000 criminal homicides in hospitals to report each year (from operating unnecessarily and without informed consent, from reckless uncleanliness and from reckless mistakes in dispensing drugs), as against the 20,000 or so "murders" (which literally means police suspicion that murder or non-negligent manslaughter has occurred) the F.B.I. reports. Health care providers nickel-and-dime an estimated $13 billion per year in fraudulent claims out of Medicare, Medicaid and Blue Cross/Blue Shield alone, as against $10 billion total losses from street crime reported by the F.B.I. In these estimates we accept the premise that the medical profession is relatively honest as among white-collar activities, which is to say



that the number of unreported criminal homicides and amount stolen in white-collar activity staggers the imagination. As we say in *Myths*, telling people they are safer because there are over a million prisoners in the U.S. is like skimming the tip off an iceberg and telling ships it is safe to pass.

I know that many readers are as aware as I am that many, many prisoners understand the hypocrisy of criminal justice full well. Like children who are spanked for trying to stay up as late as their parents, most inmates are imprisoned for doing on a small scale what the ruling elite does on a grand scale.

Consider this: If Iran-Contra arms sales and covert funding were felonious in the District of Columbia, and if people died in the Iran-Iraq war and in Nicaragua as a result, the D.C. Penal Code defines the felonious co-conspirators as guilty of felony-murder, or murder in the first degree. I'll wager that those co-conspirators are guilty of far more murders than the more than 2,000 death-row inmates combined.

We punish our prisoners essentially because they do not have enough social might to make them right. Not surprisingly, many inmates learn from their punishment that success in this society rests on defending whatever property one can acquire (*e.g.*, the woman one "owns") with all the might one can muster. All the attention and resources devoted to fighting street crime diverts attention and anger safely away from the ruling elite, and adds to the impunity with which they can unlawfully abuse their power. The iceberg of crime grows unattended below the surface of social awareness. Thus, Paul Jesilow and I say the myth that poverty causes crime in fact causes crime on a grand scale.

Fear of crime is a metaphor for more general fear and anger. When I from time to time discover a student who is angrily writing that a Ted Bundy ought to burn, burn, burn, it doesn't take long to discover that that student is angry about his or her general impotence in everyday life. After all, the student neither knows Ted Bundy nor any of his victims, and may even live thousands of miles from them all. The powerlessness and degradation the student feels in daily life crave outlet, and if you cannot lash out at your parents, teachers or bosses, you can at least have people on your side when you let loose on Ted Bundy. No one can say it is wrong to attack him. It is what in *The Geometry of Violence and Democracy* call the lightning rod effect of violence. We pass on the violence we suffer, if at all, onto politically safe targets in daily as in national life. The boss yells at the man who slaps his wife who yells at her child who beats up on the younger sibling who kicks the cat. In criminal justice as in everyday life, people get punished more because they are available and convenient than because they themselves have caused the anger that provokes the punishment.

For the many who give way to punishment to vent their anger over their suffering in a violent and unjust society, punishment is an addiction. The more one invests in punishment the more one fears to give it up. Political leaders who benefit so greatly from punishment feed this addiction, and with fellow addicts develop elaborate rationales for punishment. They will not be swayed by evidence that, to use Jeffrey Reiman's words, *The Rich Get Richer While the Poor Get Prison*. The choice whether to be punitive or a penal abolitionist is ul-

timately an affair of the heart--a matter of profound choice in every religious tradition, between retributivists who believe that some people are chosen to dictate terms to others and are qualified to pass judgment, and mystics who believe that no one is in a position to cast the first stone. This means among other things that a punitive people like Americans can at best be converted to the wisdom of penal abolition by painfully slow steps over generations.

Meanwhile, judges, prosecutors and their co-workers can be surprisingly open to creative alternatives to prosecution and incarceration on a case-by-case basis. Beneath the punitiveness there is a nagging awareness that punishment is wasteful and counterproductive. This is especially so in sentencing, where a carefully developed alternative plan may be gratefully embraced by all concerned. Conversion to penal abolition grows on a small scale when officials see that alternatives they have tried to work, for to some degree addiction to punishment is a matter of despair that nothing else can be done.

CONCLUSION

With my involvement in ICOPAs, and in editing a volume of studies of *Criminology as Peacemaking* with Richard Quinney, I have discovered that for all our punitiveness penal abolition is widely accepted and implemented even in the United States. I know that public defenders for whom this journal is published are generally committed to penal abolition, and yet feel locked in to an unyielding, unsympathetic system. I learned that even from just a couple of years' experience as a student public defender myself. I encourage you to try to reach out to people like Jerome Miller, and to come to ICOPA V, to find sympathy, encouragement, and a wealth of information about what works. With patience and persistence, it is possible to help treat our national addiction to punishment which makes crime uncontrollable.

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Books Mentioned in article:

Harold E. Pepinsky and Paul Jesilow, *Myths That Cause Crime* (rev. edn.). Cabin John, Md.: Seven Locks Press (1985).

Harold E. Pepinsky *The Geometry of Violence and Democracy* Bloomington: Indiana University Press (spring 1991).

Harold E. Pepinsky and Richard Quinney (eds.) *Criminology as Peacemaking* Bloomington: Indiana University Press (spring 1991).

Jeffrey Reiman *The Rich Get Richer and the Poor Get Prison: Ideology, Class and Criminal Justice* (3rd edn.) New York: Macmillan (1990).

THEY LOST THREE SONS

To replace them, they turned the other cheek

Father Jerry Rohrer told me this story at retreat. I've promised to keep the names anonymous. The story begins almost 30 years ago in Milwaukee, with a couple who were the parents of 3"sons. All 3 grew up to be fine lads. One was an honor student in college. Shortly before graduation, he was killed in an auto crash. That left the couple with 2 sons.

One was Father Rohrer's roommate in the Jesuit novitiate at Marquette. That is how he became acquainted with the family. The roommate left to join the Army Air Force in the 2nd World War. Not many months later, he was killed on his first mission over Germany. Now, only 1 son was left. He became a lawyer. His father ran a repair garage and some evenings the lawyer son would volunteer to work on the books, clean up the place, and lock the doors. That is what he was doing one evening when a young man came in, pointed the gun, and demanded the cash. The lawyer tried to overpower the bandit, and was shot. He died before he reached the hospital.

Now, there were no children left for the Milwaukee couple. They must have been bitter that night of the holdup.

When the killer was arrested and sentenced to life imprisonment, you would have thought that the parents of the murdered son would have enjoyed the wry satisfaction of retribution. And you would"have thought, too, that they would never want to hear the name of that young killer again. But that, says Father Rohrer, is nov how it was. A month later, on visiting day at Waupun State prison, the young slayer was told that someone had come to see hio. He walked into the room, and there sat the father and mother of the man he had killed. They had not come to rebuke him, but to offer him their friendship. They had learned that the murderer was a boy who had grown up in the slums of Milwaukee, whose home had been the streets, whose mother had abandoned him. He had never known his father.

All his life, this boy had fought and scratched, lied, cheated, stolen, and finally killed to make his way. Was this the reason they went out to visit him? "I don't know that answer," says Father Rohrer. "All I know is that every month that mother and father went to Waupun prison to spend whatever time they could visiting with the murderer of their last son."

Through the years, a close relationship developed between them and the inmate. It was almost as if he had become the 3 sons they had lost. Finally, they adopted him as their own son, knowing he would never leave prison. But it didn't matter. The years passed, and the father died, and then it was only the mother who made that monthly trek to prison. "She was there the day he became a convert to the Christian faith."

How many times the prisoner told that couple he was sorry nobody will ever know. But, wherever Father Rohrer tells the story, people are certain that the mother and father believed what he said. And forgave him long before that. "I can think of only 1 other similar story," said the priest. "It happened on a hill called Calvary."

GARETH HIEBERT

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Victim-Offender Reconciliation

PACT

Prisoner & Community Together

It is 8 o'clock in the evening. Mr. and Mrs. Walker, a retired couple in their late 50s are watching television. The phone rings. They both jump and then look at one another. Since their home was burglarized 6 weeks earlier they have both been on edge. They have heard nothing about the status of their case, other than a brief phone call from the district attorney's office telling them that the offender had been caught. He did leave them with a name, Robert Townsend. The Walkers, though, still have plenty of questions about what happened to them and why.

"Mrs. Walker, I'm Sari Chaisson. I'm a volunteer with the Porter Victim-Offender Reconciliation program. Did you receive my letter telling you a little bit about our program?"

"Yes, I think so. I remember 'reconciliation'."

"Our program provides an opportunity for crime victims to get restitution for the damage caused by the crime. And get questions answered. Tell the offender how you feel about it."

"You mean, meet the burglar who did it? Invite him back into our home?" Mrs. Walker is just about ready to hang up. The sickening feeling she got when she returned to her ransacked home two and a half months ago is flooding back.

"The meeting could be held in our office or wherever you feel most comfortable."

"We've already submitted the bills for the damages to the court. Couldn't the judge just order the boy to just pay us?"

"Yes, she could order that--"

Mrs. Walker interrupts. "But can the, what do you call him, the 'offender' pay? Does he even have a job?" Suddenly a whole host of questions floods out. How old is he? Is he sorry about what he did? Does he live in the neighborhood or does he come from across the tracks?

The volunteer listens patiently, supplying information where she can. The offender is white, male, 17 years old. This is his second time through the court system.

"What's going to happen to him?"

"That's ultimately up to the judge. But you can have a say in it."

Mrs. Walker concludes. "I'm not sure I want to meet him." She is surprised how quickly the anxious feeling she had been experiencing a minute before has been replaced by feelings of anger and frustration. "I'm just too angry."

"That's perfectly normal."

"I'd probably end up telling him off."

"That's okay too. Maybe he needs to hear that."

"Maybe he'll get upset with me."

"Mrs. Walker, all cases are carefully screened for appropriateness. And I'll be at the meeting making sure things stay in control. In the thousands of cases that have been mediated in these programs around the country there has never been an incident of violence, by either party."

"You say you're a volunteer? Why do you do this?"

"I see [the] impact these meetings have on both parties. And that's very fulfilling."

"So you think it will do some good?"

"Well, every meeting is different but studies have shown that victims who participate experience a higher degree of satisfaction with the justice process. And offenders who participate in restitution programs commit fewer and less serious crimes later on."

"Well, I'll have to think about it. I want to talk it over with my husband."

"Fine, it's entirely up to you. I'll call you back tomorrow about this time."

In the meantime the volunteer gets in touch with the offender, Robert Townsend and explains the purpose of the program to him.

"I don't have a job. I can't pay any damages," he tells her.

"You should explain that to the victims," she responds.

"What are they like? I bet they're pretty upset."

"Yes, they are pretty upset. They'd had their house burglarized. Ransacked. From what they told me the damages come to about a thousand dollars."

"A thousand dollars, no way! I just messed it up a little. Besides, they could probably afford it. They look pretty rich."

Like 65% of all victims who are contacted by victim-offender reconciliation programs nationwide, the Walkers agree to meet with the offender, who has already admitted his guilt.

During the meeting, which lasts about an hour, the facts of the case are discussed first. The Walkers described the scene that greeted them upon their return from a dinner party. Starting to clean up the mess and then stopping, not wanting to disturb any evidence. The police reports. Not getting to bed until 3 a.m. and then not being able to sleep. Fearing that whoever it was who had done this might come back again that night. The Walkers want to know why Robert chose their house. Had he been watching them? Why did he do it?

He shrugs. "I was looking for money. And liquor. I don't know why I did it."

Mr. Walker jumps in. "If that was all then why did you have to trash the place? That was just stupid. And you don't look like a stupid kid. You just look mixed up."

As the meeting moves into its second phase, skillfully directed by the mediator, specific damages are discussed. The victims begin to get angrier. As they explain the damages to the other rooms, the mediator encourages the couple to get up and walk through the

house. The Walkers point out various items as they make their way from the back door, through the kitchen and into the den and bedrooms. They show Robert the snapshots they took the night of the burglary. He just shakes his head, looking at the consequences of his actions.

Mr. Walker holds up a picture. "This portrait you damaged has been in my family for 75 years. It's going to cost us $100 to remove the water damage and restore it. The other damage totalled $900. We had to have the locks and doors repaired--that was $200 right there--and then we repainted the bedroom and kitchen."

Robert offers, "I don't think its fair for me to pay for the repainting. Couldn't you have just washed the walls? Besides, I don't have that kind of money!"

"Well," Mrs. Walker suggests, "we probably could have got by with washing--but we were going to repaint anyway. This gave us the reason to do it."

"How much money *do* you have?" Mr. Walker wants to know. Robert has $100 which he agrees to give them to help restore the heirloom photograph. He also will attempt to recover some of the stolen property. He agrees to pay the $100 for the broken locks, and half the painting bills. Since he has no job, he agrees to work off the balance, agreeing to paint the Walkers garage and working without pay at the senior center for another 50 hours.

The mediator reads the contract to make sure everyone understands the agreement. Even though everyone signs, it will still be up to the judge to decide whether to adopt it. Typically the VORP contract will become one of the conditions of probation.

According to national figures, approximately 90% of all meetings end in a contract. Approximately 98% of contracts are fulfilled. Those few that do not are usually turned over to the probation department for follow up.

At the conclusion of the meeting, both parties shake hands. Robert apologizes for what he has done. Mr. Walker jokes that he'd like to hear him say it again, *after* the garage is finished.

Meetings like this one are occurring across the country regularly. In 1989, nearly 5,000 such cases were mediated by approximately 100 programs nationwide.

VORP programs involve a face-to-face meeting in the presence of a trained mediator, between an individual who has been victimized by a crime and the perpetrator of that crime. They operate in the context of the juvenile and/or criminal justice system rather than the civil court and in addition to the likelihood of a restitution obligation, the program focuses at some level of intensity upon the need for reconciliation of the conflict (*i.e.*, expression of feelings, greater understanding of the event and of each other).

Referrals come primarily from court and probation departments, typically after admission of guilt but before sentencing. However, cases can also be referred predisposition, as an alternative to prosecution, or as part of the sentence.

Victim and offender are contacted separately by a trained mediator, a volunteer from the community who has participated in extensive training regarding the process. The benefits and rationale of the program are explained and participation invited. Offenders with a history of violence are excluded. According to one study, victims stated that the primary reason that they were participating was to receive restitution. That same group was asked later what was the most valuable part of the experience: "recovering restitution" had dropped to number 3 and "getting a chance to ask questions" was listed as number 1.

VORP programs began in the Midwest, primarily in Indiana and Minnesota, but have now spread to 20 states, with concentrations in California, Wisconsin, and the Pacific Northwest. In 1984 there were less than a handful of programs. Today, VORP programs are starting at the rate of 2 per month. They involve misdemeanor as well as felony level offenses. One program in New York works with violent crimes, but most address property offenses.

One of the reasons given to account for this tremendous rise in popularity may have to do with the benefits which VORP provides to victims, offenders and communities.

Victims have the opportunity to get questions answered about the crime and its aftermath. They are able to play a meaningful role in the disposition of the offender's sentence and obtain restitution for their material loss.

Offenders, often for the first time, are face-to-face with the human consequences of their actions. Offenders are forced to take responsibility for what they have done and repair the damage that has been caused. Because they are involved in setting the terms of the restitution contract, there is a greater likelihood that it will be completed. Studies have shown that offenders who participate in a restitution program, particularly those which have a face-to-face encounter with the victim, commit fewer and less serious crimes.

Judges are able to apply the powerful principles of conflict resolution and mediation to the criminal justice system. It is an inexpensive, but powerful intermediation sanction. Judges are able to see evidence of material change in the offender as the restitution contract is completed. Judges are able to see victims more satisfied with the process.

Defense attorneys are able to use VORP as a way of demonstrating meaningful behavioral change on the part of the offender prior to sentencing. VORP also helps defuse the anger that many victims have that is the result of stereotypes and the feeling of being "processed" by the system.

In short, victim-offender reconciliation programs represent a return to a fundamental principle of justice: that crime represents an injury and insult not only to the community but to the victim. Justice is best served when both issues are addressed: the harm done to the victim is acknowledged and repaired and the offender responsible is held accountable in a meaningful way. Victim-offender reconciliation enables this to happen. It is a simple program yet capable of producing profound change among those it involves.

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PARENTS OF MURDERED CHILDREN INC.
& OTHER SURVIVORS OF HOMICIDE VICTIMS

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PARENTS OF MURDERED CHILDERN AND OTHER SURVIVORS OF HOMICIDE VICTIMS

My initial contact with Parents of Murdered Children and Other Survivors of Homicide Victims (POMC) came in the summer of 1986. My son Michael was murdered in February of that year and I really needed the support they offered. In 1987 I became a Contact Person for POMC and finally decided to start a chapter in Lexington. The Bluegrass Chapter of POMC was started in March, 1990 and I serve as the Chapter Leader.

WHAT IS POMC?

Parents of Murdered Children and Other Survivors of Homicide Victims is a self help organization designed to offer emotional support and other information related to the loss of a loved one to murder. We have found that the mutual sharing of grief helps us deal better with our individual grief. We meet once a month to discuss our individual and collective problems. Occasionally we have speakers on grief, victims rights, and the criminal justice system.

OUR LOSS BINDS US

POMC is made up of a group of very individual people. We do not all share the same beliefs. The one thing we share is an overwhelming feeling of loss, pain, and frustration. This creates a need to talk to people who understand these feelings. The average person seems to feel that grief has a magic time limit and once we pass that limit they stop listening. Not one of us would want you in our shoes, but we would like you to listen to us and believe us when we tell you that we are now subjected to a lifetime of loss and pain.

We have all discovered that when death occurs out of its natural order our loss is intensified. Add to this the cause of death -MURDER - and the emotional stakes get higher. We have a hard time dealing with the social stigma attached to murder, much in the same way that rape and suicide victims do. For most of us, our only contact with criminals or the justice system is via television. We find ourselves emotionally drained, expected to understand a system that feels we haven't any right to be involved, and finally criticized because we become angry.

THE CRIMINAL JUSTICE SYSTEM ADDS TO OUR PAIN

Unfortunately, some of our pain and frustration is given to us by the criminal justice system. Our first trauma usually starts with seeing or hearing of the death on the media. The fact that everything is cloaked in 'we didn't give the victims name" doesn't excuse the media for its

POST - MURDER TASK FORCE DIVIDES INTO TWO COMMITTEES

In response to questionnaires sent in by members, the POMC Post - Murder Task Force will begin work in two areas: 1) Notification of family members once a homicide has occurred (for professionals); 2) The criminal justice system (for survivors)

The task force has divided into two committees. Each committee has taken on the responsibility to collect data and put together information pertinent to their topics. Their information will be finely tuned and made ready for publication in January, 1991.

PATH THROUGH JUSTICE SYSTEM COMMITTEE

Harry Frisby, Detective *
City Police, Homicide Dept.
R. Lanahan Goodman, L.P.A. *
Hermanies & Major Law Firm
Edward Monahan, Chairperson
Kentucky Department of Advocacy
Frankfort, Kentucky
Judith Mullen, Asst. Prosecutor *
Hamilton Co.
Nancy Rankin *
Hamilton Co. Probation Office
Ann Reed, Survivor *
POMC National Office
Robert P. Ruehlman, Judge *
Hamilton Co. Common Pleas Court
Nancy Ruhe, Exec. Director *
POMC National Organization
Frank M. Schmidt, Funeral Director,*
Schmidt - Dhonau Funeral Home
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lack of respect for people. The person responsible for family notification should do so immediately or some reasonable solutions between police, coroner and media should be worked out. Our need to know what happened, to see the body, to find out what happens next seems to be a problem in our system.

The majority of us do not want to hamper investigations or be in the way. Our concern is to know exactly what happened, why it happened, who committed the crime, and having justice served.

We have more trauma to live with once a trial is set. For those of you who firmly believe the victim's family should not be allowed in the courtroom, I would ask that you put yourself in our shoes. How would you want to be treated and why, should a member of your family be murdered? Almost everyone should be able to relate to the following example. You've taken your extremely ill child into the emergency room at the hospital and the child has been taken to an examination room. The doctor comes in, checks your child over, and tells you he is going to admit him for some tests. At this point the doctor hasn't told you anything, you don't know what's wrong, and his next piece of advice is to go home. He says he will call you if there is any news. How do you feel right now? Are you angry? Panicked? Frustrated? This is how we feel when you won't let us know what happened to our children. Knowing what happened in the last hours of our child's life is just as important as our very first glimpse of them at birth. The courtroom is the only place we can find out what happened.

Once in the courtroom most of us would like to hear 'the whole truth and nothing but the truth' but the truth is that the facts are mixed with untruths. We all know that the truth can sometimes hurt but we also understand a fact is a fact, like it or not. What isn't necessary are the untruths used by counsel for the purpose of trying to get jurors to dislike either the victim or the defendant. These unnecessary remarks hurt a lot of people. We realize you can't take our pain away, we only ask that you don't add to it with innuendoes and untruths. Our judicial system may be the best in thg world but that doesn't mean we can't improve it. Isn't honesty the way to the truth and a fair trial? I sure hope so.

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An Old Woman and a Man with a Gun

Can anyone really live out this kind of love? There are so many examples of all sorts of people opening their lives and hearts to others that the answer is certainly Yes. While history books tend to emphasize wars and warriors, and newspapers are far more likely to feature murder than life saving, remarkably few people are pathologically violent. Millions of people, in refusing to go the way of destruction, manage to live lives that centre on the care of others, responding as if their guests were Jesus himself. There are many signs in the world of the activity of the Holy Spirit, so many in fact that one dares to think that the main reformation in Christian history is not in the past but in the present. Churches have increasingly grown beyond national identification. In the past there were several smaller churches that were called Peace Churches, but today there are signs that the Church as a whole and not only scattered fragments of it is becoming the Peace Church it was always intended to become. We live in a time when there are large movements of people, many of them motivated by their religious faith, who have come together to build bridges between enemies and to develop non-violent methods of conflict resolution.

It is amazing what a difference a few people make. In fact it is astonishing what can come out of the faith of just one person. One of my favourite parables of what ordinary human beings can be is about a woman I know of only through a news story I happened to read in *The Christian Century*. Mrs. Louise Degrafinried, 73 years old at the time, lives with her husband, Nathan, in Mason, Tennessee. They belong to the Mount Sinai Primitive Baptist Church.

One morning Riley Arzeneaux, a man who had just escaped from prison with four other inmates, came into their house. He aimed a shot gun at Louise and Nathan and shouted, 'Don't make me kill you!' Louise responded to this nightmarish event as calmly as mothers normally respond to all the crises and accidents that happen in a house full of children. 'Young man,' she said, 'I am a Christian lady. I don't believe in violence. Put down that gun and you sit down. I don't allow no violence here.' He put the weapon on the couch. While she had Nathan get the unexpected guest some dry socks, she made breakfast: bacon and eggs, toast, milk and coffee. She put out her best napkins.

When the 3 of them sat down to eat, she took Riley's hand in her own and said, 'Young man, let's give thanks that you came here and that you are safe.' She said a prayer and asked him if there was anything he would like to say to the Lord. He couldn't think of anything so she said to him, 'Just say, "Jesus wept."' (She was later asked how she happened to choose that text. 'Because I figured that he didn't have no church background, so I wanted to start him off simple; something short, you know.')

After breakfast she held his hand again. He was trembling all over. 'Young man, I love you and God loves you. God loves all of us, every one of us, especially you. Jesus died for you because he loves you so much.' Then the police arrived. Hearing the approaching sirens, the man said, 'They gonna kill me when they get here.' But Louise said she was going out to talk to them. Standing on her porch, she spoke to the police in the same terms she had spoken to the convict: 'Y'all put those guns away. I don't allow no violence here.' The police were as docile in their response to this authoritative grandmother as the convict had been. They put their guns back in their holsters. Soon afterward, the convict was taken back to the prison. No one was harmed.

The story of what happened to 2 of the other escaped convicts is a familiar tragedy. They came upon a family preparing a barbecue in their backyard. The husband, having heard about the escaped prisoners on the radio, had armed himself with a pistol. He tried to use it but was himself shot dead. The men took his wife hostage, stole the family car, and managed to drive out of the state before they were captured and the woman freed.

Louise and Nathan Degrafinried might also have been killed, of course. Good, decent people die tragically every day. But actually it isn't so surprising that their gentle welcome to a frightened man provided them with more security than any gun.

It may be that both the prisoner and the police who encountered Louise that day thank God for meeting her and now have an altogether different idea of what it can mean to be human than they had before. Perhaps they live quite different lives because one old Christian woman does in fact love her enemies.

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Mercy is the Best Revenge

David Scott can remember the events of that night in 1980 as if they took place yesterday.

Home from college for the summer, he'd been sleeping on the back porch of his parents' home on a summer night. Suddenly, near daybreak, he found himself wide awake. Then he realized why. Someone had fired a shot. It was a shot that was to change the lives of Scott and his family forever, because the man who fired it had sexually assaulted and then murdered Scott's 17-year-old brother, Jimmy - dumping his body on the family's front lawn before speeding away. By the time the family reached him, the young man was already dead.

Not surprisingly, the killing was an event that shattered the Scott family, affecting their lives in many ways. But today David Scott, a journalist working in New York State, seems totally devoid of the bitterness or desire for revenge that one might expect to find in someone who had lost a family member under such tragic circumstances.

"I can't say that I've completely forgiven the kook who killed my brother," he says. "I have gotten to the stage where I don't need to see him behind bars."

With time and effort, Scott has been able to put the tragic events of that night in perspective and begin to live a productive life again, even learning to feel some compassion for his brother's killer.

One could argue that Scott is an exceptional human being, and perhaps he is. Certainly his attitude and accomplishments provide a positive response to some troubling questions many Christians must answer: Can anything good come out of terrible tragedy? Is vengeance inevitable?

But Scott is not alone. Many people faced with trauma over the violation of a family member at the hands of another human being - through murder or other vile acts - seem able to overcome the searing pain and go on to lead productive lives. With time, faith, and the support of others who have experienced similar tragedies, thousands somehow find the strength to carry on.

For others, of course, the pain has been too much: suicide, alcoholism, drug abuse, divorce, and more are too often found in families where such tragedies have occurred.

Sometimes, the most tragic events can unexpectedly serve as the catalyst to propel a person into doing things for others that he or she had never dreamed of doing before. But even these "survivors" agree that their lives will never be the same again.

"At the time," says Scott, "I never had those kind of powerful emotions that people talk about, such as wanting to see the killer dead. In this present moment, I'd say it's more of a religious conviction. Back then all I had was a sense of futility. Locking the guy up for 10 years had the pragmatic effect of ensuring that he wouldn't kill anyone else during that time, but to me the retribution of punishing him because he punished me - the 'eye for an eye' thing - wasn't a factor. I wanted him to serve life in prison. The practical thing you want when somebody you love dies is for that loved one not to be dead. Punishing his killer in the electric chair couldn't bring my brother back to life."

The man who killed Jimmy served 10 years in prison before getting out on parole. Although his parents worked hard to keep the man behind bars, Scott saw no point to that.

"About halfway through the jail sentence," he reflects, "tension arose with my folks over what they saw as my indifference to whether the killer served his sentence or not. I've been working at forgiving the man. I ask myself, 'Could I lay down my life for this man as the Gospel asks me to?' I haven't reached that stage yet, so I haven't forgiven him completely."

For Pat Bane, a murder in the family was also the catalyst for a process of grieving and forgiveness. Ultimately it led her into an ongoing crusade: abolishing the death penalty for murderers.

Bane, a media specialist at Syracuse University Libraries, lost an uncle in the late 1950s. Her father's brother was mugged on a Syracuse street, left brain damaged, and lingered for several weeks before dying in his late 40s. A man was arrested for the mugging but, for lack of evidence, never brought to trial.

Because New York State had a death penalty at the time, people who spoke to her about the death assumed she'd be in favor of seeing the murderer put to death if he could be tried. But Bane had a different view.

"People always assume that when you've had that kind of incident in your family, you're going to be for retribution and the death penalty," says Bane. "Later, when I got involved with a group called Murder Victims Families for Reconciliation, people would say when we spoke,

'You'd feel differently if someone in your family had been murdered.' 'They have,'" Bane would tell them. "Killing was wrong before the murder; it's wrong after the murder. Two wrongs don't make a right."

In the late 1970s, working on a degree in lay ministry, Bane decided to do prison ministry. She began work with a group called the Death Row Support Project, writing to death-row prisoners. She began to meet people who had lost family members to murder but were opposed to the death penalty. They eventually led to the formation of Murder Victims Families for Reconciliation, which she calls the one positive result of her uncle's tragic death.

Was it hard to forgive?

"It can take years," Bane says. "One reason is that we don't have a lot of respect for forgiveness in our society." As evidence, she cites bumper stickers that announce, "I don't get mad, I get even."

"People expect you not to forgive," she says. "They expect you to hate the person who did something terrible to you or to someone you loved. I don't think we deal with that enough in our churches or in our daily lives. We don't talk a lot about forgiveness in our society, and we don't have a lot of respect for it. It seems like a lot more fun to get even. Forgiveness is not something that we value as a society."

Nor is forgiveness easy. Bane says it probably took her 20 years to forgive her uncle's killer.

"It happened naturally, over time, creeping up on me gradually. In my case, my work with prisoners convinced me that being a murderer could happen to anyone. Eventually I came to realize that every murderer has a family, and they come from every walk of life. Besides, getting back at the person who did it isn't going to undo the murder."

If anyone can speak with authority on dealing with the pain of hurt inflicted by others on family members, it would be Janet Ennis and her husband, of Pittsburgh, who lost 3 children in an auto accident in October of 1982. Their teens were going to a football game. En route, they were hit by a driver in a truck. Alcohol use on his part was suspected but never proven.

For all the pain that the tragedy engendered, Ennis points to one good thing that came out of it: her involvement in a Catholic group she helped found, the "We Are Remembered Ministry." It aims to provide spiritual help to those who have lost family members to tragic deaths.

"When I was ready to seek help, I wanted spiritual answers," Ennis explains. "I needed someone who could understand what I was going through because they had gone through similar situations and survived. I wanted to know if I would always have to live with such a horrible feeling inside."

Banding together with others through this ministry - "the only good to come out of the horror" - helped Ennis learn something about the human spirit.

"I've learned that we humans are not as fragile as we think we are. I think we're

How Survivors Learn to Pick Up the Pieces

Julie, a 25-year-old nurse on the Northside of Chicago, feels justice has been served after sitting through a year-long trial that put the man who raped her behind bars."There was a point in the proceedings where I felt sorry for him," Julie says, "only because he had absolutely no control of what was happening around him. The courts treat criminals like scum."She may have allowed herself to feel sorry for the 19-year-old defendant, but his courtroom attitude didn't help her to forgive or forget. He pleaded guilty, saying he was a victim of the criminal justice system.

"He turned the tables," Julie says. "He showed no remorse and complained that the court didn't treat him fairly. He turned himself into a victim - rape wasn't even an issue with him."

Julie remembers that same feeling of being victimized by the criminal justice system during an investigation that dragged on for weeks before the rapist was arrested.

"During that time, not one person ever contacted me - I thought they had forgotten about me. The court should appoint a middle person to update the victim. I could have used a weekly call to explain the status of my case." Once the man was sentenced to 18 years in prison, that settled the case in Julie's mind.

"I think of the incident, not him. He bumped my life off course and I fear that this will someday hit me again like a ton of bricks. I fear for the day he is released. But I don't allow him to have a hold on me. I have no feelings for him. He's in prison, and it's done. With him behind bars, I have to realize he did not do this to me. He did not personally come looking for Julie. I was just an opportunity. The moment I give him a face and make him into a person with feelings and a family, that allows him to have an effect on me."

Raymond Fox feels the same way about the boy who shot and blinded his 10-year-old son, Robert Jones, for life. Robert was walking through "the hole" at the Robert Taylor Homes in Chicago. He didn't realize he was standing between a 16-year-old boy aiming a gun at somebody else for daring to enter his drug turf. The 16-year-old missed his planned target, but did hit Robert in the head. The 16-year-old is serving 1 to 5 years in a juvenile detention home."I didn't want to see him get away with it," says Fox, "especially because he didn't show one ounce of remorse. But I looked over that and put it in God's hands. It's not heavy on my mind because I have found so much else to do. I don't want things at the Robert Taylor Homes to be left the way they were."

Fox decided he had to do something to help see that this type of tragedy doesn't happen again. With the help of former NBA basketball player Earl King - who, along with former NBA player Sonny Parker, spearheads the No Dope Express, a program designed to keep kids away from the influence of drugs - Raymond Fox has established the Robert Jones Eyes on the Projects Foundation. The foundation has given Fox a way to organize a plan to enhance life in the projects. Its first task was to clean up "the hole" and make it into a decent playground.

"But that's just the starting point," says Fox, who is continually seeking contributions and sponsorship to keep the foundation going. Eventually he would like to involve other organizations, schools, and universities to help organize group-study programs, GED classes, and adult-study programs.

"The projects have the space," he says, "but they don't have the direction. Getting things done is just a matter of pointing things out. Then people respond. I get a thrill out of doing this when I realize what we are capable of doing.

"I don't want this reaction to be a flash in the pan," says Fox, "I'd like it to be a future for my son and I'd like to offer hope to other children in the projects. And Robert plans on taking over where his dad leaves off."

Robert Jones
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made of a tougher stock that makes us resilient. Most people I deal with in this ministry have come through their own tragedies after a time. I don't say that everyone comes through tragedy the same way, because grieving is as individual as the person.

"And we're *forever changed.* We are never again the same people we were before. We don't 'get over it,' as some people suggest we should. We just accept it and try to live with it day to day. You can't recover from it, because recovery means that everything will return to the way it was. And in these kinds of deaths, it will certainly never do that."

Ennis says it took her one year of isolation before she felt the need to share her feelings with others who had experienced tragic deaths in their families. In the initial shock after the accident, she says, she didn't even feel anger toward the other driver.

"My training as a Christian came in. I wanted to forgive him and say, 'Wouldn't it be horrible to have that happen?' I wanted to perceive it as just an accident so that I wouldn't have to blame anyone."

But as time went on, her anger grew.

"Whenever there is a death," says Ennis, "there's always going to be a feeling of 'What if?' But when it's something that could have been avoided by someone else acting more responsibly, then it's hard to deal with. The question 'Why?' just keeps getting bigger. I've been able to deal with my anger over time, but I still wake up some days and say, 'How can this be true? How can 3 children who left to go to a football game, with everything in front of them, be dead? How can that have happened to them? To us?' So there are days when I think of that man and feel that I'd hate to have to live with what he did. There are other days when I'm still very angry."

But Ennis says she does work at forgiveness "because I know that not forgiving, in the long run, is only going to hurt me. So I really do want to forgive totally if I can."

In her work with grieving families, Ennis has found that some 90% of the marriages where a child dies end in divorce. The reason, she says, is that no 2 people grieve alike; everyone has to deal with it personally.

"You can be having an okay day and your husband is hanging on by a thread, and 2 things happen. The person who is doing okay can be pulled down by the other, or the person who's down resents the fact that the other isn't as upset that day. Without the help that we've had, and our absolute faith in God, we certainly would never have come through it."

The president of Mothers Against Drunk Driving (MADD) of Allegheny County in the Pittsburgh area had a different reaction after her son Steven, 20, was killed by a drunk driver in 1981. Mary Ann McClain says her work with MADD has been a constructive response to his death, but she's far from being able to forgive the woman whose drunk driving on a one-way street took her son.

"My first feelings when I heard about the accident were compassion for the woman," McClain recalls. "As soon as I heard her name, I prayed for her. I didn't know then that she'd been drunk. I thought, 'Well turning the wrong way on a one-way street is a mistake that people can make.'"

When she found out, a day or so later, that the woman had been driving drunk, her reaction was still charitable. "I didn't want to hear that. I only wanted to deal with my grief. I just wanted people to go away and leave me alone, and not tell me anything about her. She was a 22-year-old woman who lived in the neighborhood, and my sons even knew her."

It soon got tougher. At the coroner's inquest, the woman "showed a callousness that I wasn't expecting," McClain says. "That's when the anger came. It's been real difficult. It's 9 years later, and I'm still not sure that she's ever mentally taken responsibility for what she did. Now that I work with other families who have lost someone to drunk driving, I find that's very typical."

Though forgiveness has been difficult because of the woman's attitude, McClain says she realizes that she must work it through.

"I have to be willing to forgive," she acknowledges. "I know that God is faithful, and that it would eat me alive to be bitter and hold bitterness forever. So in one sense I've had to forgive to save myself. And I believe that does happen. I believe that you have to say the words, and then God makes it happen. But a lot of awful things have happened to us and to families like ours because of the grief. People don't realize that it's not just this one death, then you deal with it, and it's over. It affects everything in your family forever."

Like Ennis, McClain has learned that people don't go through the grief process "with a cookbook sameness." Some might get stuck in one stage, such as denial, for years. Support groups are critically important, she believes, to help people work through the process. They need to learn that throwing themselves into work, for example, can't take away that hurt.

"The best thing you can have is faith," counsels McClain. "After that, the healing starts when you reach out to help others."

McClain makes 2 points about surviving tragic deaths in your family that families everywhere can learn from. The first is that you must redefine "normal."

Several months after her son died, she got a new boss at work. "He walked in one day, saw me smiling, and said, 'Oh, all back to normal?'" That brought a good many things into focus, McClain recalls. "I stopped and said, 'There is no normal for me anymore.' What you have, even when you've gone through some of the healing process, is a redefinition of what 'normal' is without your child. This is as good as it's going to get, and it's not great."

Beyond that, she says, persons who have suffered through such tragic deaths in their family often need to re-examine their most deeply held assumptions.

"Lots of people think that if you're a good person, good things are going to happen to you," she says. "Now [after the tragedy] your assumptions are shattered, and the world is never the same again for you. There's always a big hole in your life. There's nothing you can do to change that."

Although Maureen Welch's son, Mark, was killed at age 23 in a fall from a roof - rather than at the hands of another human being - she has worked with many persons who have lost loved ones to a

violent act at the hands of others. Today Welch channels that hurt over her loss into her work with The Compassionate Friends, a national group that helps parents who have lost children of any age through illness, accident, suicide, or murder. Welch says that, for many of these families, anger is the toughest thing to overcome.

"You go through many stages of grief," she explains. "Anger is definitely one of them. Sometimes you don't even know who or what you're angry with. Sometimes you're angry with the person that died. Sometimes it's other members of the family, or society, or God - depending on your feelings on a given day. You're numb at first, of course, but then you experience a pain so deep that you want to die yourself, because it would be easier to die than to live."

But something good can come out of such tragedies, Welch says, if a person can reach a particular stage. "You come to realize that you can't be contained in your own little world. You have to reach out to other people. That's what we're all here in this world for. You learn eventually that it's okay to laugh again; that your child or other family member would not want you to grieve forever, but to go on with your life and be happy as much as you can be."

No small part of the burden the bereaved must bear, adds Welch, is that people "say stupid things like 'It's God's will' because they don't know what to say." All that those who have lost a loved one under tragic circumstances really want to hear is that you're sorry.

"Give them a hug, and let them talk about their grief," says Welch. "It's one thing to talk forgiveness and starting over, but it's important to realize that they're dealing with the worst kind of grief that life can deal you."

LOU JACQUET

FOR MORE INFORMATION

Alternatives to Violence Project, Inc.,
15 Rutherford Place
New York, NY 10003
(212) 477-1067

Center for Prevention of Sexual and Domestic Violence
1914 N. 34th St.
Suite 105
Seattle, WA 98103
(206) 634-1903

Community Board Program
149 Ninth St.
San Francisco, CA 94103
(415) 552-1250

Let the Healing Begin

There is a "see-saw" principle that people seem to imply about [death penalty] abolitionists: if you're against executions, you're against victims. Or the converse: if you're loyal to the victim, you're for the death penalty.

Through my personal experiences, first with death-row inmates, then with murder victims' families, I have become an advocate of both.

Vernon and Elizabeth Harvey, whose daughter, Faith, was cruelly tortured and murdered 8 years ago, have helped me understand the plight of victims' families. They have taken me to meetings of Parents of Murdered Children. There I heard mothers and fathers trying to deal with grief beyond all telling.

I was in for a few surprises. I didn't know that there was in Louisiana a Victim's Reparation Fund to help families get counseling, unemployment benefits, funeral expenses. I also didn't know that often when families go to sheriff's offices to apply for these funds they are treated with insensitivity and bureaucratic runaround.

"Don't know about any funds," one deputy said, "Why don't you write to Ann Landers? She helps people."

I also didn't know that victims' families often feel abused by the criminal justice system. They often don't know their rights or what they can expect or how to make sense of court proceedings and schedules. And to top it all off, often after the trial, after the initial crisis is over, they are left to themselves by friends and relatives. "If I try to bring up my daughter's death, friends change the subject," one parent told me.

I do not believe it is accidental that when 95% of the energies of the state are poured into death and recrimination so little is left for the healing process.

Look at the gamut of pain in store for a victim's family when pursuing the death penalty. First, their loved one is violently torn away. Then at the trial they relive every detail of that death (when the prosecutor goes for the death penalty he wants the victim's family in the courtroom). After this, if the murderer gets a death sentence, the appeals begin. Every time a date of execution for the murderer is set, it is announced by the media. Often there are stays of execution until the appeals process is completed. Finally, after 3, 5, 10 years the murderer is executed and the family gets to elect a family representative to watch him die. When, in the process, can the healing begin?

In July, 1988, a Mennonite volunteer arrived in this state to begin full-time work for victims. It was a first for Louisiana. The irony is that [death penalty] abolitionists have been the ones raising the funds and recruiting the personnel for the much-needed service.

From "*Death in the Southland*," by Sister Helen Prejean, C.S.J. In Blueprint for Social Justice, May 1988 (Published by the Institute of Human Relations, New Orleans, LA 70118.)

Compassionate Friends
5171 Park Ave.
Bethel Park, PA 15102
(412) 835-1105

Murder Victims Families for Reconciliation
215 Harding Place
Syracuse, NY 13205
(315) 469-3788

Parents of Murdered Children, Inc.
100 E. 8th St.
Suite B-41
Cincinnati, OH 45202
(513) 721-5683

Safer Society Program
R.R. 1 Box 24-B
Orwell, VT 05760
(802) 897-7541

Victim-Offender Reconciliation Programs
U.S. Association for Victim-Offender Mediation
254 S. Morgan Blvd.
Valparaiso, IN 46383
(219) 462-1127

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Compassion Required for the Criminal Mind

To ignore explanation and focus only on responsibility is to make too much a mystery of criminality as evil.

Those most in need of our compassion are the least likely to deserve it. Yet such people need not deserve compassion to receive it.

The needy are those people who take an active role in their own destruction. We are not talking about victims, the lice-infested people sleeping on the street, schizophrenics mumbling to themselves or those with life threatening diseases. The people who seem least deserving of compassion are the criminals who are not yet psychopathic, the rapists and cheats, the people who beat the elderly to rob them of their savings.

There is a sensible reason why we hesitate to show compassion for them. It has to do with what we conceive of as free will and responsibility. We find it important to distinguish victims of circumstance from those who victimize. The victimizers are responsible for what they've done, while a person suffering from bad luck is not. No compassion for the wicked.

Well, almost none. Not everyone quite agrees; many people say that conditions of their childhoods and upbringing made them what they are today. These sympathizers cite statistics correlating crime with social origins -- poverty, ignorance or lack of psychological maturity -- as the breeding ground for aberrant behavior. The environment did it.

Most people today have little patience for such excuses. Just because we can explain what led up to a person's doing what he did does not absolve him of responsibility. There is a fundamental difference between what prompts someone's actions and the explanations offered for them. The sorry motivation of a criminal's behavior cannot serve as an excuse just as a psychiatric patient cannot absolve himself of responsibility for addiction or repetitive compulsion even though he can explain it. What led a criminal to take up crime or addict to take in drugs does not mean the violator was forced to do those things.

We hold people responsible for acts they felt compelled to do because of circumstances they were in, crimes they have an explanation for. This is true of parking tickets and of larger offenses as well. A company that dumps heavy metals in the river because it cannot afford proper disposal is guilty of a crime, whatever its motivation.

From the point of view of the criminal, this difference between explanation and justification is easily forgotten. Pressures of the situation obscure a sense of responsibility. The cocaine-addicted athlete may tend to blame constant public scrutiny for what brought him down. Those who work with prisoners know too well how psychological posturing can make a mass murderer or a petty crook portray himself as the real victim.

Yet demanding responsibility while refusing explanation would strain the quality of mercy. The misuse of excuses is a problem for law and order activists as well. Critics of social "bleeding hearts" may be correct to insist that people are responsible for their actions, whatever the explanation. But they often overlook the fact that there is an explanation -- sometimes useful -- for everything people do. The same critics also may be selective in their opprobrium, singling out robbers but not always polluters.

Free will and explanation are not at odds with each other. A robber may have a psychological or circumstantial need to steal, but the minute he selects a particular victim at a particular time and place, he has made a free decision. At the same time one cannot ignore the reason for his crime. For if the motivation had not been there, he would not have done the deed. To ignore explanation and focus only on responsibility is to make too much a mystery of criminality as evil.

Those who would show no mercy toward the wicked will never be in a position to solve social problems. The judgment that a person is guilty, willfully guilty, is purely retrospective and offers no guidance for the future.

Corrective action requires understanding of character as well as misdeed. Those who have compassion for the wicked may know something of character but may not be able to take corrective action if they simply regard the wicked as helpless victims. There is a moment of truth that cannot be ignored when a criminal decides upon his victim and he must be held responsible for that decision.

Those most in need of compassion are exactly those whose reasons for crime overwhelm any corresponding sense of responsibility. When being a free agent in the world gets lost within the jungle of needs and motivations, people become vulnerable to committing crimes that a person with greater sense of self-respect would shy away from.

They need compassion because they have lost all sense of who they are as persons. To show compassion is precisely to show them a way back -- reconciling motivation with responsibility. To take charge of one's own actions while at the same time comprehending them is to have a sense of self and a sense of society.

DAVID GLIDDEN
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Prisoner Visitation and Support (PVS)

A Nationwide Alternative Ministry to Federal and Military Prisoners

THE SCOPE OF PVS:

Sponsored by 33 national religious bodies and socially-concerned agencies, PVS seeks to meet the needs of prisoners in the U.S. federal/military prison systems through an alternative ministry that is separate from official prison structures.

As an independent organization, PVS is unique because it has access to all U.S. federal and military prisons. The focus of PVS's approved local visitors is on those prisoners with an acute need for human contact: those serving long sentences, those in solitary confinement, those without visits, and those in maximum-security institutions.

FEDERAL /MILITARY PRISONS:

Most federal and military prisons are located in remote, rural areas of the U.S. In a system that is spread across the country, prisoners are often transferred from one prison to another, far from family and loved ones. Thus, family disruption and isolation are major problems facing federal and military prisoners.

THE PVS MINISTRY:

PVS visitors offer friendship, help, and moral support to prisoners. The visitors help prisoners to maintain their self-esteem, and support them in their efforts to live constructive lives. PVS visitors strive to assist prisoners who need supportive services beyond those available through the prison, such as maintaining ties with family and friends, obtaining study materials, writing supportive letters to parole boards, *etc.*

Prisoners trust PVS visitors because they are not officially associated with the institution. The opportunity freely to express problems, hopes, frustrations, and ideas has a positive, humanizing effect on prisoners. PVS visitors do not impose a particular philosophy or religion on prisoners. They accept prisoners as they are, and try to support their self-growth.

A SPECIAL EFFORT:

Through its national network of visitors, PVS is able to maintain consistent contact with prisoners who are transferred from prison to prison, often far from home.

PRISONER SUPPORT GROUPS:

PVS helps local groups to form prisoner support groups around federal and military prisons.

VISITOR TRAINING:

The PVS program consists of local visitors supported by a program secretary and 3 national visitors. Initial orientation is done by one of the national visitors who familiarizes the newly appointed visitor with procedures. A special orientation tape supplements this introduction.

Ongoing training is accomplished through the publishing of a visitors newsletter which updates prison regulations and policies, responding to visitors' regular reports by the national staff, and holding an annual training workshop for visitors, with regional workshops, as necessary.

NON-VIOLENCE:

PVS is committed to the power of non-violence. PVS helped organize the first conference on non-violence held inside a U.S. prison, and continues to participate in such workshops.

PVS VISITORS ARE EFFECTIVE BECAUSE THEY:

* Visit regularly, at least once a month.
* Are good listeners, and are sensitive to the needs and attitudes of the persons they visit.
* Never break prison rules.
* Reach out to prisoners in a spirit of mutual respect, trust, and acceptance.
* Respond to prisoners' requests to assist with family problems.
* Help make family visitations possible.
* Are clear about their roles with prisoners and staff.
* Are independent of the prison system.
* Are prisoner advocates who support non-violent management of conflicts by both prisoners and staff.
* Do not impose their religious or philosophical beliefs on prisoners.
* Do not promise prisoners what they cannot fulfill.
* Are joined in a nationwide mutual fellowship, sustained through contact with each other and the PVS national office.

PRISONERS' LETTERS TO PVS

"I owe you much thanks for sending the local visitor to see me . . . . The PVS is wonderful to me, who like hundreds of others is too far away from home to receive visits. Before he came here, I had received 1 visit in over 3 years."

"I want to thank you for the wonderful hours I spent talking with you. Those times are the things I will remember about this place, and it is because of people like you that some of us in here will be able to live in a free society and not go out hating everyone else."

"I received a parole date . . . so soon! . . . There are no words to express what I feel about all you have done to effect this . . . . You have worked to give me what is the most valuable thing I can conceive of - freedom."

"Some people feel that there is no worse condition than being incarcerated. I disagree because the worst condition in the world is to have no one care for you, and in turn, care for no one yourself. I'm very, very fortunate, because not only do you people love me, but I in turn love you very much."

Eric Corson
Program Secretary
Prisoner Visitation and Support
1501 Cherry Street
Philadelphia, PA 19102
(215) 241-7117 (215) 355-5854

Ed Note: *There are 7 PVS visitors from Kentucky visiting in the federal prison at Lexington, For more information contact:* **ROY W. HOWARD,** *Second Presbyterian Church 460 E. Main St. Lexington, KY 40507-1572 (606) 254-7768*

The Crime Victim Assistance Program

The Victims of Crime Act of 1984 was enacted so that direct services would be provided to victims of crime. This program is ongoing in Kentucky with 32 projects being funded for the 1990-1991 fiscal year. The services are targeted for child abuse, domestic violence, sexual assault and a newly acquitted category of the underserved population. The victims under this category are those of burglary, survivors of victims of homicide, adult survivors of incest, elderly, handicapped, survivors of DUI, and other victims not otherwise served.

The VOCA program coordinator reviews applications, monitors grants, collects statistical data, develops state guidelines for VOCA programs, assists in developing new programs and serves as liaison between the Justice Cabinet and other victim assistance agencies and organizations. The coordinator also works very closely with the service providers and assists them with the various problems that may arise.

The Justice Cabinet provides VOCA funding statewide which includes the Purchase, Barren River, Green River, Lincoln Trail, KIPDA, Bluegrass, Northern Kentucky, Gateway, FIVCO, Kentucky River, Cumberland Valley and Big Sandy Area Development Districts. The VOCA funding is administered throughout the state in both urban and rural locations.

The needs of the victims may vary according to priority categories. However, these needs do exist and the victims and service providers have expressed their views of the system.

It is felt that in the counties where Family Court is practiced, criminal cases (incest) should be included in Family Court. There also needs to be recognition of the Child Sexual Abuse Accommodation Syndrome which is not acknowledged at this time. The fact that a child has to tell his story so many times to different people is an existing problem in child abuse cases. The Supreme Court recognition of closed circuit television in the courtroom for testimony of children is a positive development.

In the areas of domestic violence and sexual assault, the victim feels a lack of protection from the system and in the courtroom setting. The issue of safety is perceived to be a primary need. Rape victims feel they are handled callously and from the beginning of the process, feel they are not trusted. This happens many times when a polygraph test is administered. There have been times when the victim has been subpoenaed to appear in court and there has not been enough time for either the victim or the advocate to prepare adequately for the hearing.

In some instances of domestic violence, the victim feels that the judge does not sense that she is putting herself at risk by filing charges against the perpetrator. In similar situations, such as Emergency Protective Order hearings, the judge may make it a mutual order and the victim feels she is responsible for creating the violent situation. A reoccurring feeling of the victim pertaining to the court system is "like being beaten all over again."

A positive note is victims are pleased that impact statements are done for both the sentencing judge and the parole board. This lets the victim feel more involved in the court proceedings. Input from the victim should be kept confidential by the parole board.

DONNA LANGLEY
VOCA Program Co-ordinator
Justice Cabinet
Bush Building
403 Wapping Street
Frankfort, KY 40601
(502) 564-3251

Received a Bachelor of Arts degree in social work from Asbury College. Presently employed at the Justice Cabinet as VOCA Program Coordinator. Prior work experiences include with the Pregnancy Center as Coordinator of the Adolescent Family Life Program, with the Shelby County Board of Education as a substitute teacher and with the Cabinet for Human Resources as a juvenile probation officer and child protective service worker.

32 VOCA projects funded.

The Kentucky Justice cabinet was funded $993,000 from the U.S. Department of Justice and the following VOCA projects were funded with that money.

Child abuse projects and grant amounts

Gateway District Health Dept. (CASA Project)	$39,534
Family & Children's Agency - Louisville	50,500
Lexington Child Abuse Council, Inc.	12,604
The Family Place - Louisville	51,132
Paducah/McCracken Co. Child Watch, Inc.	17,000
Committee for Kids, Inc. - Covington	10,000
Exploited Children's Held Organization - Louisville	27,252
Brighton Center, Inc. - Newport	11,225
Bluegrass Mental Health Board - Frankfort	16,098
Frankfort Area Children's Council	21,166
Growing Up Safe - Versailles	9,750

Domestic violence projects and grant amounts

Women's Crisis Center - Newport	$40,400
LKLP Community Action - Red Fox	61,496
Spouse Abuse Hotline of Murray/Calloway Co.	20,475
Women Aware, Inc. - Paducah	18,180
Safe Harbor - Ashland & Morehead	30,000
The Center for Women & Families - Louisville	24,372
YWCA Spouse Abuse Center - Lexington	31,000

Sexual assault projects and grant amounts

Bowling Green/Warren Co. Rape Crisis	$21,381
Cumberland River MH/MR Board, Inc. - Corbin	11,682
Mountain Comprehensive Care Ctr. - Prestonsburg	39,600
R.A.P.E. Relief Center - Louisville	41,000
Rape Victims Services Program - Elizabethtown	10,000
Rape Victim Services, Inc. - Paducah	39,690

Underserved population* projects and grant amounts

McCracken Co. Commonwealth Attorney	$25,476
Campbell Co. Commonwealth Attorney	33,495
Fayette Co. Commonwealth Attorney	66,996
Office of Victim Assistance - Owensboro	20,800
Lexington/Fayette Urban Co. Government	5,885
Graves Co. Commonwealth Attorney	13,475
Fayette Co. Attorney's Office	19,001

* Funds victim's advocate in these offices.

WEST'S REVIEW

Kentucky Caselaw

Brida K. West

FIFTH AMENDMENT
No person shall be subject for the same offense to be twice put in jeopardy of life and limb, nor shall be compelled in any criminal case to be a witness against himself....

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.

KENTUCKY COURT OF APPEALS

DUI-RIGHT TO COUNSEL AT BREATHALYZER/ JUDICIAL REVIEW OF LICENSE REVOCATION

Commonwealth v. Cornell
37 K.L.S. 11 at 14
(September 21, 1990)

Cornell was arrested for DUI. Upon being advised of his *Miranda* rights he requested an attorney and refused to take a breathalyzer without counsel present. Cornell's driver's license was subsequently revoked pursuant to KRS 186.565.

The Court of Appeals held that Cornell was not entitled to the benefit of counsel before taking or refusing a breathalyzer test. The Court cited *Schmerber v. California*, 384 U.S. 853, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) for the principle that compelling an accused to give a blood, or breath, sample for chemical analysis does not involve the accused's Fifth Amendment rights.

The Court in *Cornell* also delineated the scope of judicial review of an administrative agency's action. That review is limited to the question of whether an agency's action is arbitrary. In the Court of Appeals' analysis, the reviewing court should look to 3 factors: whether the agency exceeded its statutory authority, whether the affected party was afforded procedural due process, and whether the agency action was supported by substantial evidence. Applying these principles to the case before it, the Court concluded that the Transportation Cabinet's action in revoking Cornell's license was not arbitrary.

VENUE

Commonwealth v. Hampton
37 K.L.S. 13 at
(October 19, 1990)

A change of venue was granted the commonwealth by the Knox Circuit Court in Hampton's prosecution for election law violations. The court directed Hampton and the commonwealth to agree on a county in which to try the case, and the case was subsequently moved to Madison County. The Madison Circuit Court transferred the case back to the Knox Circuit Court on the grounds that "venue is not a matter that may be agreed upon by the participants in a criminal proceeding; but rather, once a request for change has been made, it is a matter of judicial determination." The commonwealth appealed from this order.

The Court of Appeals upheld the order of the Madison Circuit Court. The Court looked to the provisions of KRS 452.210 that a judge in a criminal action may:

> order the trial to be held in some adjacent county to which there is no valid objection, if it appears that the defendant or the state cannot have a fair trial in the county where the prosecution is pending. If the judge is satisfied that a fair trial cannot be had in an adjacent county, he may order the trial to be had in the most convenient county in which a fair trial can be had.

The Court then stated that, since in the case before it, the commonwealth alone sought the change of venue, venue should have been changed to an adjacent county to which there was no valid objection. Only if such an objection was presented should transfer to "the most convenient county in which a fair trial could be had" have been ordered.

The Court of Appeals also rejected argument that the Madison Circuit Court lacked authority to transfer the case back to Knox County. The Court of Appeals stated: ""the Madison Circuit Court did not reconsider the issue of a need for change of venue ...[t]he Madison Circuit Court determined the legal requirements had not been met in the selection of the Madison Circuit Court as the new place of venue."

DUI-DRIVING WHILE LICENSE SUSPENDED, SUBSEQUENT OFFENSE/ IMPROPER REGISTRATION-PROOF OF OWNERSHIP
Toppass v. Commonwealth
37 K.L.S. 12 at 3
(September 28, 1990)

Toppass was convicted under KRS 189A.909, the slammer bill, of operating a vehicle while his license had been suspended for DUI. The commonwealth alleged that the charged conduct represented the third time Toppass had driven while his license was suspended. Under the statute, this made Toppass' offense a Class D felony. Toppass contended, however, that because two of his prior license suspensions were obtained under KRS 186.620(2), and because KRS 189A.090 specifies that the prior suspensions must be pursuant to KRS 189A.010, he could not be convicted of a Class D felony. The Court of Appeals rejected this argument, noting that the commonwealth's proof of Toppass' prior convictions consisted in part of a judgment of conviction of a Class D felony, operating a vehicle while license is suspended for DUI, based on Toppass' guilty plea. In the Court's view, Toppass had judicially admitted the underlying requisites.

Toppass next argued that his conviction of driving with improper registration was not supported by proof that he was the owner of the vehicle. "Owner" is defined in KRS 186.020 as "a person who holds legal title of a vehicle." It was shown at trial that the previous owner had junked the vehicle, but there was no showing that Toppass held legal title to it. The Court of Appeals reversed Toppass conviction based on this failure in the evidence.

DEADLOCKED JURY
***ALLEN* CHARGE**
McCampbell v. Commonwealth
37 K.L.S. 12 at 5
(October 5, 1990)

The jury at McCampbell's trial for second degree assault reported itself deadlocked. Over defense objection, the trial judge first asked the jury how it was split and then gave the jury an *Allen* charge that advised the jury that it had sufficient evidence to make up its mind one way or the other. Fifteen minutes after this admonition was given, the jury returned a guilty verdict.

The Court of Appeals reversed, stating: "It is difficult to find legitimacy in the court's intrusion into the jury process to an extent greater than determining if further deliberation would be helpful. If this inquiry is answered in the negative the jury should be discharged."

DUI-REFUSAL TO TAKE BREATHALYZER
Commonwealth v. Tarter
37 K.L.S. 12 at 7
(October 12, 1990)

Tarter was arrested for DUI but refused to take a breathalyzer. Based on his refusal, his drivers license was suspended by the Transportation Cabinet. Tarter was subsequently convicted of amended charges of reckless driving and disorderly conduct. Tarter then petitioned the district court to allow him to enroll in a driver's education program in order to reduce the period of his license suspension. The district court granted the petition and the Transportation Cabinet appealed.

The Edmonson Circuit Court affirmed the order of the district court and the Court of Appeals affirmed the circuit court. The district court relied on the provision of KRS 186.565(7) that any individual "who has had no previous conviction for violation of KRS 189.520 and who has refused to submit to a test of his blood, breath, urine, or saliva may apply to a district court of competent jurisdiction for permission to enter a driver's education program...." KRS 189.520 prohibits the operation of "a vehicle that is not a motor vehicle" while intoxicated. The commonwealth argued that the statute did not extend to violations of KRS 189A.010. The Court of Appeals refused to adopt this reasoning, stating "[t]here is no statute that implies the operator of a nonmotor vehicle must submit to a breathalyzer test; therefore, KRS 186.565(7) would be meaningless unless it also applied to motor vehicles."

DUI-LICENSE REVOCATION, RIGHT OF CONFRONTATION
Wyatt v. Transportation Cabinet
37 K.L.S. 12 at 12
(October 12, 1990)

Wyatt was arrested for DUI by an officer who was not qualified to administer a breathalyzer. A second officer offered to give Wyatt the test. Wyatt refused. At the hearing to revoke Wyatt's license, the first officer testified to these facts. Wyatt asserted that because the breathalyzer operator did not testify he was denied his right to confrontation.

Noting that the revocation of Wyatt's license was not a criminal proceeding, the Court of Appeals stated "we do not find that it was constitutionally necessary to have the breathalyzer testify at the revocation hearing. Although having the operator testify would be the better procedure, it is not necessary since Wyatt could cross-examine the arresting officer who was present at all relevant times...."

PFO-FINALITY OF PRIOR CONVICTION
Simpson v. Commonwealth
37 K.L.S. 13 at
(October 19, 1990)

In this case, the Court reversed the appellant's second degree PFO conviction.

Simpson argued that he could not be convicted as a second degree persistent felon because his 1982 conviction was not final. Simpson based his argument on the fact that he was never advised of his right to appeal the conviction and on the fact that the docket notation of service of the judgment of the conviction was never made as required by RCr 12.06, so that the time for appealing the conviction had not yet lapsed.

The Court of Appeals rejected Simpson's argument insofar as it was based on the trial court's failure to advise him of his right to appeal. "The appellant has failed to establish how a failure to advise him of his right to appeal would destroy the finality of the judgment, although it might form the basis for obtaining a belated appeal." However, the Court agreed that because the docket entry reflecting service of the notice of entry of the 1982 judgment had not been made, the time for appealing the 1982 conviction had not expired. The Court then cited its holding in *Melson v. Commonwealth*, 772 S.W.2d 631 (Ky. 1989) that "a prior conviction may not be utilized for establishing a defendant as a persistent felon unless the time for appealing the prior conviction has expired without an appeal having been taken."

KENTUCKY SUPREME COURT

INEFFECTIVENESS OF POST-CONVICTION APPELLATE COUNSEL
Vunetich v. Commonwealth
37 K.L.S. 11 at 32
(September 27, 1990)

While the direct appeal of his conviction was pending, Vunetich filed a motion to vacate under RCr 11.42 on the grounds of ineffective assistance of his trial counsel. The appeal from the denial of this motion was consolidated with the direct appeal. Both judgments were affirmed.

Vunetich next filed a second RCr 11.42

motion contending that his appellate attorney was ineffective in the appeal from the denial of his first RCr 11.42 motion. On appeal from the denial of this second RCr 11.42 motion, Vunetich moved to convert his appeal into a "Petition for Belated Appeal." The Court of Appeals granted this motion and thereafter denied relief, holding that Venetich's appellate counsel had not been ineffective. The Kentucky Supreme Court granted discretionary review.

Pursuant to its holding in *Hicks v. Commonwealth*, KY., ___ S.W.2d ___ (rendered September 6, 1990), the Court held that "RCr 11.42 cannot be used as a vehicle for relief from the ineffectiveness of appellate counsel." That issue should have been addressed to the appellate court as a "Petition for Relief from a Judgment which has been Affirmed on Appeal on the Ground of Ineffectiveness of Appellate Counsel." Treating Vunetich's proceedings in the Court of Appeals as such a petition, the Court found that the Court of Appeals correctly found that counsel had been effective. The Court of Appeals did not err in refusing to hold a hearing. The Court distinguished *Hicks*, stating that in *Hicks* "this court could not determine from the record whether counsel's failure to raise a particular issue on appeal was the result of ineffectiveness or the result of the exercise of professional judgment...." Thus, a hearing was required in *Hicks* but not in *Vunetich*.

DIRECTED VERDICT/HEARSAY/ "INVESTIGATIVE HEARSAY"
Bussey v. Commonwealth
37 K.L.S. 12 at 14
(October 18, 1990)

Bussey was convicted of first degree sexual abuse of an adult, but retarded, male. The victim testified that he accepted a ride with Bussey during which Bussey partially removed the victim's clothes and fondled him. In support of a motion for directed verdict Bussey relied upon the victim's retardation, the fact that the victim was a physically strong adult, and that the victim's account was inherently improbable. Bussey cited language in *Holland v. Commonwealth*, 272 S.W.2d 458 (Ky. 1954) that "[if] circumstances ...[are] so incredible or improbable or so at variance with natural laws or common human experience as to be patently untrue" a directed verdict should be given. The Court held that despite the "improbability of every detail related by the victim" a directed verdict was correctly refused since "the victim's testimony taken as a whole could induce a reasonable belief by the jury that the crime occurred."

Bussey also complained of hearsay testimony admitted when police officers testified to the victim's initial account of the offense. The commonwealth sought to justify this evidence on the grounds that the victim's credibility had been attacked in cross-examination. Reversing on the basis of this error, the Court held that "merely challenging the truthfulness of a witness' testimony does not open the door to a parade of witnesses who repeat the witness' story as told to them." The Court noted that exceptions may exist where there is a claim of recent fabrication or an impairment of present ability to remember, but neither of those exceptions applied in Bussey's case.

The Court found additional reversible error in the admission of a police officer's testimony that he reported the victim's initial account because "I came to the conclusion that there had to have been some type of misconduct or I would not have received a complaint." This testimony was both impermissible opinion testimony and investigative hearsay. *See Sanborn v. Commonwealth*, 754 S.W.2d 534, 541 (Ky. 1988). Justice Wintersheimer dissented.

DOUBLE JEOPARDY/SENTENCING PRIOR CONVICTIONS
Grenke v. Commonwealth
37 K.L.S. 12 at 17
(October 18, 1990)

At a single meeting, Grenke sold cocaine to an undercover officer and, following fifteen minutes of discussion regarding crack cocaine, gave the officer a free sample of crack. Grenke was subsequently convicted of two offenses: trafficking in cocaine, based on the sale, and transferring crack cocaine, based on the free sample.

Grenke maintained that his meeting with the officer constituted a single transaction, and that the transfer of the cocaine and the crack was a single offense. The Court disagreed. "That the events occurred within fifteen minutes of each other and during a continuous meeting between appellant and the officer does not negate the fact that two separate offenses, their elements established by separate facts, were committed. It was not the *meeting* that was criminal, but rather certain *transactions* which occurred in the course of the meeting."

Grenke also argued that those of his prior criminal convictions that were over ten years old should have been excluded from his sentencing hearing as "too remote." The Court held that, under the facts in the case before it, the prior convictions were properly admitted. "Had the 1966 conviction been an isolated incident, it certainly would have had little probative value. ***But the appellant's 1966 conviction was but the first chapter in a continuing history of convictions, and was therefore highly relevant to sentencing."

DOUBLE JEOPARDY
Moser v. Commonwealth
37 K.L.S. 12 at 21
(October 18, 1990)

Moser broke into a drugstore and removed a quantity of drugs. That same evening he approached some teenagers and asked them if they "did drugs" and stated that he had a "bunch of narcotics." Based on this evidence Moser was convicted of third degree burglary, receiving stolen property, trafficking in a Schedule IV controlled substance, and possession of a Schedule III controlled substance. Moser contended that the multiple convictions could not be carved from a single course of conduct.

The Court affirmed the trafficking conviction, stating that "Although the substance involved was the same substance that was stolen in the burglary," a "completely new crime was committed" when the appellant apparently solicited the teenagers to purchase the drugs. The Court held that the receiving stolen property charge did not merge with the burglary even though the conviction of burglary required an "intent to commit a crime" and the evidence showed that the crime intended was the theft of the drugs. The Court refused to extend its holding in *Jones v. Commonwealth*, 756 S.W.2d 462 (Ky. 1988) barring convictions of both robbery and receiving stolen property based on the taking of property during the robbery, to convictions of burglary and receiving stolen property. The Court did, however, reverse Moser's conviction of possession of a controlled substance. "The possession of the Schedule III controlled substance was an element of the charge of receiving that substance as stolen property, and there is no additional element which would constitute it to be a separate crime." Justices Leibson and Combs dissented and would have held that the receiving stolen property conviction was barred by the burglary conviction.

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THE DEATH PENALTY

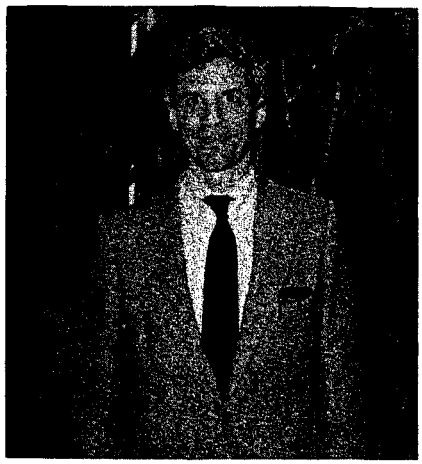
A Matter of Life and Death

EIGHTH AMENDMENT, United States Constitution
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

SECTION 17, Kentucky Constitution
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

This regular *Advocate* column reviews all death decisions of the United States Supreme Court, the Kentucky Supreme Court, the Kentucky Court of Appeals and selected death penalty cases from other jurisdictions.

DOES THE DEATH PENALTY MATTER?



DAVID BRUCK

There is a small group of lawyers in this country--perhaps 100 in all--who spend most of their time opposing the reinstitution of the death penalty for convicted murderers. I'm one of those lawyers, and have been more or less continuously, for the last decade. It's various and interesting work. You can make a modest but steady living at it, and since there's not much competition for jobs defending people who are facing the death penalty, anyone with the inclination and any talent at all can feel useful and needed doing it.

But like most of my colleagues who have been at this for a while, I started this work in 1980 in a white heat of moral intensity, and with ambitious goals against which I would measure my effectiveness and those of our collective effort. Things have not gone, to put it mildly, the way I hoped they would, nor the way I expected them to. The Law School's kind invitation to come here today has given me the chance to stop and look back, to consider what has come of the struggle against legal homicide in the United States, and to think about the future.

This is a rare luxury. The tempo of the work varies greatly from day to day, but whether in an execution crisis or in the day-to-day grind of ordinary capital appellate litigation, the law's immediate concerns are usually amazingly small.

For example: this week I've been on a brief for the United States Supreme Court on whether two burden-shifting jury instructions given in a 1981 South Carolina murder trial--43 words in all --can or cannot be disregarded as harmless error. This claim began in a petition filed in the South Carolina Supreme Court nearly six years ago, and so far the state Supreme Court has denied the petition three times, and the United States Supreme Court has granted *certiorari* three times, and reversed twice. In January the case is to be argued before the Supreme Court yet again. This means that I spend large parts of my days just now probing the intricacies of conclusive and mandatory rebuttable presumptions. But these complexities of criminal procedure aren't really what's wrong: what's wrong is that if five members of the Supreme Court don't agree with my view of these jury instructions, my client might well be executed in the electric chair. His death sentence was more or less a fluke to begin with, but so far it's held up for nine years. Meanwhile more than two dozen other South Carolina death row inmates--almost all of whom committed far worse crimes--have been resentenced to life imprisonment. Now his closest friends are starting to die in the chair. My client is an very simple but likeable young man, and the pressure of nine years on death row is wearing him down. When his parents visited him recently he started to cry and asked if they would take him home. He is grateful for the years of work I've put into his case, and tries to understand the legal issues. I try to explain them, but half-heartedly, because the truth is painful. No one's life should depend on how an appeals court parses a jury instruction, and it's humiliating for a lawyer than to have to tell someone that his life does. All this by way of telling you that the work of defending people on death row is like a lot of other legal work in this

respect: it doesn't encourage thinking about questions that matter. So I'm grateful for the encouragement that this invitation has provided.

While those of us who work against the death penalty focus on minute legal issues like the one I just described, the idea of capital punishment is ascendant in our political culture to an extent that no one thought possible just a few years ago. The decisive moment of the 1988 Presidential election was a reporter's question to Michael Dukakis about capital punishment--an issue that has almost nothing to do with being President, but which Lee Atwater had managed to put at the center of the campaign. This year the death penalty became a central "issue" in gubernatorial primary elections in Florida, Texas and California, and in Congress pressure for faster executions is now bursting the rivets of the system of federal habeas corpus. For a political candidate, opposing the death penalty during an election campaign is about as attractive as burning the flag: with a handful of exceptions, such opposition has simply disappeared from electoral politics. Now politicians hector each other about how passionately they themselves "believe in" the death penalty--that revealing phrase!--or how recent was their opponent's conversion.

So when we look up from the daily minutiae of fighting this issue case-by-case, it's hard to avoid these questions:

Is this struggle against capital punishment over? Did we lose?

What will capital punishment be like in five or ten years? Isn't it so hedged in with safeguards and restrictions that it will never acquire more than symbolic importance?

And if it's just a symbol, affecting a tiny handful of already-devastated lives, what difference does it make? Is it really worth the creative energies of committed young lawyers and legal workers? Hasn't enough time and energy been squandered on this business already? Can't we live with death?

Coming from someone who has spent so much time in this effort, these may sound like rhetorical questions. They're not. I have walked to the electric chair with a young, scared, mentally-impaired man who was trying desperately to believe that Jesus would help him, and I watched the prison guards wrestle his body onto a stretcher and cart it off. Afterwards I drove over to his parents' house to give them his flipflops and his hairbrush and his Bible, as he had asked me to do. This execution had attracted more attention than most: because the boy was only seventeen when the crime occurred, appeals for clemency came in from Perez de Cuellar, Mother Theresa and Jimmy Carter. The execution process itself even froze in place for thirty minutes, five hours before the appointed time, while the prison staff, the condemned man and his family, and every one else involved watched Ted Koppel consider the case on *Nightline*. Our side won the argument, or so it seemed to me, but theirs had already won the court case, and when *Nightline* was over, the surprisingly complex execution process resumed.

Maybe you can imagine the scene of devastation I found at the borrowed apartment where the family had gone from the prison to wait for, and then to hear, the news. You could not have told, looking at these people in their helpless anguish, whether the son they mourned was murdered or murderer. People who argue for the death penalty by asking, "What about the victims?" would have met some victims--some "innocent" victims--had they been with me that night.

Lest all this seem too sentimental, I should tell you what this young man was executed for doing. He was the triggerman in the robbery-murder of a seventeen-year-old boy, and the kidnapping, rape and murder of his fourteen-year-old girlfriend, who pleaded for her life before she was shot, telling her killers that her mother loved her too much for her to die.

That was the horror which this ritual was intended to expiate. Much as I wanted to stop it, I couldn't help but understand it.

It was time to drive home in the bright morning sunlight. It was rush hour. The city was coming back to life after a cold January night. Children at the schoolbus stop, office workers dropping little kids at daycare, maids waiting for the bus to take them to the suburbs for the day. The city, better and worse, seemed no different than it had been the day before. The governor started another day: he was a decent man who would have glad to see capital punishment abolished. But when the clemency decision had to be made, he didn't cash in the political chips he needed for his educational reform program to save the life of one brain-damaged murderer. Life went on. What difference did all of this make? What difference *does* it make?

A few months after this execution, I spent a few weeks in South Africa, court-watching and researching the only other large-scale death-selection apparatus besides ours which still operates within a Western judicial system. The parallels I expected to find were there, all right: the South African courts insisted that they were colorblind in their death-sentencing, and explained away huge racial disparities in much the same way that the American courts have responded to evidence of racial disparities in the litigation which culminated in *McCleskey v. Kemp*.

But while I eventually produced an article which reported these weird similarities between the U.S. and South African death systems, the truth is that my weeks of observing the South African death-selection system left me discouraged in a way that I hadn't expected. The death penalty might have been a tool of the apartheid system, but that didn't end the matter: in truth, while the black freedom movement didn't want any of *its* fighters to be hanged, the institution of capital punishment itself seemed deeply ingrained in the various cultures of the country. Indeed, it seemed to be one of the few things that most white and black South Africans agreed on. Was there a real link between liberation and abolition? If so, it was invisible to me. Abolition in South Africa seemed as foreign and irrelevant a cause as vegetarianism. In the midst of so much violence, both official and unofficial (South Africa has a homicide rate four times greater than ours), what difference did the fate of a hundred or so murderers each year really make? Nightmarish as Pretoria's death row was--250 waiting to be hanged on a gallows that dispatches seven prisoners with a single pull of the lever--the institutionalization of death seemed from that perspective to be almost as immutable as the weather. The dismal thought came to me that the campaign against the death penalty might represent nothing more than an obsession of some leftover sixties types.

As a matter of fact, the legal challenge to capital punishment in the United States reached its high water mark in the 1960s, and the death penalty's resurrection in the United States is all the more stunning when we recall how different things were just twenty years ago. Then the United States appeared firmly on the path of abolition, along with the other Western industrial democracies. In 1968, the Supreme Court described American jurors who favored capital punishment as members of a "distinct and dwindling minority," *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968), and when he cast the deciding vote four years later to strikedown all existing death penalty statutes in *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Byron White observed that the capital punishment system created by those statutes "has for all practical purposes run its course." After

Furman, Chief Justice Warren Burger is said to have predicted privately that there would never be another execution in the United States.

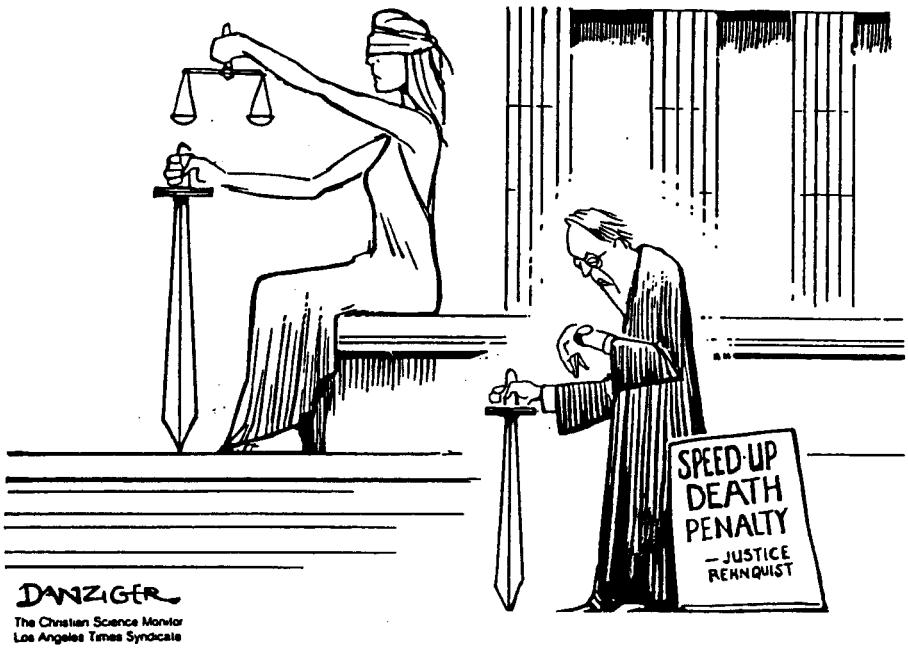
But at that moment, the United States parted company with the rest of the western democracies, and re-enacted death penalty laws with a vengeance. The phenomenal new growth of capital sentencing statutes after 1972, and, before long, death sentences, stood in contrast to the other countries with which we share our legal heritage and political ideals: Britain abolished the death penalty in 1965, Canada in 1976, France in 1981, and now out of all the countries of the NATO alliance, only Turkey and the United States still execute their own citizens.

In their astute analysis of *Furman's* aftermath, Frank Zimring and Gordon Hawkins conclude that the derailment of abolition in the United States after *Furman* was a product of the peculiarly American system of divided government, which by diffusing responsibility for such profound moral decisions permitted the country's political leadership to avoid the courageous actions of their Western European and Canadian counterparts. Zimring and Hawkins point out the remarkable fact that in no country did public opinion favor abolition before the fact. Everywhere but here, elected leadership actually took the lead, abolishing capital punishment while the public opinion polls still favored it. Only in the United States could the political branches pander to retentionist public sentiment in the knowledge that the courts would step in and sort out who, if anyone, would actually get killed.

When *Gregg v. Georgia* ratified the derailment of abolition in the United States in 1976, the handful of lawyers engaged in the struggle against the death penalty expected that executions would begin relatively soon, and in large numbers. But fourteen years later, the average annual rate of executions still stands at only ten, and the backlog of prisoners on death row has exploded to four times the total who waited at the time of *Furman*.

Why has it taken so long?

Obviously, the pace of executions will quicken, as the Rehnquist Court steadily removes legal obstacles, and slashes away at the federal habeas system. But I don't think that executions will even remotely approach the 250 or 300 death sentences imposed each year around the country. Americans' enthusiasm for executions is inversely proportionate to the responsibility they bear for carrying them out. Wherever responsibility comes to rest, there you will find a bottleneck. Lift the responsibility from the federal courts, and the cases will pile up in the state courts. If the state courts start letting more cases through, you'll begin to see increased jury reluctance to impose death sentences--as appears to have happened in Louisiana, where new death sentences have dwindled to almost zero in the years after the execution binge of the mid-1980s.



By Danziger for the Christian Science Monitor. Reprinted by permission. Copyright 1990. The Christian" Science Publishing Society

This reluctance to assume personal responsibility for large numbers of executions should not be surprising. It tells us that the United States has not veered so far after all from the abolitionist path of the other democratic countries of the West. The practice of killing unarmed prisoners has run its course here too. It's just that we lack the political means to say so.

If it were not for the fact that the current political death-binge has produced over 2300 condemned people, the effect would be something like the repeal of the Establishment Clause of the First Amendment--an endless series of enervating and divisive conflicts over religious symbolism. But the death penalty is not, unfortunately, purely symbolic: its props are human flesh and bone.

This contradiction between the symbolic power of the death penalty in the public imagination--of which more in a moment--and the gritty reality of its application, produces an interminable series of ever more demoralizing constitutional disputes. Four years ago, in *Ford v. Wainwright*, the Supreme Court was forced to decide whether the Eighth Amendment prohibited the execution of the presently insane: the answer was yes, 5-4, but if the case had come up today, the answer would probably have been no, 5-4. In 1988, the vote was 5-4 against executing fifteen-year-old offenders: two more 5-4 votes last year upheld the execution of sixteen- and seventeen-year-old murderers and the mentally retarded. This Term the Court will reconsider earlier rulings which forbids juries to consider the character of a murder victim, and the wishes of his relatives, in imposing the death penalty. If the Court overrules these prior cases, and there is little doubt that a majority would like to, states will be free to convert capital trials into memorial services, with punishment by death as consolation and catharsis. Such a holding might accord with the slogans of some "victims' rights" advocates, but by making the "worth" of each murder victim fair game for litigation, the Court might well require the prosecution to disclose--and the jury to consider--every human failing and fault of the murder victim. If he used racial epithets, kept a secret stash of soft-core porno videos, or tested positive at autopsy for HIV--and I've seen cases recently involving each of these--such embarrassing or intimate facts will be grist for the mill of litigation. Indeed, a prosecutor would be bound by due process to disclose the most private facts about a vic-

tim uncovered during the murder investigation so that the defendant can use them to diminish the victim's life and worth in the eyes of the jury. After all, if the state can bolster its case for death by showing how much this murder victim was worth, due process must allow the defendant to show how little.

This Term also brings what is surely the most appalling question to date, as the Court decides in *Perry v. Louisiana* whether an paranoid schizophrenic prisoner may be forcibly medicated in order to render him competent to be electrocuted. I do not know what the Court's answer will be. But I can say for sure, based on what we have seen in the fourteen years since the question of the death penalty was supposed to have been settled in *Gregg v. Georgia*, that whichever way the Court decides *Perry v. Louisiana*, the next Term will see petitions raising new issues involving insanity among the condemned, and about what process is due during this grisly struggle at the death chamber door.

The death penalty forces such grotesque issues to the center stage of constitutional adjudication. This is not the way the legislators who passed our current death penalty laws planned it. The death penalty was supposed to be about getting even with Ted Bundy, not executing teenagers and the retarded, or wrestling condemned schizophrenics to the gurney for forced doses of Haldol. But here we are.

This divergence between the death penalty that the legislators voted for and the one we actually have is really a divergence between the symbolic death penalty and the one which kills people. Prison officials and a few lawyers encounter the latter, from whence legal disputes like *Perry v. Louisiana*. But for most Americans, capital punishment is as symbolic as the Pledge of Allegiance.

Symbolic of what?

To those who spend their time thinking about civil liberties, the death penalty is the greatest possible intrusion of governmental power into the individual human personality. But I think that to many Americans, perhaps to most, the death penalty actually appears as a *limitation* on governmental power. It is a limitation on the power of irresponsible and insensitive officials to release dangerous criminals back into society to resume their depredations. Seen in that light, the death penalty is a "populist," *anti*-government measure, and a perfect expression of an attitude fostered and encouraged in the Reagan era. The death penalty takes the custody of dangerous criminals away from the bureaucrats, the unresponsive and incompetent "gummint," and puts the matter in plain view, where the severity and irreversibility of punishment can be verified, and never modified.

If this is so, then it was to be expected that the recrudescence of the death penalty in the 1970s and 1980s should have coincided with the great shocks to America's self-confidence: defeat in Vietnam, inflation and chronic economic decline, the end of American political and economic world dominance, the loss of the optimism of the civil rights years, the descent into the seemingly intractable estrangement of the races, and finally, the marked, but by no means steady, rise in crime. With government helpless before these problems, the death penalty offers a symbolic but tremendously powerful expression of the desire to reassert control on an issue of personal safety--even survival.

Because the death penalty's political energy derives entirely from this symbolic significance, it makes no difference that it has virtually no practical impact on anyone's safety. In fact, the scariest thing about being a lawyer for condemned Americans in 1990 is how little the life-or-death outcome has to do with anything real. A death sentence turns a prisoner into a symbol, and once the spotlight focuses on your client, nothing about how he got selected seems to matter any more. Don't expect the governor to care that your client was picked on the basis of race, or because of the incompetence of his lawyer, or because crippling disabilities such as mental retardation, brain damage or paranoid schizophrenia went unrecognized throughout his life and at his trial. What counts is that he *was* picked: now he is a symbol, and any decision to spare him will be freighted with political symbolism, too.

The obvious irony of the phony criminal justice populism of capital punishment is that it extends to government the most terrible power as a hedge against the incompetence of that very same government. But this isn't such a contradiction as may appear. For the voter senses that the risk of error in crime-control falls on him and his family, while the erroneous imposition of the death penalty afflict only "them." And this, I think, brings us to what is most destructive about the death penalty, and the reason why it must be resisted.

The search for explanations of murder is the reaffirmation of the democratic faith that all of us start off in life more alike than different, and that no group or class or race of people is marked from the inception. This faith is our hope as a society. The death penalty, because it is absolute, necessarily posits absolute evil in those prisoners who are more or less randomly selected as its subjects. And by marking as simply evil these most damaged and impaired, the death system both represents and fosters the idea that not all people are really human, and that the criminal law can and should differentiate "them" from "us."

It is fashionable to describe the contrary attitude as sober realism; as a healthy skepticism about the perfectibility of man, and so on. But such trendy tough-mindedness only gets in the way of seeing what's really there. It's not misty-eyed idealism but a simple fact that murder is a rare phenomenon, cnd that the most outrageous crimes are likely to have been committed by people who were ravaged and scarred themselves long before they hurt anyone else. To demonstrate this in the face of a shocking murder requires imagination, scientific rigor, and hard work. But when we do this work properly, we demonstrate, in case after case, in *every* case, that each human being has his own story to be told, and that guilt, even when great, is never absolute.

The victims of fetal alcohol syndrome include a few who will become muggers, and a few of those few will kill without reason or remorse. The terrible lifelong disability of such offenders, their chronic and often infuriating bad judgment, their inability to learn from experience, the social marginalization that characterizes adults whose brains were malformed in an ethynol bath in their mothers' wombs--none of this requires us to forgive their crimes. But it is an act of democratic faith to insist that we must first understand, and *then* judge: tough-mindedness is not a good substitute for knowledge.

Working against capital punishment was more dramatic when a single landmark case could derail hundreds of executions. Now the fight is waged one prisoner at a time. But this stubborn case-by-case battle contains the political meaning of the work. In each case, the defense attorney begins with the insistence that the client has a unique story, takes on the task of uncovering the saga of *this* client, and tries to understand what made him who he is, and why he did what he did.

You always find something like this:

- The client at age ten trying to commit suicide by throwing himself under a car so that his mother--herself the product of a chaotic and sexually abusive home--would be able to collect the insurance money.

- The alcoholic and abusive client, abandoned by his parents, spent his childhood in a foster home where discipline involved being hung by his arms in a dark closet, having his penis rubbed with an emery board until it bled, and being forced to eat his pet rabbit as a punishment for some trivial act of misbehavior.

- The client, now affectless and flat, is a product of an inappropriate twenty-year commitment in a state school for the mentally retarded where his infancy resembled an experiment in the effects of total emotional deprivation, and where his childhood was marked by sexual abuse from older boys, and terrifying (anf seemingly life-threatening) forms of discipline at the hands of caretakers responsible for huge numbers of emotionally starving children.

- The client was wounded three times by gunfire by the time he was seventeen, and had been shot at dozens of times.

These cases force us to do something that we do nowhere else -- we must take **one** member of a categorically feared and written off segment of society-/"the underclass," "the street people," "the drug culture," "the rednecks"--and pay the most scrupulously careful attention to the details of his unique story. The death penalty demands that we look at exactly how this individual was deformed and stunted, and why. Questions usually addressed on the level of statistics--single mothers, longterm effects of lead exposure, fetal alcohol syndrome, segregated education, violence against children, exposure to violence against women, post-traumatic stress disorder (Vietnam, northeast Washington, D.C.). . . to struggle against the death penalty requires the tracing in one person's life of any and all of the ways that a soul can be hurt. It demands that the law, and the society, listen. It is a sort of archeology of the damage inflicted on those who had no one to defend them.

This unending insistence on the individuality of each condemned man and woman is the heart of the legal struggle against the death penalty. It is also the heart of all democratic feeling and life. Its clearest antithesis is racism. And it is not hard to see why the history of capital punishment should have been, and still is, so inextricably intertwined with race, in South Africa (which this year has, I might add, suspended its use of the death penalty), and here.

I have to admit that the death penalty would still matter to me even if it signified nothing but one more drop of pointless suffering in a suffering world. We are all of us huddled at the edge of the same void, and we should not push each other off the edge.

But I think the death penalty matters in a more practical way. The democratic spirit in our society--in any society--is not either present or absent: it is found in greater or lesser degree, ebbs and flows, and must be fostered and protected. It consists of the belief that all people share an irreducible equality, and it is absolutely inconsistent with the use of the human personality as a symbol, as a thing. It is no coincidence that newly liberated countries from Czechoslovakia to Namibia have abolished the death penalty within the last year. Its resurgence in the United States is a setback"to our democracy. It reflects the same pessimism that accepts as immutable our deep divisions of race and class. And it seals that pessimism, it enacts it in a hopeless ritual of terrible permanence.

That is why the case-by-case struggle against the death penalty has a value of its own. Each time the death lottery fastens on a convicted man, there needs to be a stubborn response, an unbending insistence that not even this man--not any man--is so utterly different from us that he can be treated like this.

Whatever is, eventually seems normal. To protest such ordinary human rights violations, against such powerful public clamor, feels a little ridiculous at times. But so it always seems for those who have not yet prevailed.

This point hit me hard a few years back as I researched thg history of the death penalty for juveniles. In the National Archives I came across the *certiorari* petition filed in the United States Swpreme Court on behalf of two black teenage murderers in a Mississippi case in 1947. The petition had weak legal claims--the papers seemed desperate, and succeeded only in postponing that double execution for a few months. I think I can imagine the sense of humiliation and defeat that their lawyer must have felt the night of that execution, when he watched the clock and knew he had failed so completely to stop the inexorable grinding of that racist system.

The signature at the bottom of that *cer.t* petition was Thurgood Marshall's. His work for the NAACP Legal Defense Fund may seem to have been glamorous and exciting now, when so many of the battles he fought have been at least partly won. But that night, his hopeless campaign to stop Mississippi from executing those two black teenagers must have seemed pointless, marginal, a humiliating enactment of political weakness.

Justice Marshall was the lone dissenter last week when Virginia electrocuted a man named Wilbert Evans. This stubborn stand again seems forlorn, and so, I suppose, it is.

But this phase in our history won't last forever. We will regain our faith in our ability to address our problems as a society, and our sense of shared responsibility and of a shared destiny as a people. And as we do, the inexorable progress of abolition will resume.

I can't say that this is the most important legal work one could be engaged in. But I do think it needs to be done. If there are some law students here tonight who think you'd like to put your shoulder to this wheel, welcome. Don't be discouraged. Push. It'll move.

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Speech given Oct. 23, 1990. Harvard Law School. Reprinted by permission of the author and the journal *Reconstruction*..

I Can Out-Revenge You

During the March, 1990 Texas primary campaign for Governor, the following two commercials were aired. Jack Rains was a Republican candidate. Mark White a Democratic candidate. Both lost.

JACK RAINS: *I fought to see that we put a billion dollars into new prison construction. I want to make sure we have adequate capacity so that violent offenders, those who are threats to society, are not out on the streets., I want to keep those dangerous people off the streets and out of our faces. I want to treat those people like the gargabe they are. I'm going to put em in that can, and I'm going to sit on the lid*

MARK WHITE: *These hardened criminals will never again murder, rape, or deal drugs. As governor, I made sure they received the ultimate punishment - death. And Texas is a safer place for it. But tough talk isn't enough. The criminals know how to tangle up the court and delay execution. To bring them to justice takes strength and dedication, because if the governor flinches, they win. Only a governor can make an execution happen. I did. And I will.*

One Man's Court of Last Resort

James McCloskey Works to Set Free Those Whom He Feels Have Been Falsely Imprisoned

JAMES McCLOSKEY carries no weapon, wears no badge, and has no law degree. Instead the Princeton minister relies on the power of persuasion as he searches for the truth that will set his clients free. His clients are inmates, convicted of serious crimes like murder and rape, sentenced to life behind bars, or death by electrocution or lethal injection. All have 1 thing in common: They claim they are innocent.

And since 1983, this 1-time conservative, fast-track businessman has helped spring 9 convicts from prison, including 5 since last July. Among McCloskey's most recent triumphs is the case of Joyce Ann Brown of Dallas. Mr. Brown had been convicted and sentenced to life in prison for a May 1980 robbery that led to the murder of a Dallas fur store owner.

Her conviction was overturned November 1 after an investigation by McCloskey identified another woman with a startling resemblance to Brown as the possible murderer and raised questions about the credibility of a jailhouse witness whose testimony helped convict Brown. "McCloskey's a God-sent person," said Brown in a recent phone interview. "He comes from the heart. Once he becomes convinced of your innocence, he doesn't give up until you're free."

3,000 REQUESTS FOR HELP

From the basement of a small office building in Princeton, McCloskey and his 2 staff operate Centurion Ministries, an organization dedicated to researching convicts' claims of innocence.

In the past 4 years, he has received more than 3,000 requests for assistance. Operating on a budget of $178,000 from foundation grants and private donations, McCloskey and his assistants barely have enough time to read all the letters, let alone investigate the writers' claims.

He's working on 6 cases across the country, although an office blackboard lists 12 more. McCloskey looks for certain patterns in his efforts to determine if an inmate has been framed. "There are certain things that jump out at you," he says. McCloskey looks for discrepancies in statements from witnesses in what they first told police and their testimony at trial. Another red flag, he says, are "jailhouse confessions," in which an inmate in prison gets a reduced sentence for testifying against a cellmate who they say confessed to a crime.

Having no subpoena power, McCloskey relies on what he says is his ability to talk to people gently and put them at ease. "No one is obliged to talk to me," he concedes. But McCloskey can also be quite persistent: In some cases, he has pursued witnesses for years.

Although critics question his motives, James McCloskey's background doesn't hint at his current calling. A little more than a decade ago he was a Philadelphia management consultant specializing in United States-Japanese trade. "I was a conservative Republican living in suburban Philadelphia," he says. "I was on the fast track. I had a high-paying job, the nice house in the suburbs, and the Lincoln-Continental."

But McCloskey says something was missing. "I felt a spiritual emptiness in my life," he says. "I wanted to touch the heart and souls of people, but the business world didn't allow you to do that."

McCloskey started attending church again after a 14-year absence. His going to a local Presbyterian congregation persuaded him to give up his business career and enter the seminary.

He entered Princeton Theological Seminary in 1979 for his master's in divinity degree. His life started changing, but McCloskey says the decisive transformation came the following year.

He become a student prison chaplain at the Trenton, N.J., state prison as part of his training. There he met George (Chiefie) De Los Santos. The then-convict was serving a life sentence for the 1975 murder of a Newark, N.J., used-car salesman.

McCloskey became friends with De Los Santos but didn't believe his claims of innocence. But after De Los Santos persisted, McCloskey read De Los Santos's trial transcript and became convinced of his innocence. McCloskey played detective, using up a lot of shoe leather in what became a 3-year effort to get De Los Santos out of jail.

McCloskey graduated from Princeton Divinity School in June 1983. One month later, a federal district court judge ordered De Los Santos freed. Former US District Court Judge Frederick B. Lacey said testimony from a jailhouse witness that convicted De Los Santos "reeked of perjury." McCloskey says De Los Santos's release convinced him of what has become his mission. He was never ordained; instead he founded Centurion Ministries with the last $10,000 he had left from his days as a businessman.

WALKER CASE SPOTLIGHT

It was the case of Nat Walker that brought McCloskey into the national limelight. McCloskey uncovered medical evidence proving that Mr. Walker, who was serving a life sentence, was not guilty of the 1975 rape of an Elizabeth, N.J., woman.

After Walker's 1986 release, both *People* and *Newsweek* magazines profiled McCloskey, and the letters from other inmates behind bars started pouring in.

McCloskey's power of persuasion helped with the release this January of Conroe, Texas, high school janitor Clarence Brandley, who had been convicted of the rape and murder of a 16-year-old female student. "Jim was able to break the case wide open," says Brandley attorney Paul Nugent. "He came down to Conroe for 6 weeks, worked 15 hours a day trying to find witnesses who would clear Clarence. He just kept at it, visiting witnesses repeatedly until he found out the truth."

When McCloskey arrived in Conroe in 1987, Brandley was 6 days away from being executed for the Aug. 23, 1980, rape and murder. Three white janitors had implicated their boss, black head janitor Brandley, at the trial. The execution was stayed after 1 of the 3 white janitors told McCloskey that his white colleagues had actually dragged the girl away. A Texas state judge, Perry Pickett, said the new evidence suggested the 2 white janitors were responsible.

Two months ago, the Texas Court of Criminal Appeals reversed Brandley's conviction.

Montgomery County District Peter Speers, who prosecuted Brandley, sees McCloskey much differently than attorney Nugent. "I don't know why he would come down to Conroe from New Jersey," he says. "He must be doing it for the money or the media attention. It's hard for me to believe he's doing it out of the goodness of his heart." Spears insists that Brandley is still guilty and says physical evidence proved that. He says he plans an appeal to the US Supreme Court.

These days McCloskey is busy working on several cases. On Feb. 20th, he got some good news on 1 of them: A Philadelphia judge announced he was throwing out the 1978 conviction of Matt Connors, a Philadelphia man sentenced to life in prison in the fatal stabbing of an 11-year-old girl. He was released in March, the eighth prisoner serving a life or death sentence freed through McCloskey's work.

McCloskey said that evidence that would have cleared Connors was never revealed at his trial. "Sometimes this work can get very frustrating," McCloskey says. "It seems next to impossible to get to the truth. It feels like hitting a brick wall. But then, finally, someone in authority admits a mistake was made.... And all my anger at the injustices that have been done becomes worth it. It's the greatest feeling in the world. Nothing beats it for pure fulfillment and joy."

RANDY DIAMOND Special to The *Christian Science Monitor.*

Jury Questions on Race Sought

High court told attitudes of jurors need to be known.

Over the years, courts have been reluctant to pry into the racial attitudes of potential jurors, even in cases in which the defendant and the victim were of different races.

But an attorney for a black inmate on South Carolina's Death Row told the state Supreme Court that such information is essential and that judges should let attorneys ask open-ended questions about racial bias during jury selection.

Columbia attorney John Delgado said it was not enough to ask questions such as, "Are you racially biased or are you racially prejudiced?" as was done in picking the jury that in 1987 sentenced Raymond Patterson to die in the state's electric chair.

"Unless you have a Klansman coming in with a robe, you are never going to get somebody who says, 'Yes, I have a problem with that,'" Delgado said.

Delgado also argued that 11th Circuit Solicitor Donnie Myers bullied the jury into returning the death penalty by telling it in closing arguments not to "cop out" on its responsibility.

But Myers said Delgado was quoting him out of context. All the language in his closing argument had passed the scrutiny of the state Supreme Court in previous death penalty reviews, he said.

The Supreme Court may take several weeks or longer to decide the case.

Patterson was convicted of the 1984 murder of Matthew Brooks, a West Virginia man who was beaten and shot in the head during a purse-snatching. The murder took place in the parking lot of a St. Andrews motel while Brooks' wife, Ruth, who was injured in the attack, looked on. Brooks was white.

Patterson's first death sentence was reversed on appeal because he had not been permitted to introduce evidence about his ability to adapt to prison life. A second jury, convened in Lexington County in 1987, sentenced Patterson to die; one person on the second jury was black.

Delgado wanted to ask juror candidates about their social experience with blacks, their feelings on interracial dating and the causes of racism, and whether they were offended by the Confederate flag that flies over the South Carolina State House.

But Circuit Judge Hubert Long wouldn't permit the questions. Delgado said Long and other judges feel that the questions are improper because of a previous Supreme Court ruling that prohibits "staking out" the jurors' positions on race. But Delgado said a later ruling by the U.S. Supreme Court permitted courts to ask jurors about racial bias in death penalty cases.

Assistant Attorney General Harold M. Coombs Jr. argued that Long had been "a very careful judge" during jury selection and had taken pains to ensure that Patterson had received a fair trial.

Although it is no indication of how the court will eventually rule, Justice Jean Toal asked both attorneys what sort of directive the court should give judges if it decides to allow jurors to be questioned about racial bias.

Delgado offered the questions he wanted to ask of jurors in Patterson's case. Coombs said that at best, the court could allow "something minimally intrusive."

JEFF MILLER
State
April 18, 1989

Politicians and Death

This year's election campaigns are beginning to resemble old fashioned medicine shows. All over the country, candidates are hawking their cure to violent crime. And it's always the same: executions. In fact, the candidates' wares are so similar that they are now focusing on body counts rather than on the concept of the death penalty itself.

It's a staggeringly simple premise: in today's climate of fear, political strategists seem to believe that the critical sound bite is their candidates's record on executions: "My candidate has electrocuted more people than your candidate." Those who can't hawk quantity, hawk quality, as in "I got Ted Bundy." When the blood hasn't started flowing, for example, in New York or California, the measure of a candidate's moxy is the persistence of his or her vote to get the chair warmed up.

In California, the gubernatorial campaign is getting whipped up over the approach of what may be the state's first execution in over 20 years. In Florida Governor Bob Martinez is combatting his low public approval rating and a recent series of political defeats with the incessant incantation of death (there have been only 5 executions in Florida since Martinez took office, so he focuses instead on the 90 death warrants he has signed), and on his success in extinguishing Florida's most famous villain, Ted Bundy.

Of course, it's always troubling when political races are reduced to numbers. And it's troubling that what the candidates are actually counting here are dead bodies - real people whose wives are now widows and whose mothers and sons and daughters miss them. It's as if taking a prisoner's life were no more significant than, say, cutting funding for school lunches or drafting a mandatory seatbelt law.

But the spectacle is most offensive because the message is so patently false. Someone ought to call the truth in advertising police. There is no relationship between executions and a decrease in violent crime.

During the current term of Florida Governor Bob Martinez, there have been over 3,000 murders in the sunshine state, placing it consistently among the top five in murder rates. In Texas, former Governor Mark White brags that he enthusiastically authorized the deaths of 25 men. That's less than half of one percent of the number of murders in his state during his term. Texas has had the highest murder rate in the nation consistently since 1983. Neither Governor White nor opponent Attorney General Jim Mattox (who boasts 32 killings) can say that their prized body count has fixed anything in the Lone Star State.

These candidates aren't offering much more than snake oil to cure their state's endemic violence. And rather than find something that will, death penalty proponents whine that we just don't execute people fast enough. How fast is fast enough? We now have over 2,000 people on death row. Experts say that we would have to put one person to death each day for over five years to empty death rows across the country. Is that really the country we want to live in?

Real answers to crime are not found in the execution chambers of our state prisons. Real political debates don't focus on whose hands are the bloodiest. The politics of death cheapen and distort the way political campaigns function, and the way the criminal justice system functions as well. Those who are hawking executions would do better to come up with some real answers to violence. Instead, with one eye on the public opinion polls, the candidates stubbornly close the other to real solutions. And herein lies another of the dangerous side-effects from this year's latest elixir.

The effect of this stump debate is to squelch serious debate on alternative solutions to crime. "This being an election year," says New York Senator Vince Graber, a sponsor of the latest effort to bring back the electric chair in his state, "I don't think the Senate is in the mood to go with mandatory life. The death penalty would become less of a campaign issue, and I don't think they want to do that." The message is clear. Implement life-without-parole and you diffuse your campaign major rallying cry. Governor Martinez knows the game as well. Last year Martinez vetoed a measure which would have added life-without-parole as a third alternative (keeping the death penalty fully intact in Florida) for convicted murderers. Martinez's reasoning? He was afraid that juries, faced with the option of death or life-without-parole, might choose life.

Martinez and Graber know something that some of the other medicine show candidates don't know: that only the shallowest examination of the death penalty question suggests that the public is really clamoring for executions. A more thorough examination reveals something different. The conventional wisdom that supporting the death penalty is a smart political bet comes from public opinion polling which shows that when asked: "Are you for or against the death penalty?", most people will answer yes. This question does not however, really capture what it is that the public wants. The public wants safety and fairness. And it is not entirely clear that the public equates the death penalty with either of these two objectives. Further polling which explores alternatives to the death penalty finds majority support for lengthy prison terms over continued use of the death penalty. Voters asking them to buy isn't the real stuff. But the stuff of real proposals hasn't been around lately. And when it is -- as in state legislative efforts to raise minimum sentences for homicide, or in cries for gun control or solid victims assistance programs which would provide counseling and financial aid to victims of violent crime, or for increased police protection in poor neighborhoods -- the shrill cries of the candidates drown out the more reasoned calls for debate on real solutions.

It's time that politicians get serious about stopping crime and keeping the streets safe. Hawking death and counting bodies may seem productive on the stump, but snake oil never really cures anything. And in this violence-ridden society, our political candidates would do well to find a more helpful pill to push.

LEIGH DINGERSON
Director, National Coalition to Abolish the Death Penalty
1419 V Street N.W.
Washington, DC 20009

DIANN RUST TIERNEY
Legislative Counsel
American Civil Liberties Union

"Reprinted from *Lifelines*, membership newsletter of the National Coalition to Abolish the Death Penalty."

NEAL WALKER RESIGNS

A Model of Excellent Service to Poor and Capital Clients

Of Neal Walker- The DPA has afforded me many opportunities to learn trial practice, but working this year with Neal, as co-counsel in a capital case, was my first chance to see an intensely focused, creative professional at work. I know what Neal means now when he refers to a lawyer as being "up to speed." I hope we all strive to attain this world class level of excellence. -***BILL SPICER***, APA and Regional Manager.

Neal Walker resigned his position as Chief of the DPA Capital Trial Unit (CTU) to join the Loyola Death Penalty Resource Center, 210 Baronne Street, Suite 608, New Orleans, Louisiana 70112 (504) 522-0578. His work at the Resource Center will be post-conviction litigation for the 32 inmates on Louisiana's Death Row. There have been 19 executions in Louisiana post-*Gregg*.

Steve Bright, a Southern death penalty lawyer, welcomes Neal's help: "Although Neal's leaving is a terrible loss for Kentucky, he responds to a desperate need in Louisiana. Like many of the states in the deep South, Louisiana has no public defender program similar to the Department of Public Advocacy. Neal will have a major and immediate impact both in helping individuals facing the death penalty and in assisting trial and post-conviction lawyers in capital cases throughout the state. I look forward to continuing to work with Neal in his new position there."

CTU

According to **Ernie Lewis** a career public defender since 1977 "[t]here are men and women in Kentucky who will be sentenced to death because of Neal's leaving DPA. He is that good. On the other hand, there are people in Louisiana who would have been electrocuted had it not been for Neal's moving there. He's that good. Neal will be missed here. His commitment was total. His truth-telling was inspirational. His gentleness and loving nature were humbling. Go in peace, Neal. And right on."

The gem of Neal's accomplishments over the years as Chief of CTU was the assembly of a crack capital trial team to actively track, enter, and pursue the most critical death penalty cases across the state. The unit has entered into or assisted in 23 cases since its creation by Neal in 1989. Of those cases 9 have been pled to a sentence less than death. None have resulted in death sentences.

Neal recruited **Steve Mirkin**, an attorney with the New Hampshire Public Defender's Homicide division (1983-89), **Mike Williams**, a contract public defender from Campbell County, KY (1985-89),

and investigator, **Randy Edwards** from the Maryland Death Penalty Unit (1985-89). **Tena Francis**, an investigator with the Paducah office since 1987 transferred to the Unit on July 1, 1990. **Cris Brown** paralegal, has been a with the unit since 1983.

Neal's breadth of experience is immense. as Steve Mirkin recognized, "The great thing about working with Neal has been the breadth of his knowledge--I can't recall a time when I've asked about some issue when he hasn't been able to hand me a file full of information on it, and come up with an angle I hadn't thought of. But what I'll miss is having someone to discuss Screaming Jay Hawkins, Merle Travis and Arlo Lindsay with."

Bottom (L to R) **Donna Ouellette**, legal secretary, **Cris Brown**, Paralegal, **Tena Francis**, Investigator, Top (L to R) **Steve Mirkin**, Attorney, **Patsy Shryock**, Legal Secretary, **Randy Edwards**, Investigator, **Mike Williams**, Attorney.

On Neal's Resignation

"One of the most talented, dedicated and fearless lawyers I have ever met. Neal's willingness to take on my responsibilities at the Department made it possible for Gail Robinson and I to venture out on our own. For that, his friendship (not to mention his education of my taste in music), I shall always be greatful. So it is that we wish him "Godspeed" on his journey to Louisiana.

Frankly, I pity David Duke. He doesn't know what's coming. Our sorrow in seeing him leave Kentucky and our regret that we could never convince him to join our law practice is only tempered by our happiness that he remains as committed to *The Work* as ever." - KEVIN MCNALLY

A CAREER PUBLIC DEFENDER

With a brief interlude to the Eastern Kentucky Federal Defender's office, Neal has worked with DPA since his graduation from Salmon P. Chase College of Law in 1979. Throughout, quality service to the client has been Neal's standard:

> Former DPA investigator **Doug Wilson** commented, " I have seen Neal impress so many defendants with his efforts to provide them with better representation than could be purchased with the big bucks. Neal is a good role model of what a great public defender is all about."

From 1979-Aug. 1980, Neal was a trial public defender in Prestonsburg. He was an appellate public defender in Frankfort from Sept. 1980- March, 1983.

From September 1985- present he has been with the death penalty section. In Jan. 1989 he became Chief of the section. His leaving will have a significant impact:

> "Neal Walker's departure from the Department of Public Advocacy will leave a physical and emotional void that will be difficult to fill, according to **Mario Conte**, Federal Defenders of San Diego, Inc. I have been privileged to know Neal for the past several years and rarely have I encountered someone of his caliber. I know of Neal's unflagging dedication to his capital clients and how intense and focused he was with each and every case he handled. Working with Neal, Conte observed, one soon learns that no stone is left unturned, no detail is too small, and unceasing persistent efforts for his client are the hallmark of this wonderful advocate. His pursuit of *excellence* will be missed by the Department of Public Advocacy and the clients to whom he endeared himself on death row."

In the time he was away from DPA, March 1983- 1985, Neal worked in criminal defense with the Federal Public Defender's office in Lexington. **Allen Holbrook**, now a prominent Owensboro attorney, had the following reflections about their time together in the federal defender's office:

> "I worked with Neal Walker in the Federal Public Defender Office in Lexington from 1983 until the office closed in 1985. Neal had already started when I got there. Neal impressed me with the thoroughness with which he prepared cases. No stone was left unturned. His trial notebook was a work of art, and one which I often wish I were able to emulate even today. Neal's trial practice was of such high quality that he gained the respect of judges, prosecutors, and the federal agencies that we often dealt with on a day-to-day basis. Kentucky has lost a premiere defense attorney. Louisiana's gain is our loss."

AMNESTY INT'L, U.S.A.

Neal is extremely active in Amnesty International and is the Kentucky Death Penalty Co-ordinator (1987-Present). He served on the National Death Penalty Advisory Committee 1987-89. On June 6, 1990, he represented Amnesty at the Annual General Meeting of the Dutch Section in Amersfoort, the Netherlands. On June 22, 1990, he was a guest speaker, along with Amnesty Executive Director, Jack Healey, on Studs Terkel's nationally syndicated radio show. The topic was the death penalty.

THE PRIVATE MAN

Despite working long hours on capital case concerns, Neal finds time to pursue private interests. It is the less well-known side of Neal. Neal is an accomplished artist- his charcoals unforgetable. He also makes collages. Neal loves music and is a skilled percussionist. He has performed publicly on the conga drums. Neal is also a long-distance cyclist.

COMMITMENT

Perhaps the most prominent trait of Neal is his commitment to serve poor clients on trial for their lives; a commitment few are willing to give.

Bob Carran, Northern KY Public Defender said:

> "While I have enormous respect and admiration for Neal's legal knowledge, even temper, and high sense of moral and ethical standards, it is his total commitment and dedication to defense services which always astounds me. Somehow, he always has the time for your problems."

In the trial of Robert Judd, charged with two counts of capital murder in Green Co., Neal spent his own money to provide the defense the client deserved as funds had been denied by the Court for exhibits- exhibits that are routinely created for the prosecution's case. Neal won an acquittal in the case, the only acquittal in a multiple murder case in Kentucky in 25 years.

No one is more well versed than Neal in capital trial issues, and his genius is evidenced in the victories that one doing capital work has to accept as chipping away at an unfair process that often produces a death sentence. The creative side of Neal comes out in cutting-edge practice.

Neal's vast experience and knowledge is often tapped as he is a much sought-after speaker on death penalty defense related topics at national seminars. His speaking engagements are too numerous to mention.

Neal exemplifies the best public defender characteristics: zealous, creative, intelligent, and hardhitting advocacy on behalf of clients who have the most to lose, but the least to pay to secure adequate representation.

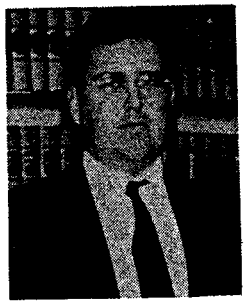
We are loathe to have him leave us, but wish him the very best.

Neal's Commitment & Courage

Neal would be a powerful advocate in any forum, but one of the most effective arguments he ever made was not before a court, but before the American Bar Association Task Force on Habeas Corpus in Death Penalty Cases in Atlanta in the fall of 1989. The room was packed with representatives from death penalty defense teams from across the South, and also with death penalty prosecutors and attorneys general. Sitting on the bench were the task force members, also representing both sides of the issue, not only with respect to habeas corpus, but also regarding the quality of representation at trial and on direct appeal in death penalty cases. Then Neal rose and began to speak in that intense way of his about what kind of lawyers had "represented" many of the people on Kentucky's death row. Neal told one horror story after another about the job these lawyers had done (or failed to do), and why an adequate defense (not to mention a quality defense) would have made a difference in the outcome. Neal also described for the task force how many of those same lawyers have since been suspended or disbarred for their representation in other cases. As he spoke, some task force members and people in the audience began to squirm uncomfortably, and when he finished speaking there was an uncomfortable silence in the room. I'm sure Neal's preparation helped convince the task force to take the strong position it did on standards for the appointment and performance of counsel at all stages of capital cases. -**MARY BRODERICK**, Director, Defender Division, National Legal Aid & Defender Association.

EVIDENCE

Kentucky's New Evidence Code - Part III



FOURTEENTH AMENDMENT
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This regular *Advocate* column reviews new evidence cases decided in Kentucky and federal courts, and deals with specific evidentiary problems encountered by criminal defense attorneys.

ARTICLE VIII HEARSAY- CONFRONTATION AND GENERAL PROVISIONS

Any revision of the hearsay rules is going to be affected by the confrontation clauses of the federal and Kentucky constitutions. The 6th Amendment provides that in all criminal prosecutions the accused has the right "to be confronted with the witnesses against him". Section 11 of the Constitution of Kentucky provides that in all criminal prosecutions the defendant has the right to "meet the witnesses face-to-face." As we will see in the second part of this examination of Article VIII of the new Evidence Code, these provisions are necessary guides to interpreting the Code language for application in criminal cases. Hearsay rules that are acceptable under the general due process afforded to civil litigants can run afoul of the specific protections of the 2 confrontation clauses and therefore several of the proposals must be examined carefully to see if modification is required. The task of understanding the hearsay article was made somewhat easier by the rendition in June of this year of *Maryland v. Craig*, 497 U.S. ___, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) and *Idaho v. Wright*, 497 U.S. ___, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) in which the Supreme Court provided a thorough review of its understanding of the 6th Amendment confrontation clause. The *Maryland* case in particular generated controversy including a stinging dissent authored by Scalia. A short review of these cases will assist the examination of the new proposals.

Kentucky's language differs markedly from the language of the 6th Amendment by guaranteeing the defendant the right to a face-to-face meeting with a witness. Obviously, because the hearsay exceptions have existed in Kentucky for a good many years, no court has interpreted this section as a general prohibition of hearsay. However, review of some cases from other states construing the same language shows that Kentucky's Constitution might impose stringent requirements on hearsay exceptions and this might affect the new proposals as well. What I propose to do first in this article is to review the law concerning confrontation. Then, in a second part, I will review KRE 801, KRE 801-A and KRE 802. The remainder of Article VIII will be discussed in the next issue.

Before doing this I would like to provide an update on the Code. In the 1990 Regular Session the General Assembly enacted the Evidence Code, subject to the approval of the Supreme Court of Kentucky. [Kentucky Acts, 1990 Regular Session, Ch. 88 (HB 214), Sec. 93, p. 213 (3-19-90)]. The Evidence Code, adopted as Chapter 422A of the Kentucky Revised Statutes, is now available either in the Acts volume or in the pocket parts to the statute sets. The Banks-Baldwin *Criminal Law of Kentucky* book for 1990 also has them included as an appendix. It is never too early to start looking at these rules because barring unforeseen developments, they will be the law in Ky. in June, 1992.

RIGHTS OF CONFRONTATION

According to the majority opinion in *Maryland v. Craig*, the central concern of the Confrontation Clause is insurance of the reliability of evidence by subjecting it to rigorous testing at an adversary proceeding conducted before the trier of fact. The issue of confrontation in *Craig* arose because of a statute that allowed a child to testify in court but out of view of the defendant. The majority noted that the court had never said that face-to-face confrontation before the jury was absolutely necessary. Rather, the clause "reflects a preference for face-to-face confrontation at trial" which must occasionally give way to considerations of public policy and the necessities of the particular case. [110 L.Ed.2d at 680]. The court noted that although face-to-face confrontation is not an absolute requirement, courts may not easily dispense with it. Under *Craig*, face-to-face confrontation may be dispensed with only where it is necessary to further an important public policy and only where

the reliability of the testimony is otherwise assured. [111 L.Ed.2d at 681-682]. The finding of necessity must be a case specific one. According to the majority opinion the trial court must hear evidence and determine whether the use of out-of-court statements is necessary within the context of the particular case.

Scalia and 3 other justices were very unhappy with this result. Scalia's dissent accused the court of reaching an anti-textual conclusion based on out-of-context scraps of *dicta* from other cases. [111 L.Ed.2d at 689]. According to the dissenters, the 6th Amendment does not contain a literal prohibition against hearsay evidence, since it guarantees the defendant "only the right to confront the witnesses against him." However, the court had on previous occasions found implicit in the Confrontation Clause some limitation on hearsay evidence because otherwise the government could subvert the confrontation right by putting on witnesses who knew nothing except what an absent declarant said. Thus, in determining the scope of that limitation, the court considered whether the reliability of the hearsay statements is assured. However, Scalia said that the same test cannot be applied to something that is explicitly forbidden by the constitutional text. Scalia then went on to discuss *Idaho v. Wright* and noted that the Confrontation Clause permitted hearsay, but included a general requirement of unavailability except for certain types of evidence.

Idaho v. Wright, is a case dealing specifically with the admissibility of hearsay. In the majority opinion, the court noted that the 6th Amendment provides for the right to be confronted by witnesses and noted that from the earliest opinions of the court the court had held that the Confrontation Clause does not necessarily prohibit hearsay even though such hearsay might be a violation of the literal terms of the clause. Thus, the Confrontation Clause permits hearsay where it is necessary despite the defendant's inability to confront the declarant at trial. However, the clause also can bar in criminal case evidence that would be admissible under hearsay exceptions in civil cases.

In examining the child hearsay testimony in *Wright* the court reviewed *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980) and noted that the 6th Amendment created a "preference" for face-to-face confrontation. From this the court concluded that the 6th Amendment established a rule of necessity with respect to hearsay statements. The prosecutor must in almost every case show unavailability. Once unavailability is shown, the statement is admissible only if there are sufficient indicia of reliability proved by the prosecutor. [111 L.Ed.2d at 651-652]. Reliability can be established in 2 ways, the first being proof that the hearsay is within a "firmly rooted hearsay exception". The second way is proof that the statement has "particularized guarantees of trustworthiness." Under this analysis, long-standing exceptions like the co-conspirator's exception do not need particularized guarantees of trustworthiness, because the reliability of the statement can be inferred from its long history as a hearsay exception. Under these circumstances, the prosecution need not show unavailability. The court said that the firmly rooted exception satisfies the constitutional requirement because of the weight given to long-standing judicial and legislative experience in admitting certain types of out-of-court statements. [111 L.Ed.2d at 653]. However, where the exception is not firmly established, the state must show unavailability, and must in addition show that the circumstances surrounding the making of the out-of-court statement render the declarant particularly worthy of belief. [111 L.Ed.2d at 655]. The court ruled that the evidence showing reliability must relate to the declarant and the circumstances of the declaration. Prosecutors are not allowed to use other evidence produced at trial to show the reliability of the statement. [111 L.Ed.2d at 657]. Thus, in the *Wright* case, the child's out-of-court statement, admitted under the residual exception [similar to KRE 804(b)(5)], had to have particularized guarantees of trustworthiness after the child was shown to be unavailable.

From these 2 cases a general statement of the federal constitutional rule can be formed. The Supreme Court believes that there is no literal prohibition against the introduction of hearsay testimony. Rather, as Scalia noted in his *Craig* dissent, the text of the amendment prohibits introduction of testimony without an opportunity to confront it. The court is satisfied that the amendment does not prohibit certain limited exceptions to the "preference" for face-to-face confrontation. The court has accepted the prosaic explanation of the rule which is simply that hearsay exceptions have existed since the development of the hearsay rule in the 16th Century and that long practice has given some exceptions a certain amount of legitimacy. But the important question to ask under the federal constitution is the limit to which the exceptions may be taken.

Kentucky's confrontation right is established by Section 11 of the Constitution. Section 11 as it is now written is a rearrangement of the original clause of the Constitution of 1792, which was itself a copy of Section 9 of the Declaration of Rights of the Pennsylvania Constitution of 1776. This particular part of the Pennsylvania Constitution was adapted from the Virginia Declaration of Rights of 1776. It seems obvious that the choice of different language should lead to different results. By using the "more graphic and explicit 'to meet the witnesses against him face-to-face' instead of the word 'confront' used by other states" it appears that the drafters intended to give the accused the benefit of face-to-face cross-examination of the witness in the presence of the trier of fact who could then judge the demeanor and credibility of the witness. [*Opinion of the Justices to the Senate*, 547 N.E.2d 8, 10 (Mass., 1989)]. One purpose attributed to this language is to preserve in criminal cases the principle of the hearsay rule which was adopted in England some 100 years before the American Revolution. [547 N.E.2d at 10]. The important difference to note is that Kentucky gives the right to meet witnesses face-to-face and not simply the right to "confront the witnesses against him". Arguably, this difference in language means that the accused is entitled to meet face-to-face anyone who provides evidence whether in or out of court. However, this has never been clearly stated and the use of the word "witnesses" at least implies that the confrontation right may be limited to those who appear in court to testify. In light of the long history of hearsay exceptions in Kentucky, it appears that the different language of Section 11 means that courts should be hesitant in creating new exceptions to the hearsay rule, but that Section 11 does not prohibit the introduction of hearsay. The recent statement of the hearsay rule in *Barnes v. Commonwealth*, Ky., 794 S.W.2d 165, 167 (1990) states the theoretical framework that should underlie the new hearsay article.

"The essence of the rule prohibiting the admission of hearsay evidence is the absence of an opportunity for cross-examination. While a number of exceptions have been developed to permit the admission of hearsay evidence when it has been shown to be necessary and trustworthy, the general rule has not been lost in the exceptions. To deprive a litigant of a right so fundamental as the right to confront and cross-examine witnesses, the statements must possess characteristics or have been made under circumstances which substantially eliminate the possibility of error.

Reliability must be established." This cautious attitude should be retained in construing and applying the new rules of evidence.

PROVISIONS OF THE HEARSAY ARTICLE

Weinstein says that the scheme of the hearsay article of the federal rules is that of a statement of a general prohibition coupled with a system of (a) "class exceptions", (b) open ended provisions in Rules 803(24) and 804(b)(5) and (c) exemption of certain types of prior statements from the definition of hearsay. [4 *Weinstein's Evidence*, Section 800.[02], p. 800-13]. The Kentucky scheme is almost identical, with 2 or 3 striking exceptions.

THE HEARSAY RULE

The hearsay rule is set out at KRE 802. It is identical to the federal rule with the exception of language necessary to adapt it to the Kentucky form of government. The rule says simply that "Hearsay is not admissible except as provided by these rules or by other rules of the Supreme Court of Kentucky or by acts of the General Assembly." Evidence that appears to be hearsay is inadmissible unless it falls under Rules 803 and 804, or 801-A. The Commentary notes one other exception which is the use of depositions in civil cases under CR 32. And apparently, for use in civil cases also, the rule acknowledges the authority of the General Assembly to create exceptions to the hearsay rule.

KRE 801-A

KRE 801-A(1) has 3 important parts for criminal cases. Subsection (A) was discussed in the article on impeachment and the abrogation of the *Jett* rule in the August, 1990 *Advocate*. Prior statements of a witness (declarant) can be admitted despite the availability of the declarant if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement sought to be introduced is (1) inconsistent with the trial testimony and was given under oath subject to the penalty of perjury at a trial hearing or other proceeding or deposition, or, (2) is consistent with the declarant's testimony but is used to rebut a charge of recent fabrication, or (3) is one of identification made after perceiving the person. The big change under Subsection (A) is that the type of statement used for substantive evidence is, in contrast to *Jett*, limited.

Although the Commentary says that KRE 801-A(1)(B) is not a significant change in pre-existing law, I think that

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the admissibility as substantive evidence of statements to rebut recent fabrication charges is an addition to the current law. There is no doubt that prior consistent statements can be introduced in order to rebut the charge of recent fabrication. But that is the only use to which the statement should be put. Under those circumstances, the statement comes in because it is being introduced not for the purpose of showing the truthfulness of the statement or of the declarant, but simply to show that the declarant had not recently improved or changed her testimony for purposes of trial. The Commentary and the text of the subsection make clear that the evidence will come in not only to rebut the allegation of recent fabrication but also as substantive evidence. The Commentary states that the distinction "between substantive and credibility use of such statements has been unsettled." I have never heard of such statements being used for any purpose except for the non-hearsay use of rebutting the allegation of recent fabrication. It may well be that in the absence of an admonition jurors might have felt free to use the statement for any purpose, but I believe that under the current law the trial court would be bound to give a limiting instruction if requested. If this subsection remains in its present form, defense counsel is going to have to be very careful in laying a charge of recent fabrication or bad motive for testifying. Such a line of cross-examination might well bring in a previous written or oral statement that is better for the prosecutor than the witness' trial testimony.

Subsection (1)(C) is an improvement on the rule set out in *McCloud v. Commonwealth*, Ky., 698 S.W.2d 822 (1985). The basis for the rule is that the declarant is available for cross-examination concerning the prior statement and that the conditions surrounding the extrajudicial identification are no more likely to lead to misidentification than the suggestive conditions in a courtroom. One important limitation under the subsection is that only the individual who has made the identification may testify about it. Someone who has seen the identification procedure is not permitted to testify. If the Commentary means what it says, then only the witness who made the photopack, lineup, or showup identification can testify about it. The police can say that they showed pictures or conducted the lineup, but they cannot report what the witness said.

The second type of statement not excluded by the hearsay rule even though the declarant is available is the statement offered against a party. The important subsection here is KRE 801-A(2)(A) which deals with the party's own statement. Anything that a defendant says to anyone, if relevant to an issue at trial, can be introduced through the witness who heard it. It is important to remember that KRE 602 limits testimony to the personal knowledge of a witness. Therefore, if the defendant has spoken to a witness, and the witness appears at trial, he can testify concerning what he heard the defendant say.

Subsections B, C & D really do not come up often in a criminal trial. However, Subsection (2)(E), the co-conspirator exception, may play an increasingly large part in Kentucky criminal practice because of drug prosecutions. That subsection says that if a statement is offered against the defendant and the statement is by a co-conspirator of the defendant and was made during the court of and in the furtherance of the conspiracy, the statement may be admitted as substantive evidence. According to the Commentary, this co-conspirator exception is identical to pre-existing federal and Kentucky law. The Commentary says that because co-conspirators are liable under the criminal law for acts committed by other conspirators in furtherance of the conspiracy, "they are 'liable' under this provision for statements made by other co-conspirators during the course and in furtherance of the conspiracy."

The existence of a co-conspirator exception is not novel. The way the conspiracy is proved under the rule is. Under previous Kentucky law, as noted by Lawson in the *Evidence Handbook*, the Commonwealth had to prove the existence of the conspiracy before the statement could be used, and the substance of the statement could not be used in order to establish the existence of a conspiracy in the first place. [Lawson, *Kentucky Evidence Law Handbook*, 2d Ed., Section 8.20 (B), p. 220-221 (1984)]. There was some difference of opinion among the federal circuit courts before the U.S. Supreme Court decided the case of *Bourjaily v. U.S.*. The question was whether the inapplicability of the rules to determinations of preliminary questions of admissibility under FRE 104(a), would allow use of the statement itself in establishing the existence of the conspiracy. The U.S. Supreme Court decided in *Bourjaily* that it could be used. [483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)]. Because under FRE 104 the rules of evidence do not apply and because the question is one for the court alone, the fear of misleading or overemphasizing something to the jury does not exist. Thus, in federal courts, the substance of the statement can be used to establish the existence of the conspiracy, which conspiracy can be used to justify the introduction of the co-conspirator's statement as substantive evidence tending to show the defendant's guilt. [Graham, *Evidence: Revised 2nd Ed.*, Ch. 6(C)(5), p. 127-129 (1989)]. Under the federal rules, once the court decides that the conspiracy existed, and that the statement was made by the declarant (1) in the course of, and (2) for the purpose of furthering the conspiracy, the statement can come in, subject of course to the general admissibility principles set out in Article IV. The Commentary to KRE 104(a) makes specific reference to *Bourjaily*, and obviously, that is going to be the law of Kentucky with respect to co-conspirator statements. Subsection (3) of KRE 801-A will apply in civil cases, and therefore will not be considered here.

DEFINITIONS

"Hearsay" itself is defined by KRE 801. There the drafters set out definitions of the terms "statement", "declarant", and "hearsay." "Hearsay" is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. [KRE 801(3)]. If the statement is not introduced for this purpose, KRE 802 does not apply. The "declarant," of course, is the person who made the statement. [KRE 801(2)]. A "statement" is an oral or written assertion, or the evidence of non-verbal conduct of a person if it is intended to be an assertion. Subsection (1)(b) refers to the obvious non-verbal assertions like movements of the head in response to a question, and it also applies to failure to act as in the case of failure to complain or inaction in the face of an accusation. [4 *Weinstein's Evidence*, Section 801(a)[02], p. 801-64]. According to the Commentary, an objection to non-verbal conduct under the hearsay rule requires a preliminary hearing under KRE 104(a) on the issue of fact of whether the actor intended to make an assertion. The Commentary says that "the rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility."

The general provisions of Article VIII, with 2 major exceptions for substantive use of ostensible rebuttal evidence of recent fabrication and foundation for co-conspirator statements do not present a large change in Kentucky law. In the next issue of the *Advocate* we will look at KRE 803 and KRE 804 which list the exceptions to the hearsay rule. Some of these appear to violate the state and federal confrontation clauses and should be rewritten or deleted before adoption.

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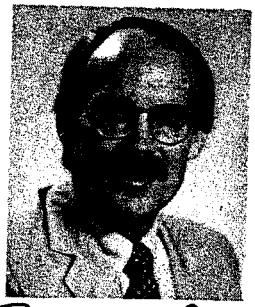
PLAIN VIEW

Search and Seizure Law



Ernie Lewis

FOURTH AMENDMENT
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause....

SECTION 10, KENTUCKY CONSTITUTION
The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizures; and no warrant shall issue to search any place or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

This regular *Advocate* column reviews all published search and seizure decisions of the United States Supreme Court, the Kentucky Supreme Court, and the Kentucky Court of Appeals and significant cases from other jurisdictions.

This is the dormant time for the U.S. Supreme Court. The only significant recent search and seizure decisions of late have been from the Sixth Circuit.

U.S. V. CUMMINS

In *United States v. Cummins*, 912 F.2d 98 (6th Cir. 1990), the Court examined issues surrounding *Franks v. Delaware*, 438 U.S. 154 (1978), which held that false statements in the warrant application had to be excluded when reviewing the probable cause determination of the magistrate.

Cummins, involved a confidential informant who told a police detective that a large amount of cocaine was in Cummins' apartment. A warrant was obtained by a second detective, Jerry Warman. In two affidavits filed with the court in an effort to obtain a *Franks* hearing, it was alleged that Warman's affidavit had falsely stated that Cummins was in the apartment at the time of the observation of the cocaine.

The Court held on appeal of a conditional plea that no *Franks* violation had occurred. First, the Court found that because Warman had not been examined at the suppression hearing that Cummins had not met his burden of proving Warman's statements to be intentionally, false or in reckless disregard of the truth. Secondly, the Court held that even had the statement been proven to be false, that whether Cummins was present at the time or not was immaterial, and thus no *Franks* violation occurred.

Finally, the Court held that no error had occurred in continuing to hide the identity of the informant at the suppression hearing. In the *Franks* context, one must wonder how one can prove a false statement in an affidavit when the identity of the person in a position to know is not disclosed.

U.S. V. BARNES

This case, *United States v. Barnes*, 19 SCR 17 (September 5, 1990), grew out of a violent episode between rival motorcycle gangs in Cincinnati and Memphis. A task force was formed to try to prevent future violence. Part of the activities of the task force was to watch particular locations known to be frequented by the gangs.

Officers Cupp and Jefferson were watching a gang clubhouse in Memphis when two people got into a Lincoln and drove away. The officers followed. At a gas station, the officers were able to identify the driver as Floyd Barnes. The task force had identified Barnes as one who had been armed during the previous altercation, and was thought to be carrying a weapon in anticipation of renewed violence. The officers pulled Barnes over and found a gun, three pocket knives, and a vial of a "white powdery substance" in plain view.

Relying upon *United States v. Hensley*, 469 U.S. 221 (1985), the Court approved of this *Terry* stop. The task force itself had amassed sufficient information on Barnes, according to the Court, to justify an investigatory stop. Accordingly, the resulting search was legal.

U.S. V. KELLY

The 6th Circuit did reverse the third search and seizure case before them. *United States v. Kelly*, 19 SCR 17 (October 2, 1990). Unfortunately, their reversal involved a district court's suppression of evidence, and a remand to the district court.

Here, one Kelly was approached by the police at an airport. Kelly agreed to go with the officers to their office for further questioning, and agreed to a search of some of his bags. The officers then frisked Kelly, and his bag, which contained contraband.

The district court found that the search of Kelly was illegal and not justifiable as a frisk for weapons, particularly since he had just come off a plane. The district court further found that the unlawful search tainted the prior consent to search

the bag. The 6th Circuit disagreed with the district court's latter finding. The Court stated that not every illegality will taint previously given consent. Rather, the court remanded to the district court because an improper rule of law had been used to judge whether consent had been terminated by the illegality.

U.S. V. CLUTTER

In *United States v. Clutter*, 48 Cr.L. 1038 19 SCR 20 (9/18/90), the Court held that a 12 year old and a 14 year old boy could consent to a warrantless police search of the house occupied by them, their mother and her boyfriend.

Relying upon *United States v. Matlock*, 415 U.S. 164 (1974), the Court held that the boys could consent "since the boys enjoyed that degree of access and control over the house that afforded them the right to permit inspection of any room in the house."

CERT. GRANTS

The Court has already granted *certiorari* in 4 cases involving search and seizure. In the first, the Court appears to be ready to overrule *United States v. Chadwick*, 433 U.S. 1 (1977), which had been vulnerable in the past. *Chadwick* had held that a warrant was required to search a container in a car which had been discovered during a probable cause search of the car. In *California v. Acevedo*, 48 Cr.L. 3001 (1990), the Court will examine the question of whether *United States v. Ross*, 456 U.S. 7988 (1982) had overruled *Chadwick*, that is whether an officer with probable cause to believe contraband is in a container in a vehicle must obtain a warrant prior to opening the container.

California law requires a probable cause determination to be made within 48 hours of arrest. A federal injunction was obtained requiring this determination to be made within 36 hours, pursuant to *Gerstein v. Pugh*, 420 U.S. 103 (1975). *Gerstein* is one of the few United States Supreme Court cases exploring the 4th Amendment ramifications of warrantless arrests, and how long one may be held prior to a judicial probable cause determination. While an expansion, of even clarification of *Gerstein* would be helpful, I fear that *Gerstein's* minimal protections may be lifted in this case, known as *Riverside County, California v. McLaughlin*, 48 Cr.L. 3001 (1990).

In *Michigan v. Chesternut*, 486 U.S. 567 (1988), the Court had held that no search and seizure has occurred where a reasonable person feels free to leave. The Supreme Court will look at this issue again in *California v. Hodari D.*, 48 Cr.L. 3001 (1990). In *Hodari*, the California Court of Appeals had held a person had been seized by police running toward Hodari D. intending to block his path. The California Court had suppressed evidence discarded during the chase. The Court will examine both whether physical restraint is required for the 4th Amendment to be implicated, and whether contraband which has been abandoned must be suppressed when the detention following the abandonment is illegal.

The final case on which certiorari has been granted recently is *Florida v. Bastick*, 48 Cr.L. 3029 (1990). There, the Court will examine the issue of whether it is legal to board a bus and ask for permission to search the occupants' luggage. The Florida Court had answered this question in the negative.

THE SHORT VIEW

State v. Hayes, Nev., 797 P2d 962 (1990). *Maryland v. Buie* was given teeth in this decision of the Nevada Supreme Court. The police went to Hayes' mobile home to arrest him for car theft. Upon arrival, they found a shotgun in the yard. Further, they were aware that Hayes had a wife named "Dawn" and a violent associate named "Don." When the police arrived, Hayes came outside, was arrested, and called out "Dawn." The police then conducted a sweep of the mobile home, which resulted in certain evidence being found which was used to procure a search warrant and even more evidence later. The Court held the above to be insufficient to justify a *Buie* protective sweep. "[W]hile officers need not have probable cause to believe a dangerous third person is present, the mere possibility of such a presence is not enough. Instead, police must have specific and articulable grounds sufficient to support a reasonable belief that a person posing a danger is present. On the facts of this case, Hayes' calling out a name known by a lead officer to be the name of Hayes' wife simply does not support such a reasonable belief."

Derricott v. State, Md.Ct.Spec.App., 47 Cr.L. 1492 (9/4/90). A state trooper stopped a young black man in a 1985 Nissan 300ZX for speeding. Derricott was dressed in a blue sweatsuit, gold chains, and a gold ring. He had a beeper and papers with phone numbers on them in his car. These facts, according to the Court, justified a *Terry* investigative detention beyond the traffic stop. Is the operative characteristic "black man" or what? This case is particularly curious given *Snow* which follows.

Snow v. State, Md.Ct.Spec.App., 47 Cr.L. 1494 (9/4/90). A case in the same court on the same day demonstrates how close the reasonable suspicion test can be. Here, Maurice Snow (snow?) was stopped for speeding. He was nervous and would not make eye contact. There were three air fresheners on the rear-view mirror. The officer asked Snow for consent to search the car, but Snow refused. A dog was called, and he alerted to the Blazer. A search of the Blazer revealed heroine in an overnight bag. The Court reversed, holding that the detention following the initial traffic stop was not justified by reasonable suspicion. The Court found each circumstance above to be not suspicion either singly or in toto. Further, the Court held that the exercise of Snow's constitutional right to refuse to consent to search could not be considered in the reasonable suspicion equation.

United States v. Ricardo, 47 Cr.L. 1495 (9th Cir. 8/24/90). A juvenile detained at best on reasonable suspicion was *de facto* arrested when held by the arm and placed in the back of a cruiser for questioning. "[T]aking hold of and isolating an unarmed, compliant juvenile in the back of a police car was unnecessarily coercive, and thus transformed the investigatory stop into an arrest." Thus, a confession made in the cruiser had to be suppressed.

United States v. Morales-Zamora, 47 Cr.L. 1496 (9/6/90). You combine this case with *Sitz*, authorizing DUI roadblocks, and we're in real trouble. Here, Morales-Zamora was stopped at a roadblock ostensibly to have her license and proof of insurance checked. While the papers were being checked, another officer walked a narc dog around the outside of the car, producing an alert. A search revealed a large quantity of marijuana. The Court held that because the person was not detained past the traffic control inquiry, that no seizure occurred. Further, because a dog sniff is not a search, no level of suspicion whatsoever is required before allowing the dog to sniff the car. With numerous narc dogs being trained, we can expect to see increasing numbers of arrests being made similar to the one in this case.

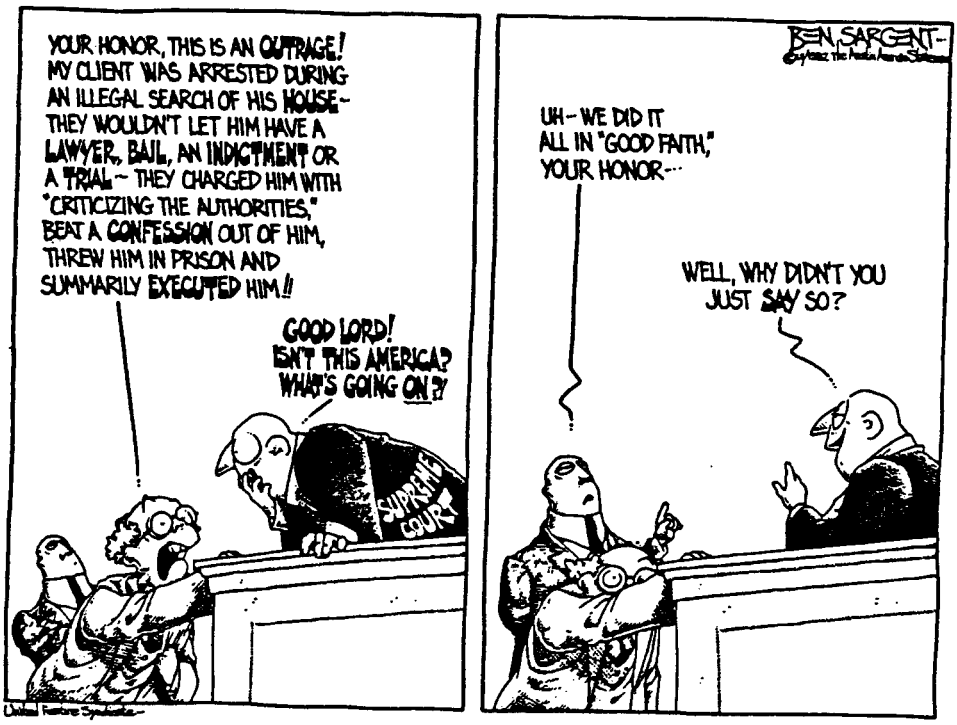
United States v. Giraldo, 47 Cr.L. 1463 (E.D.NY 8/24/90). The police entered Giraldo's apartment by posing as gas company employees and warning him of a gas leak. This was going too far for the Court, which held that while some deception is permitted in procuring consent, there were good policy reasons for finding no consent here. "'Consent' was

obtained by falsely inducing fear of an imminent life-threatening danger."

LAW REVIEW ARTICLES

Lewis Katz has written an interesting assessment of where the Court has taken us over the past 25 years in a law review article entitled *In Search of a Fourth Amendment for the Twenty-first Century*, 65 Indiana Law Journal 549 (1990). He notes that *Katz v. United States*, 389 U.S. 347 (1967) was intended to revolutionize 4th Amendment jurisprudence by leaving behind 18th Century property analyses and analyzing searches from the perspective of people rather than places. Ironically, however, *Katz* has instead been used to put most activity outside the reach of the 4th Amendment. He is not pleased. "The ability of our government to invade our informational privacy without restraint is now akin to the ability of governments in societies we do not ordinarily compare ourselves to." *Id.* at 589. As a remedy, Prof. Katz believes that activity now outside the reach of the 4th Amendment, such as writing letters, making telephone calls, our personal movement, our activities in our backyards, placing our garbage outside, etc., all should be included within a new category called "intrusions" which would require "reasonable suspicion" prior to governmental action. Such a change is "acutely necessary to protect the rights of future generations of Americans if the 4th amendment is to continue to protect liberty by prohibiting unreasonable government intrusions into the people's reasonable expectations of privacy. No less than the very nature of his society is at stake." Interesting reading.

Another law review article, this one by Prof. Matthew Lippman of the University of Illinois at Chicago entitled *The Decline of Fourth Amendment Jurisprudence*, 11 Criminal Justice Journal 293 (1989, makes a similar analysis of the Fourth Amendment. "[T]he fourth amendment is being interpreted so as to have little practical significance in protecting the rights of Americans and has been reduced to a mere symbol of personal freedom." *Id.* at 293. I had learned as a youth that one way in which we differed from the Soviet Union was that their Constitution was hollow, while ours lived, and had practical impact on our lives. Hmmmmm. He goes on to note that this has resulted in motions to suppress being filed in less than 5% of all criminal cases, with only 17% of those being granted, resulting in a loss of only .6% of all cases. This has resulted in an amendment which is "dangerously close to being reduced to a symbolic affirmation of American values which provides limited practical protection." In order to "reinvigorate" the 4th Amendment, the Court "should adopt a strict warrant requirement with stringent review of probable cause determinations." *Id.* at 355.



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The stakes are high indeed. "The same judicial philosophy which has legitimated the erosion of the fourth amendment certainly will influence the Court's interpretation of other rights. In this sense, the debate over the fourth amendment has ramifications for the future of the Bill of Rights. Those who cherish civil liberties have been all too silent in the face of the decline of fourth amendment jurisprudence." *Id.* at 356.

A third view from academia should round out our analysis from academia. "Recent decision of the Supreme Court, however, have so diminished our expectations of privacy that the Amendment's original function has become distorted and lost from view." Laurence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 John Marshall Law Review 825 (1989). Prof. Benner summarizes the reach of these decisions. "In the space of only a single decade, we have thus witnessed the diminution of protectable privacy in our automobiles, our business premises, our offices, our backyards, and even our homes. We have also lost any right to privacy in our trash bins, our bank records, the identities of those to whom we have telephone calls, and the locations to which we travel and whom we visit. Our children moreover have lost important constitutional protections concerning their right to be secure in their persons and effects at school, while many of us have been shorn of any meaningful protection against unjustified invasions of personal privacy and dignity at the workplace."

Prof. Benner postulates no remedy, however. For him, the past twenty years "confirms the wisdom of holding firm to the principle that the rights of even the most despised members of society must be protected. For while the erosion of Fourth Amendment protection began as an attack on the right of suspected criminals, it has steadily encroached upon the rights of businessmen, public schools children and now public employees. Can the rest of us be far behind." *Id.* pg. 876.

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Punishment in an Age of Scarcity

A Judicial Perspective

Citizens perceive judges as empowered to deal in such a manner with those who would dare to break our laws that they would not wish to transgress the law in the future, that others would be discouraged from committing similar wrongs, that the offender would be rehabilitated, that the victim would be compensated for the wrong done, and that those law-abiding citizens within our society would be protected.

Few citizens concerned with the problem of crime in American have escaped the almost continuous barrage of plausible rhetoric proposing the solution to this most serious social affliction. Unfortunately, those espousing solutions cannot agree on the correct or even preferable course to follow. The public is bombarded with numerous proposals; even professional associations, however, cannot agree on the suggestion with the greatest potential for success.

Citizens find themselves in an unenviable quandary: Something must be done to curb the rising crime rate - but what? We often feel compelled to select one of the offered solutions without understanding how it is supposed to work or what difficulties may arise from efforts to bring its promised rewards into being. Citizens do not have the time necessary to study the proposals in an effort to understand them; and even if they did have an abundance of time, what chance is there of comprehending the complicated, intertwined philosophies and practicalities of corrections? After all, the experts - those who have studied and worked within the area of corrections - cannot agree which route leads to the long-sought and elusive goal of crime reduction. Thus the public is forced to support a proposal without understanding it.

Most of us try to make logical decisions. We listen to reasons expressed by those advocating a certain position; however, we never seem to have enough time for more than a cursory examination of the proposition or an abbreviated debate of its merits and deficiencies. We quickly reject those suggestions that, we are told, have been tried and have failed. This failure may have been the result of improper implementation or inadequate funding, but we count it as failure nonetheless. Many times we unconsciously equate simplicity of plan with potential for success. Thus our choice, though logical to us, may well be based upon inadequate or erroneous information. Nevertheless, we frequently are convinced that we, the people, must find a solution to the problem of rising crime and that we, the people, must become vocal in support of our position.

That citizens are becoming vocal in support of positions they have adopted is not necessarily bad. In fact, this trend is encouraging in many respects. The problem with this cry from the public is that those whom it is directed toward may appear to respond in a positive manner, knowing that the response is in reality a meaningless sham. Those who answer directly to the public - most notably, elected officials - are often tempted to comply with the wishes of the people and occasionally to step to the forefront of the clamor even though they know that the proposed action is artificial in its results and often self-defeating. Unfortunately, such is often the case in the adoption of policies in the field of corrections.

The public generally focuses upon the judicial system when searching for a likely solution to the problem of crime. Citizens perceive judges as empowered to deal in such a manner with those who would dare to break our laws that they would not wish to transgress the law in the future, that others would be discouraged from committing similar wrongs, that the offender would be rehabilitated, that the victim would be compensated for the wrong done, and that those law-abiding citizens within our society would be protected. Those of us cloaked with that black robe of judicial potency long for the wisdom and ability to accomplish those goals. Yet we must admit to ourselves that our most earnest efforts have failed to achieve the seemingly simple objectives.

The people who elect us now place impossible demands upon us, but we must respond. Dare we answer that we cannot comply with their demands? Dare we say that the solution which our electorate has chosen will not work? Have we the time and the ability to explain the fallacies of a certain scheme? And, of paramount importance, do we have a better idea? The temptation to respond artificially to the public is great. Compliance with the demands of the public is the facile solution for a judge. Apparently, many of us have chosen this route.

This paper examines the system of corrections from a judicial perspective and takes a brief prospective glimpse of anticipated (perhaps "yearned for" would be a closer description) judicial activity. The judicial point of view has been neglected in the continuing dialogue concerning corrections. Judges are often called upon to solve the problem of rising crime and to implement certain policies and practices in corrections, but rarely are we consulted during the formulation of the proposed solutions, policies, and practices. Much of the responsibility for our absence from this dialogue and formulation process rests on the shoulders of the judiciary. We have elected to remain silent for too long. We must seek a forum, or we cannot complain when others are heard above our muffled assertions. This paper seeks to express the testimony of some members of the judiciary - we, like other segments of our society, are not unanimous in our opinions. And finally, this is my personal plea to other judges to become vocal leaders in the search for solutions to our problems in corrections, and to become catalysts for the implementation of needed programs.

PUBLIC OPINION

Most of us agree that there is no one simple cause for the rising crime rate. And yet, we as citizens are prone to accept and advocate 1 or 2 (at most a very few) simple solutions to this complex problem. Often the information we receive about the proposed solutions comes not from professionals within the field of corrections but from those seeking, or holding, political office.

Those of us who seek political office find it necessary to address popular issues. We all oppose crime and favor an effective system of corrections. We seem to be able to detect the main stream of public sentiment and, occasionally, to profit politically by adopting a consistent policy as our own. Perhaps, by advocating popular positions as our own, we increase that sentiment, causing it to grow stronger in the public's eye. After all, if those running for public office frequently advocate that which we already believe, then we must be right. The criminal justice system is not immune from the reinforcement of currently popular views.

The strength of public opinion, whether resting on logical foundation or erroneous assumptions, cannot be denied. Public opinion shapes public policy. We commonly agree that "[s]ome lay opinion may be based exclusively on guesswork or prejudice; some may be grounded in firmer soil; but all of it constitutes the opinion of the people, and in a democracy, the voice of the people must be listened to and respected as the *vox populi*." [1]

People have seen fads in corrections come and go and they have become engulfed in one current after another, only to become disappointed and to seek another solution. One solution, imprisonment, seems to fade only to reemerge as the popular favorite. Ronald Reagan, then governor of California, expressed the view of many, perhaps the majority, of citizens when he opined that "[t]here is talk these days that punishment is not a deterrent...and I believe that that talk is partly responsible for our increase in crime." [2]

Professor James Q. Wilson of Harvard University recently commended on the public's choice of imprisonment as one of the primary tools of the criminal justice system. Professor Wilson stated that

...in recent years our society has taken the view that the purpose of the criminal justice system is primarily to punish the guilty and protect society. Many states have passed tougher sentencing laws that require either more certain penalties, more severe ones, or both. As a result of these factors, prison populations have exploded. [3]

Dr. Alfred Blumstein of Carnegie-Mellon University points to the rising crime rate as partial cause of the public's insistence upon stiffer punishment. The increase in penitentiary confinement is related to the public call for punishment. Dr. Blumstein attributes a portion of the increase in the number of penal inmates to the recent growth in crime. Public outrage "has generated a harsh response in terms of new laws." [4]

J. Edgar Hoover, former director of the Federal Bureau of Investigation, was a popular spokesman for increased punishment. He often set the tone for public sentiment favoring confinement of law violators. He felt that the public was "losing patience with systems of parole and probation that are little more than conveyor belts from our prisons and court chambers back to [crime]." [5]

The increase in prison population is an indication that public officials are responding to the public sentiment for punishment by confinement. Milton Rector, director of the National Council on Crime and Delinquency, mentioned this fact in an evaluation of prison statistics. He said that the increase in the prison "population is a manifestation of the pressure on judges and parole boards to set policy based on..public opinion." [6]

Public opinion favoring incarceration does have an effect upon judges, especially those who must face the electorate periodically. If the public favors punishment as the principal tool of corrections, it will elect what are perceived as "tough" judges - judges who deny probation and incarcerate defendants. And yet, denying probation is sometimes the artificial response previously mentioned.

We judges, charged with the responsibility of sentencing, appear to be complying with the public outcry favoring increased confinement for more offenders when we deny probation. However, many of us realize that when we place one person into the penal system we, in effect, release another who is already there. Many of our penal institutions are filled to capacity.

Federal judges, in response to petitions filed by inmates within our prisons, are taking steps to limit the number of inmates who may be accepted by these penal institutions. These institutions, in obedience to federal court orders, are refusing to receive new inmates. In some cases the number of inmates within a facility must be reduced for prison administrators to comply with court orders. Some federal judges are considering (and in Alabama have granted) court-ordered early release of a specific number of inmates. Contempt citations have been levied against some state officials for failure to reduce prison populations.

When we evaluate the condition of our penal facilities, we must face the fact that only a few, if any, additional prisoners can be taken into penitentiaries. Prison space must be limited to those offenders who are deemed dangerous. When we put an offender in the front door, an offender walks out the back door. Do we accept the artificial solution and appear "tough," or do we seek reasonable alternatives to this dilemma?

OPTIONS

Sentencing judges are faced with a serious dilemma. Public opinion demands that we be "tough" and confine more offenders, but federal judges tell us that our penal facilities are overcrowded. When we place a new offender in the system, a previously incarcerated offender is released, or the newly sentenced offender remains in local jail facilities until released by state officials. Local facilities are not equipped or constructed to house long-term inmates. Security or medical problems arise, and distraught local officials plead for relief. The local saturation point is reached soon; there are no spaces for new prisoners. What now?

Penal confinement is 1 of the 2 primary sentencing options traditionally available to sentencing judges - with confinement, except in the most serious cases, being stripped from our sentencing mainstays. Probation, originally reserved for first-time, nonviolent offenders, once was hailed as the ultimate rehabilitative device. Offenders were left with their families and friends, and retained their jobs, homes, and ties. The probation officer was to supply needed supervision - the key to the success of the program. The suspended sentence was to deter future misconduct and ensure cooperation. However, as is often the case, fact diverged from theory.

Probation services are underfunded. In some areas, supervision is nonexistent or, at most, consists of the probationer filling out an activity report. Probation has become nothing more than a minor inconvenience to some offenders. Probation services that are underfunded, understaffed, and underequipped are viewed as next to useless to some judges. The potential for usefulness has been

shackled by reality.

The judge turns to the American Bar Association for help. The ABA has prepared a series of recommendations concerning the criminal justice system.[7] The introduction to these standards stresses de-emphasis of confinement and the use of alternate forms of sentencing. The ABA recommends maximum contact between the offender and society. The standards urge the readjustment of the offender to society and they also suggest that the sentencing court "should be provided in all cases with a wide range of alternatives, with gradations of supervisory, supportive, and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case."[8]

This is not the only reference to alternatives. The ABA urges that partial confinement be given preference over total confinement. The standards propose that the judge be provided "a range of sentencing alternatives that provide an intermediate sanction between supervised probation on the one hand and commitment to a total custody institution on the other hand and that permit the development of an individualized treatment program for each offender."[9]

The recommendations of the ABA sound great. With such alternatives available, the judge could tailor a program for each offender. But alas, when judges seek these alternatives, they find that the recommendations are just that - recommendations. In most jurisdictions these recommendations have not been, and probably will not be, implemented. There is a woeful lack of physical facilities, trained personnel, and adequate funding in the correctional system. Legislators have been criticized for contributing little to fairness and reasonableness in the field of corrections.[10]

Rehabilitation was once touted as the goal of modern corrections.[11] In the 1960s Judge Horace Gilmore expressed the opinion that "informed and intelligent criminal sentencing is one of the proven tools for the rehabilitation of the criminal offender."[12] Rehabilitation is indeed a noble goal, but many judges, who once espoused the rehabilitative value of penal institutions, have admitted to themselves and the public that rehabilitation rarely occurs within prison walls.

The overcrowding of our penal institutions has forced us all to abandon the pretext of incarcerating to rehabilitate. Our second mainstay of sentencing - probation - is viewed as little more than nothing. Professor Wilson expresses the growing view among judges when he states that "...the 1960s were a time when many judges still believed that criminals could be rehabilitated and that probation was a better solution than prison." He continues that we now know that "existing rehabilitative programs rarely work (though certain programs have benefited some individuals)."[13] Professor Wilson's words ring true to those of us who have been provided with no alternative to overcrowded prisons and underfunded probation services.

The American public continues to list the threat of crime as one of its major concerns, and this concern is mirrored by those who deal with criminals. In 1984 it was reported that police and prosecutors had "joined 1,447 top state and local criminal justice officials in naming prison and jail overcrowding as the most pressing problem facing the state criminal justice system across the nation."[14]

The overcrowding of our penal institutions and the underfunding of probation services create a dismal view of our criminal justice system. However, all is not bleak. Many judges are seeking and creating alternatives that will give some possibility of success. Some of us believe that we can find alternatives that will give some possibility of success. Some of us believe that we can find alternatives that will enable us to progress toward a solution to the problem of crime, sentencing, and prison overcrowding. Judge Inge Johnson, chairman of the Committee on Crisis in Jails of the National Conference of State Trial Judges, recently stated that "there is a crisis of overcrowding in America's jails and prisons, and state trial judges have a responsibility to exert leadership in solving it."[15]

The task of sentencing is never easy. The judge must consider a myriad of factors: the offender, the offender's background, any prior offenses, the victim, the severity of the crime, punishment, deterrence, protection of others, and public opinion. The sentence should be fashioned by all of these factors, for they all have a bearing upon the possible success of the total correctional effort. Judge Ivan Lee Holt, Jr., summed up the judge's predicament by stating:

The judges's choice must be intelligent and individualized: this means that he must take a multitude of factors into consideration. As the quote from Justice Henry Alfred McCardie succinctly puts it: "Trying a man is easy, as easy as falling off a log, compared with deciding what to do with him when he has been found guilty."[16]

Sentencing is becoming more difficult. The near saturation of our prisons has curtailed our options. Difficult economic conditions are limiting revenue and causing the already tight purse strings to be drawn tighter. The new federalism is increasing economic pressures upon state and local governments. Former sources of federal funds have disappeared; thus, funding for new prisons and for alternatives to incarceration will be slow in coming.

Therefore, it appears that any forthcoming alternatives to incarceration and to probation must be created on the local level. Some have already pointed to the local community as the proper situs for correctional efforts. For example, Robert Cushman, president of the American Justice Institute states:

Crime is ultimately a community problem. That's where crime is generated, and that's where it will have to be dealt with. Ninety-nine percent of the people who are sent away are going to come back. It's to the community's advantage to see to it that something positive comes out of the experience.[17]

Local control, characterized by some as the "bright hope" of American corrections, appears to be the immediate avenue for needed alternatives.[18] These alternatives will not come without work. However, any gain in alternatives will be an improvement of the present situation.

JUDICIAL IMPLEMENTATION

Judges do not generally initiate reform. In the criminal justice system, we are expected to use the correctional programs available to us. If we do the best we can with what the government provides, the public is satisfied. We are not to blame for inadequate penal facilities or underfunded probation services. The blame rests squarely with those who appropriate public funds. And so, we may devote our time to clearing dockets and doing justice; after all, that is what we are paid to do, and that is what we are expected to do.

We too are citizens crying for a solution to the problem of rising crime. Crime affects us just as it does those around us. We see the failures of our programs of corrections, and we complain just as our neighbors do. But we must admit that we have an ability which other citizens lack; we have the power to implement change.

Judges, as a result of the power to sentence offenders, possess the ability to develop alternatives to the failure of incarceration and probation. We must realize that the simple sentence pronounce-

ment does not guarantee the success of our alternatives. In fact, if this is the extent of our involvement, we probably guarantee failure. We must seek and nurture citizen acceptance of, support for, and participation in the alternative. It is fruitless to plant a tree and then allow it to wither away because of inattention.

To be successful, an alternative to incarceration and probation needs public acceptance. I recently began conducting a series of surveys in an effort to identify factors which the public deems important in an alternative program. Preliminary results indicate the deterrence is viewed as a necessary ingredient in any such program. Increased supervision ranks high in public appeal. Thus far, the public has accepted well a program of community service by offenders. The chief selling point of this program appears to be the fact that it supplies mandatory service to the community, viewed by the public as punishment, from offenders who are placed on probation. Punishment, but not necessarily incarceration, is perceived by the public as an essential element in deterrence.

I am finding that the public will readily accept alternatives to penal confinement if those alternatives contain some sort of punishment perceived as providing a deterrent effect. Also, the public is willing to support local rehabilitative programs such as work release. If we inform the public of the failures of the overcrowded penal institutions and underfunded probation systems, citizens will accept alternatives. In fact, they will help to implement those alternatives. [19]

As judges, we have the ability to disseminate information about the correctional system - information that will prepare the public for alternatives to penal confinement and probation. In view of the many problems facing our correctional systems, including the rising crime rate, can we afford to continue the charade of complying with the public demand for "tougher" sentences when we know perfectly well that our compliance is artificial and without true effect?

If we wish to make sentences "tougher," we can do so by adding alternatives to supplement probation, thereby increasing the obligations of the offender. We can use alternatives to help save penal facilities for multiple or violent offenders. By encouraging public involvement, we are able to increase the supervision of offenders. There is so much to gain and nothing to lose.

CONCLUSION

Judges have listened silently to complaints about our system of corrections for far too long. We have considered proposals from others, but we have failed to speak. We have been content to function within a system that promises much but produces little.

Others have tried frequently to initiate changes with this system. All too often their seeds have fallen on rocky ground. And yet we, who are in a position to see the failures of the system from within and who possess unique powers to implement alternatives, wait for others to succeed. As judges, we must use our resources to initiate a system of corrections that has the community as its setting and local citizens as its supporters.

The implementation of such a system does not have to lie in the distant future. It can be ours if we will engage in its growth. We, as judges, have waited too long for others to provide the needed changes. Others have failed and will continue to fail without our active involvement. The choice is ours. [20]

LESLIE G. JOHNSON

Leslie G. Johnson has served as a judge of the 11th Judicial Circuit of Alabama since 1977. Before becoming a circuit court judge, he served 6 years as deputy district attorney for that circuit. He is a member of the American Judges Association and is currently serving as chairman of the National Conference of State Trial Judges' committee on jail and prison overcrowding.

FOOTNOTES

[1] *David Dressler, ed., Readings in Criminology and Penology, 3d ed. (New York & London: Columbia University Press, 1972), p. viii.*

[2] *Id. at 712.*

[3] *Florence Times-Tri-Cities Daily, "Family Weekly," 15 November 1981.*

[4] *Kevin Krajick, "The Boom Resumes," Corrections Magazine, April 1981, p. 17.*

[5] *Supra note 1, at 32.*

[6] *Supra note 4, at 17.*

[7] *American Bar Association, Standards Relating to the Administration of Criminal Justice (New York: American Bar Association, 1974), p. 337.*

[8] *Id. at 351.*

[9] *Id. at 353.*

[10] *Sol Rubin, "Developments in Correctional Law," 17 Crime and Delinquency 2 (April 1971), p. 213.*

[11] *Ramsey Clark, Crime in America (New York: Simon and Schuster, 1970), p. 220.*

[12] *Horace W. Gilmore, "Responsibility in Sentencing," 5 Trial Judges' Journal 1 (January 1966), p. 1.*

[13] *Supra note 3.*

[14] *U.S. Department of Justice, 5 Justice Assistance News 2 (1984), p. 3.*

[15] *Inge Johnson, "Judges Should Work to Solve Jail Crises," 2 Trial Judges News 4 (1983), p. 3.*

[16] *Ivan Lee Holt, Jr., "The Judge's Attitude and Manner at Sentencing," 6 Trial Judges' Journal 3 (July 1967), p. 11.*

[17] *John Blackmore, "Can the Communities Succeed Where the States Have Faltered?," Corrections Magazine, April 1981, p. 22.*

[18] *Id. at 21.*

[19] *The Optimist Club has responded to my request for assistance by adopting as a club project a juvenile diversion program. This is a 3-stage program in which the participants perform community service, such as cleaning park facilities and removing trash from roadsides. The second phase consisted of a class type self-evaluation program in which the participants are encouraged to follow alternate life styles. The third stage is a "big brother" program with interested citizens providing one-on-one relationships for the participants. Members of the Retired Senior Volunteer Program are assisting with the Optimist Juvenile Diversion project and with a drug awareness program. The Jaycees are providing manpower for supervision and counseling in the Juvenile Diversion Program. In addition, the Jaycees are spear-heading a drive to coordinate the crime prevention and diversion activities of all local civic clubs.*

[20] *Leslie G. Johnson, "Frustration: The Mold of Judicial Philosophy," Criminal Justice Ethics (April, 1982).*

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U.S. Penchant for Prison

The U.S. incarceration rate is not a reflection of the American crime rate, says Norwegian philosopher and criminologist Nils Christie. It is a reflection of America.

"I don't think you Americans realize how far out the United States exists" compared with other countries, said Christie, a professor at the University of Oslo, "how extreme is your need to incarcerate."

The United States, Christie said, has one of the highest rates of incarceration in the world: For every 100,000 citizens, 407 are in prison or jail. The rate was 230 a decade ago.By comparison, the British rate is 100, the French rate is 92, and the Norwegian rate is 47.

The United States outpaces even the Soviet Union, Christie said. He estimated the Soviet incarceration rate at 350 to 400 for each 100,000 people - down from 669 for each 100,000 a decade ago.

A LAST RESORT

Christie, a researcher and author who visited Washington and Canada for conferences in June, said Western European nations tend to see hard time as a last resort in dealing with crime, whereas Americans see long prison sentences as normal.

In Scandinavia, the most heinous killing would be punished with - at most - a 21-year prison sentence, Christie said. "And even then," he said, "the chance is that the person would be freed after 11 years.""We think 21 years is really immense," Christie said. "I can't remember anybody serving that much time."

Nearly every industrialized nation has banned capital punishment, Christie noted - but not the United States. Neither has South Africa nor the Soviet Union.

"For me, as a foreigner, one factor is very clear: that you believe your situation is inevitable," he said, "that you believe your level of pain delivery is a reflection of crime."

REFLECTION OF CHARACTER

Whereas most people see imprisonment as a reaction to crime, Christie views it as a reflection of national character. Some countries express themselves through their national theater or national arts museum, Christie said. What does it say about a country that overloads hundreds of prisons and jails?

"It is very troubling," he said, "that you don't find more humane ways of coping with criminals than warehousing them, storing them away without any hope."

Christie said it was "obviously an error" to link incarceration rates with the level of crime in a society. In the Netherlands, where industrialization and class and ethnic strife produce sizable crime rates, the incarceration rate is 36 prisoners for every 100,000 people, he said.

To look at it another way, the U.S. crime rate increased only 1.8% between 1979 and 1988, according to FBI statistics, although the nation's prison population doubled during the decade.

DISTURBING PORTRAIT

Christie said Europeans are disturbed by the portrait of America presented by the prison landscape, and particularly by its racial tones. About 50% of inmates in U.S. prisons are black, though blacks make up about 12% of the overall population.

INCARCERATION RATES PER 100,000 CITIZENS

COUNTRY	RATE
United States	407
Soviet Union	350 - 400
Britian	100
France	92
Norway	47
Netherlands	36

The war on drugs is fueling much of the increase in U.S. prison populations,

Christie said. So is a trend toward longer sentences and mandatory sentences for major crimes.

In Europe, judges have maintained more independence from legislatures and have retained more flexibility in dealing with lawbreakers, Christie said. "They don't give the maximum each time."

The United States stands nearly alone among Western nations in regarding prisons as a large-scale necessity, seemingly to answer wide societal problems, Christie said. Federal, state and local governments will spend about $20 billion this year to operate the nation's hundreds of jails and prisons.

MORE HUMANE SOLUTION

It would be more humane - more in tune with Western Europe - to spend some portion of that money to improve the social conditions that breed the U.S. crime problem, Christie said. "You want to make people less desperate," he said. "It's as simple as that."

"When I'm asked, 'What's the best alternative to prison?' I say, 'The best alternative is no prison.'" Christie, author of a work examining the underlying philosophy of punishment, *The Limits of Pain*, was a featured speaker at a Washington conference sponsored by the National Center on Institutions and Alternatives. Christie and others at the conference said the idea of rehabilitation had been almost buried in the United States over the past 15 years by an ideology of "just desserts" - that prisoners deserve all the punishment they get and that punishment is all they should get.

NAZI-LIKE MENTALITY

"I'm so fond of the United States because of all the friendliness," Christie said. "But at the same time there is a shadow over the whole country. When I look at the level of incarceration, and how selective the country is regarding who is incarcerated, I feel the shadow of the Weimar Republic." Christie, who has studied the Nazis, chose the Weimar analogy with care. Under that German government, which laid the seeds for the Nazis' rise, "there was a lot of criticism that people weren't being tough enough against the criminals."

"And then it happened," he said. "The Nazis came in with their solution. The final solution. Their final solution against groups they didn't like. And the attack on criminals was very central."

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Murder in the U.S.A.

Recent studies have again brought Americans face to face with the least attractive aspect of their society - its violence.

A Senate Judiciary Committee report warned that homicides could reach a new high of 23,220 this year. Earlier, researchers from the National Center for Health Statistics released a study showing that the murder rate among young men in the U.S. is almost 22 per 100,000. That contrasts to 0.5 per 100,000 in Japan, 1.2 in England, and 1 in West Germany. Guns figure in 3/4s of U.S. homicides, noted the NCHS study.

Immediate response to such figures are predictable: alarms from politicians, with calls for even tougher law enforcement. That's fine, as far as it goes. The 1990 Omnibus Crime Bill, heading toward final passage by Congress this fall, puts restraints on the sale and manufacture of automatic weapons, beefs up federal law-enforcement capability, and strengthens sentences.

But if the nation is serious about reversing its scandalous murder rate, a lot more is needed. Gun control is going to have to go beyond easily evaded regulation of a few classes of assault weapons. Handgun control - stringent waiting periods and registration requirements - continues to be essential. The war against drugs will have to be fought more strenuously along such fronts as treatment and education, to keep more young people from being claimed by the drugs-and-violence culture.

Scholars point out that demographic surges contribute to rises in violent crime. Right now, it's the eldest offspring of baby-boom children reaching their teens. But that can't account for - and it certainly can't excuse - the singularly violent climate in the U.S. Neither can the country's relative social heterogeneity.

Policy decisions are crucial to building a more peaceful society. And so are decisions of individuals. We all choose, daily, between hatred and compassion, anger and reason. No one is irrelevant in the fight against violence.

DPA

Employees	
White	161
Black	6
Attorneys:	
White	68
Black	2

RACISM

The Advocate has been focusing on racism in the criminal justice system in a continuing series of articles, interviews and tables.

This series has been compiled in a 43 page booklet and is available from The Department of Public Advocacy for $3.50 the cost of xeroxing and mailing. Make your check out to Kentucky State Treasurer and mail to:
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Two's a Crowd

Prison overcrowding unconstitutional

"Reprinted with permission from the October 1990 issue of the ABA Journal, the Lawyer's Magazine, published by the American Bar Association."

With the crime rate rising and public frustration with the cumbrous criminal-justice system at high tide, you would expect that prison inmates' complaints about the poor quality of their food and lodging would be paid much attention. But 2 federal court of appeals recently have ruled that prisoners have a right to better quarters and fare than some of them are currently getting.

The U.S. Court of Appeals for the 3rd Circuit has held that overcrowding at Pennsylvania's State Correctional Institution at Pittsburgh is so severe that it violates the Eighth Amendment. And the U.S. Court of Appeals for the 7th Circuit - not exactly a collection of bleeding-heart liberals in these post-Reagan days - has revived the complaint of an inmate who objects to being served pork in violation of his religious faith.

The central problem at the Pittsburgh prison is "double-celling" - the housing of 2 inmates in cells designed for only 1. The result is a space crunch that makes it impossible for the cellmates to stand in the cell together; one must lie on his bed. In this space-capsule environment the inmates spend from 16 to 22 hours of every day.

Being out of the cells isn't much better. The district court found that "the auditorium and gymnasium are virtual dens for violence. Assaults, stabbings, rapes, and gang fights occur in the auditorium." In addition, outdoor recreational space is limited and undersupervised.

Adding to these woes, the prison is dirty, without air conditioning, poorly ventilated, overrun with mice, lice and bedbugs, home to flocks of birds that fly in the broken windows, and in need of roof and plumbing repairs and better fire safety.

The district court concluded that these conditions were so appalling that they amounted to cruel and unusual punishment in violation of the Eighth Amendment, and by means of a detailed remedial order, told the state to clean up the mess. The state appealed the district court's finding that "double-celling" was unconstitutional, but the 3rd Circuit, in an opinion by Judge Dolores K. Sloviter, affirmed.

tional where "general prison conditions were otherwise adequate." In this case, she said, the totality of the circumstances suggested "a decaying physical plant with inadequate staff and security."

The court agreed with the district court that the prison was "unconstitutionally overcrowded, that lighting, safety, ventilation, plumbing, showers and fire safety provisions fell below constitutional norms, that violence and insecurity were pervasive, and that medical and mental health care were constitutionally deficient."

These dreadful conditions, Sloviter continued, were more than enough to justify the district court's remedial order. She noted that the U.S. Supreme Court "has not hesitated to affirm remedial orders correcting constitutional deficiencies in conditions of confinement."

Al-Amin Hunafa is a devout Muslim confined in a Wisconsin state prison. His religious faith forbids him to eat pork - which is nonetheless served by the prison. In an effort to accommodate those who find pork objectionable, the prison kitchen serves meals on divided trays in which pork-free items are also included.

The trouble was that, despite the divided trays, pork was sometimes slopped over onto the soup and bread, and Hunafa refused to eat anything at all when pork was served. His Section 1983 suit claimed that the serving of pork violated his right to free exercise of religion. The district court granted summary judgment to the state, but the 7th Circuit, in an opinion by Judge Richard Posner, reversed and remanded for further proceedings.

The state contended that it was too much trouble to ask the kitchen to prepare pork-free trays, that granting Hunafa's request would send waves of anti-Muslim feeling through the prison, and that Muslim kitchen workers, who are also prisoners, would know which trays were going to other Muslim prisoners and would try to smuggle contraband to them.

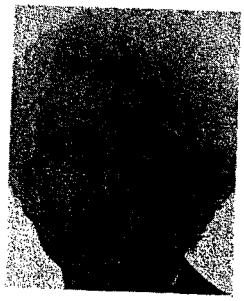
Posner dismissed these arguments as "trivial," "implausible" and "speculative."

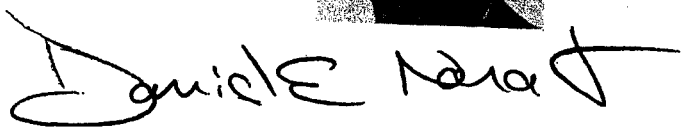
"[T]he benefit of the practice to the prison must be weighed against the cost to the inmate of having to give up several meals a week in order to avoid defilement," he said. "On this record, which consists essentially of a brief affidavit filed by the prison's food administrator that summarizes the prison's concerns but makes no attempt to estimate their magnitude in relation to the plaintiff's religious claims, the balance is too close for summary judgement to be proper."

(*Tillery v. Owens*, No. 89-3689, June 29, 1990; *Hunafa v. Murphy*, No. 88-3180, July 10, 1990.)

ALTERNATE SENTENCING

Restorative Justice at Work





SECTION 7, KENTUCKY CONSTITUTION

The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.

This regular *Advocate* column features information about sentencing alternatives to prison.

An August, 1990 *Advocate* article on Alternate Sentencing "walked" us through the process of how to gain insight into a defendant by networking information from the client, the community, the family, and education and human services providers. That same article's "closing comments were "...that an Alternative Sentencing Plan should be creative and tailored to the specific needs of the individual....," that "[t]he purpose of alternate sentencing is to provide viable sentencing options to the court...."

The October, 1990 *Advocate* article on alternate sentencing talked about responsibility based alternative sentencing. Also, how the criminal justice system, public officials, and the public must be informed about the fact that realistic sentencing alternatives can succeed in holding defendants accountable.

The focus of this article is to answer the question. How can judges, defense attorneys, and prosecutors accurately evaluate an Alternative Sentencing Plan (hereinafter ASP) in individual cases?

The accompanying document entitled "ALTERNATE SENTENCE OR PRISON" is designed to aid the court in evaluating the viability of a specific ASP for a"specific client." The document enables the court to weigh how effectively an alternate sentence for a particular client meets the sentencing goals of Retribution, Deterrence, Rehabilitation, and Incapacitation.

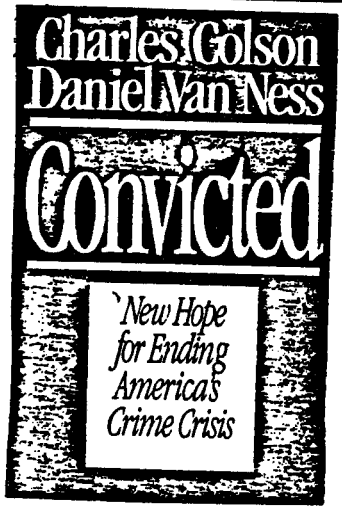
By visualizing a sentence as a process where the court weighs what each sentencing option, prison or an alternate sentence, can provide in meeting the goals of sentencing the court is then able to enter a more client appropriate sentence. After the balance has tipped to either prison or an alternate sentence, the court then steps back and asks itself, what sentence would be appropriate for this defendant? and why?

If the scale falls on the side of prison orif the court is not satisfied that prison is the best option, the court can again look over its decision. The court can then reflect on what it would take to sentence the defendant to an ASP by reviewing the sentencing goals of Retribution, Deterrence, Rehabilitation, and Incapacitation.

If in the court's view the goals of sentencing can be reached through means other than prison the court should request defense counsel to address this concern and return with a realistic option.

Due to the lack of success that prison has had in reducing crime and making citizens feel safe, the criminal justice system must take the extra step to break our addiction to incarceration. The criminal justice system must demand of itself that it address sentencing goals in a responsible and realistic way so as to tip the scales in favor of an alternate sentence. Use of the accompanying document is a start in the process of holding defendants accountable by entering realistic and responsible sentences.

DAVE NORAT
Director
Defense Services
Frankfort, KY 40601



Ed. Note: See page 62 this issue for a review of the book, *Convicted: New Hope for Ending America's Crime Crisis.*

Date ____/____/____

ALTERNATE SENTENCE OR PRISON

1. Name of Defendant: _____

2. Charge(s):

_____

_____

3. How effectively does an alternate sentence for this defendant meet the 4 goals of sentencing compared to a prison sentence?:

	Alternate Sentence	Prison
a. **RETRIBUTION:** *punishment specific to this defendant*		
b. **DETERRENCE** *specific to this defendant*		
c. **REHABILITATION:** *does it deal with the causes of crime*		
d. **INCAPACITATION** *keep defendant from doing more harm*		

4. In terms of meeting the 4 sentencing goals

a) What does sentencing this defendant to prison provide that the alternate sentence does not provide?

1. Retribution
2. Deterrence
3. Rehabilitation
4. Incapacitation

b) What does sentencing this defendant to an alternate sentence provide that prison does not provide?

1. Retribution
2. Deterrence
3. Rehabilitation
4. Incapacitation

5. What sentence would be appropriate for this defendant?

6. Why is the above sentence inappropriate?

7. What would it take for me to sentence the defendant to an alternate sentence in terms of the 4 sentencing goals?

1. Retribution
2. Deterrence
3. Rehabilitation
4. Incapacitation

Legal Rights of Deaf Defendants

This is the first installment of a series of articles on deaf defendants.

UPON ARREST AND PRIOR TO COURT PROCEEDINGS.

The deaf man stares at the flashing blue light of the police cruiser, then back to the face of the police officer, who has begun to speak. He longs to ask the policeman why he is being arrested, but his hands--his primary means of "talking"--are bound in handcuffs. He watches the policeman's lip movements intently, straining to catch the words, but to no avail. The policeman stops speaking and looks at him, as if expecting an answer. The deaf man doesn't know the "right" answer, so he decides to nod and smile, in hopes that the policeman will see that he is friendly and remove the handcuffs. Seeing the nod, the policeman signs with relief--apparently the prisoner *does* understand his rights under the *Miranda* Warning, after all. The officer escorts his prisoner to the cruiser, and the cruiser door opens to receive him...

Scenes like the one just described are, thankfully, less common now than in the past--however they still occur far too frequently. It is crucial for public defenders, judges and others in the criminal justice system to know the rights of deaf clients under the law--and to know how to help them secure these rights. "Routine" procedures such as reading or reciting legal rights upon arrest simply will not work for--and will be grossly unfair to--a large number of deaf individuals. Providing a written copy of the *Miranda* Warning to a deaf person is likewise insufficient in many cases, because many deaf persons experience difficulty in understanding written English as well as spoken English. Certain special measures must be taken to grant the deaf individual his full rights under the law.

USE OF PREFERRED LANGUAGE

A deaf defendant has the legal right to "hear" the *Miranda* Warning, and the charges against him, clearly and fully in the language which he best understands. For many deaf persons--those who consider themselves members of the "cultural Deaf community"--that language is American Sign Language (ASL). ASL, as those familiar with it know, is a visual-gestural language--not an auditory-oral language as spoken English is. For deaf defendants who identify more with the "hearing world," the preferred language may be English which is presented by spoken words combined with signs presented in English word order (this combined method is often referred to as "simultaneous communication," since signs and mouth movements are made simultaneously). For yet other deaf persons--those who prefer to use lipreading

and their available hearing in order to communicate--an oral interpreter may be the answer. (Oral interpreters do not use signs, but do use natural gestures coupled with mouth movements.)

Depending on many factors, such as the language skill of a deaf individual in ASL and/or English, the time required to give a deaf prisoner/detainee his rights in a manner he can understand can vary greatly from individual to individual. Spending sufficient time to do this is of critical importance, however, for the protection of everyone involved in the legal process.

Some deaf persons have minimal language skills (MLS). They do not have a formal "language." These persons often have been isolated from other deaf persons and have developed a type of "homemade" sign system to communicate. These home signs are often only understood by family members. This does not mean that professional interpreters would not be able to establish communication with a person like this. In fact, the best way may be to get 2 professional interpreters; one who is deaf and one who is hearing. The deaf interpreter, one who holds Reverse Skills Certification (RSC) from RID, and the certified hearing interpreter, can make an effective team. The RSC, with the assistance of a family member, interprets the home signs into conventional sign language. The hearing interpreter tjen interprets that into English and vice versa. Those who have minimal language skills will more than likely require more time to communicate with.

After the rights of the prisoner/detainee have been presented to him, it is a good idea to check to make sure that he understands those rights. A form has been designed which may be helpful in doing this. Some of the questions which this form suggests be asked to the deaf prisoner to evaluate his understanding are:

"Do you have to answer even one of my questions, or say anything to me?"

"Do you realize that if I am called into court to testify about what both you and I said in here today, I will be placed under oath to tell the complete truth?"

"I will tell the complete truth, regardless if it helps or hurts the prosecutor or helps or hurts your side--do you realize that?"

Copies of this form can be obtained from Dana Parker, telephone 1-800-372-2907 or (502) 564-2604 (voice or"TDD).

The cost of interpreting services used in presenting a deaf prisoner/detainee with his rights are paid by the police department which makes the arrest.

OBTAINING AN INTERPRETER

The KY Commission on the Deaf and Hearing Impaired (KCDHI) publishes an interpreter directory which includes the names, addresses, and phone numbers of interpreters who are nationally certified or state screened. The directory includes a suggested fee schedule and a description of the various levels of certification and state screening. If a jail or police department does not have an interpreter directory, its staff can call KCDHI to get an interpreter referral immediately and to request a copy of the interpreter directory. KCDHI will assist by giving names and phone numbers of interpreters in the vicinity of the jail/police department. If there are no interpreters in that immediate vicinity, the nearest qualified interpreter should be secured. In other words, just because there is not a qualified interpreter in Goshen, KY, doesn't mean the jail/police department is relieved of the obligation to provide one.

USE OF A QUALIFIED INTERPRETER

Kentucky law clearly grants deaf defendants the right to be served by an interpreter "qualified by training or experience" (see KRS 30A.405). In *criminal* court cases, the law requires that a qualified interpreter be provided for a deaf defendant or witness and be paid for out of the state treasury. In order for a deaf defendant to receive fair representation, an interpreter should be provided for attorney/client consultations. In *civil* cases, the deaf defendant or witness has the right to ask the court for an interpreter, but the court has the option to decide who will pay for the interpreter--the state, the deaf person himself, or the losing party in the case.

Much confusion exists about the meaning of the term "qualified interpreter," and on whether the terms "qualified interpreter" and "certified interpreter" are synonymous. Kentucky law states that an interpreter provided by the court must be "qualified"; the law does *not* specifically state that the interpreter be *certified* as well. However, it should be noted that certification of an interpreter by the national Registry of Interpreters for the Deaf (RID) indicates that particular interpreter has passed both knowledge *and* skills evaluations designed to assess whether the examinee possesses certain minimal interpreting competencies established by the RID. If an interpreter is certified, then, there is a good chance that the interpreter will also be "qualified" (capable of understanding, and being understood by, the deaf consumer).

A "qualified" interpreter is defined by Section 504 of the Rehabilitation Act of 1973 as one which can understand--and be understood by--the deaf consumer. For 2 major reasons, however, not all certified interpreters are equally qualified to understand a specific deaf individual. The first reason is that the RID awards different types of certification for different types of interpreting skills. For example, an interpreter may hold certification in the English-based sign systems, but may have difficulty understanding a deaf person who communicates in American Sign Language. The grammar and syntax of ASL are quite different from that of the English grammar employed in the English sign systems; for this reason, the interpreter who communicates with an ASL signer should be certified as competent in ASL (or, of course, as competent in both ASL and English-based systems.

A second reason for the difference in skills between 2 "certified" interpreters lies in the nature of the RID evaluation an interpreter must pass to become certified. The RID evaluation is designed to determine if an interpreter possesses certain *minimally acceptable standards* of skills and knowledge relating to the interpreting task. Two interprevers may thus both be certified as "minimally" competent in the area of ASL skills; however, the actual skills and experience of one of the interpreters may be clearly superior to the skills and experience of the other.

How can you determine if a particular interpreter is both certified and qualified, especially if you are relatively new in dealing with deaf persons? A certified interpreter should have a card showing that she is certified by the RID. (Note: A regular business card is not proof of RID certification--the card should clearly indicate that the interpreter is certified). To further check an interpreter's certification, call the Kentucky Commission on the Deaf and Hearing Impaired (KCDHI) in Frankfort at 1-800-372-2907 or (502) 564-2604. KCDHI maintains an up-to-date list of all known certified interpreters within the state, including both sign language and oral interpreters. The next article in this series will discuss specific names and meanings of various types of RID certification.

Determining if an interpreter is *qualified* may be somewhat more difficult, especially if you are unsure if a deaf person's "sign language" is ASL or an English-based sign system. The determination that an interpreter is "qualified" is one in which all participants can and should play a role. The deaf prisoner/detainee has the most at stake in a legal interpreting situation; for this reason KY law insures that an interpreter can be dismissed by the Court if the deaf person has difficulty in understanding -- or being understood by -- the interpreter. However, the conscientious judge or attorney should not hesitate to make his own assessment of the "ease of communication" between the deaf person and the interpreter. The deaf person may be unaware of the fact that he has the right to protest the use of a specific interpreter, or he may be too frightened to do so. If communication between the 2 appears strained, the attorney or judge should suggest that a second interpreter be called in. The ethical interpreter will also be another resource in helping insure that a deaf individual has a "qualified" interpreter. RID-certified interpreters have pledged to uphold the RID Code of Ethics, a creed which outlines standards for interpreters' professional and ethical conduct. One primary tenet of the Code of Ethics is that an interpreter will refuse to accept an interpreting assignment which she feels she cannot competently perform. If an interpreter feels she cannot adequately communicate with a deaf individual, she should respect the Code of Ethics and her profession enough to say so, and refuse the assignment! If our judgment, thankfully, many certified interpreters do just that, and request that another interpreter be obtained.

USING "SIGNERS" AS "INTERPRETERS"

Suppose a jailer who knows fingerspelling or took a sign language class "interprets" the advice of rights for a deaf prisoner? This is similar to a jailer in Spain who took one English class in high school, "interpreting" the advice of rights to an English-speaking person. Think for a moment that the English-speaking person was your daughter. Would you trust the Spanish jailer's interpretation to be accurate and reliable? Certainly not! Merely knowing a language does not necessarily qualify one as an "interpreter" of that language. These are very different skills. One does not necessarily result in the other. Some jails or police departments use signers in lieu of qualified interpreters because they make the false assumption that it is less expensive. When a deaf prisoner is acquitted of a crime he is accused of because a signer was used instead of a qualified interpreter, a great deal of money (and time) is wasted...far more than the cost of a qualified interpreter.

RIGHT TO ONE CALL

If the jail/police department receives federal money, it should have a telecommunications device for the deaf (TDD).

If so, the deaf prisoner/detainee must be given the opportunity to use the TDD when making his phone call if he so desires. If the jail/police department is remiss in the obligation to have a TDD, an interpreter must be provided for the deaf person to make his call. This, of course, should take place as soon as possible after the individual is arrested or detained.

DIFFERENT, NOT INFERIOR

American Sign Language (ASL) has been shown, through the work of Bill Stokoe and other modern linguists, to be a unique language in its own right with its own complete and well-defined grammar and syntax--not the "inferior form of English" or the "pantomime only" that it was once mistakenly believed to be. The "discovery" of ASL grammar and syntax, as well as the admirable conciseness and powerful expressiveness of ASL and the culture and art forms of ASL users--have led many of the nation's leading universities to offer ASL courses for foreign language credit--including Harvard, MIT, New York University, Brown, Georgetown, UCLA, Boston College, and the University of Southern California (USC).

The false view of deaf people and their language as inferior took root in our country during the 1880s, at a time which, for many reasons, allowed the idea to flourish. For example, at that time many immigrants were entering the United States from southern and eastern Europe, causing a backlash of xenophobia among "established" Americans. The "fear of strangers" that many Americans held toward these immigrants soon generalized into disdain for anyone who was different in any noticeable way. Ironically, the same kinds of paper-and-pencil intelligence tests which caused many arriving immigrants to be detained or deported from Ellis Island are still used at times to unfairly brand deaf people as "mentally retarded," "stupid," or "dull-witted." This negative view of the deaf has no doubt been compounded by the traditional use of the word *dumb* in the phrase "deaf and dumb" (the word was originally intended to indicate persons who preferred sign over speech). Even among those who understand what "deaf and dumb" was intended to mean, we find individuals who equate intelligence with prolific, intelligible *speech*.

The poor reading and writing skills of many deaf individuals make it additionally difficult for them to "prove" their intelligence. (Ironically, the poor literacy skills are related not to lack of intelligence but to early language deprivation.) Although research indicates that the reading levels of deaf high school graduates may be improving, it is still generally recognized that literacy skills of deaf students lag far behind those of their hearing peers. Moreover, while children who acquire American Sign Language (ASL) from their parents during infancy often tend to academically outshine children who enter school with *no* language, the number of children with this "ASL advantage" is relatively few. This is because only about 10% of deaf children have deaf parents. The other 90% have hearing parents who must spend much time *learning*--through sign language or other means--how to communicate with their deaf child.

As can be expected, difficulties with the structure and vocabulary of English pose problems for any deaf prisoner/detainees. If a police officer or public defender instructs or questions the deaf person in writing, the deaf individual may understand little or none of the message. The message may contain unfamiliar words, or other structures such as passive voice sentences or English idioms, which can hinder understanding. Calling in a poorly skilled "interpreter" who does nothing more than fingerspell unfamiliar words to the deaf defendant will do nothing to enlighten him on the *meaning* of what is said. A deaf individual who does not understand the word "evidence" will be aided little by an interpreter who spells out the word using the manual alphabet.

Let us look at some hypothetical but realistic examples to illustrate the importance of providing the deaf person with an interpreter who can communicate with him in the language he best understands. For example, suppose Jimmy, a deaf man, is arrested on charges of fraud. Jimmy claims he is innocent but was instead duped by someone else (the "real" criminal) into being an innocent pawn in the con game. Jimmy's lawyer is questioning Jimmy, with the help of an interpreter, to find out more about his role in the scam. Jimmy is a competent user of ASL but has trouble understanding certain English words. The interpreter in this case, however, although she is certified and capable in English signing systems, knows little about ASL.

Lawyer (to Jimmy, through the interpreter): You say you were gullible...

Interpreter (signs): You say you were g-u-l-l-i-b-l-e (fingerspells words using manual alphabet)...

Jimmy (confused by the strange word): (Shakes head, shrugs shoulders, looks helplessly at the attorney).

Now let's look at the same question as it might be handled by an interpreter well-versed in ASL:

Lawyer (to Jimmy, through the interpreter): You say you were gullible....

Interpreter (signs): Swallow fish, you? ("Swallow fish" is a common ASL idiom which members of the deaf community often use to indicate gullibility.)

Jimmy (nodding heard vigorously and looking greatly relieved, signs): Yes, yes, myself innocent!

In this case, the ASL interpreter knows how to use a familiar ASL idiom to convey the message in a way Jimmy fully understands. (Note: Although ASL does have a few idioms, e.g., "train gone" in ASL is equivalent to the English idiom "missed the boat"--English has far more, many of which are confusing or unfamiliar to ASL users.)

Let's take one more example to show how Jimmy's difficulties with the English language might cause him problems. In this case, the problem is with passive voice structures, which are used extensively in English but not at all in ASL. (Research shows that ASL users often ignore the prepositional phrase in a passive voice sentence, interpreting a sentence such as "The cat was chased by the dog" as "The cat chased the dog."):

Lawyer (to Jimmy, through interpreter): You say you were tricked by this man...

Interpreter (signing in English word order): You say you were tricked b-y (fingerspelled) this man...

Jimmy (ignoring the preposition *by* and interpreting the sentence as "You say, you trick man..): No, myself not lie, man lie.

Now let's "replay" the scene with a competent ASL interpreter:

Lawyer (to Jimmy): You say you were tricked by this man...

Interpreter (knowing that the passive verb forms are NOT used in ASL): "You say, man trick you?"

Jimmy (relieved): Right, right, you. Man trick me!

In both examples above, the ASL interpreter's knowledge of the grammar and syntax of ASL elicited correct answers from Jimmy, without costing Jimmy frustration, confusion, and lack of trust by his attorney. These examples show why it is crucial for an interpreter to be able to use the sign language or sign system preferred by the deaf consumer,

and to be familiar with the grammar structure of the preferred language. (Note: It cannot be safely assumed that a deaf person, simply because he is deaf, prefers ASL. Some deaf persons prefer to communicate orally, or by simultaneous communication. A deaf person proficient in English-based signing would probably not be confused by the passive voice verb form as Jimmy was. Jimmy's confusion resulted not for his lack of intelligence, but simply from the fact that his primary language does not have a passive verb form among its grammatical structures.)

HOW TO USE AN INTERPRETER

Once an interpreter has been contracted with (and both parties agree on the terms prior to the assignment), the interpreting assignment begins. In the interpreting situation, the hearing person (the police officer, the jailer, *etc.*) is expected to speak to and face the deaf person just as he would when speaking to another hearing person. For example, if the hearing person says, "Tell him to sit down over there," the interpreter would interpret, "Tell him to sit down over there." The deaf person may wonder who he is supposed to tell to sit down. The interpreter will be the hearing person's voice to the deaf person and the deaf person's voice to the hearing person. The interpreter's job is to interpret *everything* that is said. She cannot give opinions, counsel, or advise. She must keep all of the information from the interpreting assignment strictly confidential.

DO INTERPRETERS HAVE "PRIVILEGE"?

KRS 30A.430 states: "Every person who acts as an interpreter in circumstances involving the arrest, police custody or other stage in a criminal, civil, or other matter of a person coming under KRS 30A.410 shall not be examined as a witness regarding conversations between that person and his attorney, when such conversations would otherwise be subject to the attorney-client privilege, without the consent of that person. (Enact. Acts 1976 (ex. Sess.), ch. 22, Section 70, effective January 2, 1978.)

The question of whether or not interpreters have privilege in legal interpreting situations is discussed by Nancy Frishberg in her book *Interpreting: An Introduction* (1986). According to Frishberg, in most states, the interpreter is protected by privilege in only 2 instances. The first is when the interpreter is in the presence of the protected individual (*e.g.*, the defendant's attorney, or a doctor or clergyman who might be called in as a witness in the case). The second instance is when the communication between interpreter and client is authorized by the attorney or other professional. Frishberg suggests that the interpreter would be wise to leave the room when the professional leaves, so as to avoid discussion of potentially confidential matters without the protection of privilege. Although RID's Code of Ethics requires the certified interpreter to keep all interpreting-related matters confidential, the Code does not have legal status and will not protect the interpreter from having to testify if she is subpoenaed. Similarly, if the deaf person waives his right to privilege, granting permission for the professionals to testify about private conversations they had, the interpreter has no legal grounds for refusing to testify.

Elaine Gardner, another expert on legal interpreting, discusses 2 situations which are not privileged: police interrogations, and private conversations between the deaf person and his interpreter. (see the March 1983 issue of the *NCLD Newsletter*, of the National Center for Law and the Deaf). Frishberg suggests that the interpreter in a police interrogation situation try to insist on having the situation videotaped, so that the interpreter will not be subpoenaed later and asked to testify on what was said during the interrogation. Indeed, it is a wise idea for the interpretation of the *Miranda* Warning and the interrogation to be videotaped. This not only protects the interpreter, it protects the police department as well.

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Recognizing and Treating the Chemically Dependent Offender

For the better part of the last 12 years, I have dedicated my professional talents as a licensed psychologist and certified chemical dependency counselor to the treatment of adolescents and young adults who suffer from the disease of chemical dependency. These young people risked death, brain damage, incarceration, institutionalization, and permanent psychological damage through use of a kaleidoscope of mind-altering substances including: alcohol, marijuana, hash oil, PCP (angel dust), LSD, cocaine, amphetamines, barbiturates, quaaludes, opium, heroin, gasoline, and glue.

While working with these clients, I have encountered several challenges with the legal profession as well as the legal process, that divert a therapist's efforts to effectively treat these clients. These challenges include:

1. insufficient information among the legal profession as to the nature of the disease chemical dependency, its diagnosis, and effective intervention and treatment.

2. an acceptance and/or tolerance by many members of the legal profession that the usage of recreational drugs should be permissible in our society, e.g. marijuana and cocaine.

3. inadequate legal avenues to access evaluation and treatment for those citizens who, as a result of their drug usage, pose a danger to themselves and/or others and are unable to recognize the severity of their own drug problem.

This article is being written to address these challenges and to encourage open debate about the ensuing issues these challenges present.

The next time someone tells you that the problem of chemical dependency is worse in the big city where blacks and Hispanic groups stalk the streets, give them this accurate profile of the typical drug user in the United States. The typical user is male, 18-34 years of age, white, from a city about the size of Frankfort, Kentucky, and employed.

In the 1990's, it is imperative that responsible members of the legal profession be familiar with the disease of chemical dependency, recognize its signs and symptoms, and understand the importance of early intervention. The informed legal professional also needs to understand the personality dynamics of the disease and its relationship to effective treatment.

FOUR STAGES OF CHEMICAL DEPENDENCY

Chemical dependency is a disease of attitudes which leads to emotional and physiological disorders and a deterioration of the spirit.

The disease of chemical dependency has 4 distinct stages:

1. initial usage
2. problem usage
3. psychological addiction
4. physiological addiction.

Although reversible, the disease left untreated is usually fatal.

The first stage of chemical dependency is *initial usage*. Usually after a few exposures to a drug such as alcohol or marijuana, a person learns that "*a way* to alter his emotional or feeling state is to use the drug." Although no immediate harm will usually accompany first time use of many drugs, the beginning stages are set for the disease to worsen.

Stage 2 of the disease, *problem usage*, is often difficult to detect by the user or an outside observer, especially in the case of marijuana usage. With continued use of the drug, the person's self talk gradually changes from "*a way* to feel better" to "*a good way* to feel better." Subtle changes begin to occur in the person's performance. Work performance may slip a grade. Occasional lying may begin. The person usually begins to be more secretive. Sudden and unusual outbursts of anger begin occurring. Feeling of guilt and depression occur more frequently. The user may begin violating well-learned ethical, and legal standards. The user's ability to be responsible diminishes. The seeds are firmly established for the disease to become more acute. Further compounding the problem is the reinforcement and encouragement of other users to continue to engage in self-destructive behaviors.

Stage 3 of the disease becomes much more obvious to the outside observer but is actively denied by the abuser. At the *psychological addictive* stage, the person is now firmly convinced that the "*only way* to effectively cope" is to get high. In addition, the person begins practicing a self-talk of deception that openly denies the drug usage while casting blame and responsibility on employers, family members, and others for current irresponsible behaviors. At this stage a network of self defeating attitudes become firmly entrenched and in some cases are irreversible. Suicidal ideas are often present. Ability to care for and sustain oneself is greatly diminished. Psychologically, the abuser could be accurately described as a walking psychotic with a reality orientation.

Stage 4 of the disease is *physiological dependency*. At this stage, the person's body has come to depend on the presence

of drugs. The disease has progressed from an emotional and spiritual disease to a disease of the body. The body actually craves the drug. Irreversible damage to important body organs can occur or may have already occurred. Further emotional and spiritual deterioration occurs. The abuser at this stage exists, but no longer lives.

SIGNS AND SYMPTOMS

There are many indicators which are extremely helpful in determining whether an offender may have reached a harmful stage of the disease:

1. *Work* - The offender develops a negative attitude toward work. The offender may frequently miss work and require repeated discipline. Drug users find it difficult to maintain good work habits.

2. *School* - The offender has developed a negative attitude toward school. Skipping class, suspension and/or expulsion and lower grades are common. Dropping out of school altogether is not unusual.

3. *Dishonesty* - The offender conceals drug usage and either denies or minimizes it when discovered. The offender may steal from his employer, pad expense account, or lie about whereabouts while on company time.

4. *Personality changes* - The offender may start using foul language, or begin lying about activities. The offender may appear more irritable, having fits of anger or rage with little or no provocation. The offender may show a loss of motivation, lowering of ambition, loss of drive toward goals, and no quest for excellence.

5. *Law-breaking* - Traffic violations, especially (DUI's) are a common sign. Other common crimes are breaking and entering, vandalism and robbery.

6. *Physical/Medical condition* - Personal grooming and hygiene may deteriorate. Speech and actions may be detectably slowed. Gait and posture may change. Clothing and hairstyle preferences may change. The offender may exhibit a lack of vitality, with a need for excessive sleep at unusual times. Eating habits may be altered and weight loss may occur. Bloodshot eyes, dilated pupils, talkativeness, excessive or inappropriate laughter, along with slowed speech and decreased coordination are not unusual. The offender may attempt to conceal bloodshot eyes with eye drops. Infections of the skin and respiratory tract are common. A chronic cough without apparent infection may occur. Extreme fatigue and weakness are common. The offender may complain of frequent colds or chest pain.

7. *Family relationships* - Withdrawal from family relationships are common. Parental and household responsibilities are often neglected. Spouse abuse, child abuse, and severe marital problems are common place.

Chemical dependency is a treatable disease. Detected early, much physical, emotional, and spiritual pain can be averted.

IMPORTANCE OF EARLY INTERVENTION

It is never too early to intervene, especially in the case of a young person. For while the disease may take 6 to 14 years to fully develop in an adult, the disease of chemical dependency progresses to maturity in young people in a 6 month to 2 year period of time. More important, the disease also effects the emotional and physical well being of other family members. And in the case where the family unit consists of more than one teenager, it is not uncommon to find the other children engaging in drug use.

A recent study appearing in the *Journal of the Florida Medical Association, Volume 71, April 1984* reports the results of early intervention treatment of 314 adolescents. The youth, the study indicates, began using drugs at an average age of 12 1/2 (earliest 7, oldest 17), had used drugs for 3 1/2 years, and were 16 years old on entering treatment. The typical client was a poly drug user, with emphasis on alcohol and marijuana. Furthermore the study stressed that chemical dependency is a progressive disease and spontaneous recovery is rare. The study emphasized that the youth did not have to hit bottom in order for the parents to seek help for the youth; especially since youth at the later stages of the disease are more resistant to treatment.

The study also emphasized that the majority of the youth were doing drugs for over 2 years before their parents realized it. In addition, less than 30% of the parents were aware that their children were also engaging in other criminal activity.

The overall results of this study clearly suggested that early intervention is essential in increasing the chances of recovery from this deadly disease.

Excerpt's from a letter that I received from a former client further reinforce the importance of effective, early intervention for adolescents.

"My name is Martha. I'm 14 years old. The drugs I did are pot, alcohol and hash. I did these drugs for 2 years.

I never really got drunk or high or anything. I did marijuana about 10 times, hash once. I knew drugs were wrong and could hurt me. I did it for acceptance. I wanted my friends to like me. I didn't want them to call me chicken.

When I first came into the program, I was mad. I didn't think I needed it. I thought, I don't do many drugs; I don't have a problem. I stayed angry for 3 or 4 months, and didn't try to change or understand myself.

I had a bad attitude towards my family, especially my dad. I didn't think they had any control over me. I only wanted to do what I wanted to do, to be with my friends. School was a big joke - a place to go for your social life. I didn't take it seriously or do my homework. When I got bad grades I thought it was the teacher's fault. I didn't respect any authority.

At the program, people kept reaching out to me, helping me to see that things weren't so great before, that I did need to change some things. I began to realize that you didn't have to do a lot of drugs to be a druggie. With my attitude, I would have done more drugs, treated my family even worse.

I saw that my attitude was a problem. My parents didn't deserve to be treated like I treated them. I realized I could have better than I had. I saw that I wouldn't have gone anywhere in life because I was so apathetic all the time. I really didn't care about my life or my parents' life. I only wanted my way. I never thought about where it would get me."

EMERGING PERSONALITY

Understanding the personality that emerges as a result of the offender using and abusing drugs will help clarify many of the salient points about what constitutes effective treatment for chemical dependency. The emerging self talk that forms the core of a substance abuser's personality can be delineated into 4 distinct interrelated layers.

The first and most outer layer of the personality is called *psychological/physiological addiction.* This layer of the offenders self talk contains an erroneous belief that "the only way I can manage my life is to get high" (psychological addiction). This obsession is often times reinforced by a craving for the drug of choice if physiological addiction to the drug has occurred.

The second layer of the personality is labeled *denial of feelings and actions.*

This layer of self talk is made up of 5 distinct beliefs that assist the abuser in avoiding and honestly examining the realities of sustained usage. These beliefs include:

1) *denial* - outright non-acceptance of behavior when confronted.

2) *rationalizations* - justifying drug usage - making excuses: "I'm not really doing that bad especially when compared to" ... Everyone else is doing it... I can handle it".

3) *projection* - blaming others for present circumstances and difficulties.

4) *wishful thinking* - believing that I am in control of the drug usage and I can stop anytime I choose to with little effort and without anyone's help.

5) *magical thinking* - I can continue to use drugs without any danger of physical, emotional, or spiritual harm.

These beliefs result in a set of emotional responses that mislead the user into believing that all is well.

The third layer of the personality is labeled *refusal*. Refusal encompasses a distinct set of beliefs that precludes the abuser from accepting the help necessary to refrain from drug usage. These beliefs include:

1. *indifference* - I don't really care what happens to me.

2. *self-sufficiency* - I can get off drugs by myself.

3. *self-righteous* - I already know how to get off drugs.

4. *defiant* - you can't make me stop taking drugs.

5. *rejection* - I can't do it. I'm not worth it.

6. *belligerence* - I'll fight you if you attempt to stop me from getting high.

These beliefs result in a set of behavioral responses that significantly precludes the user from accepting much needed help from others and reinforces the denial beliefs that mislead the user into thinking that everything is okay.

At the core of the substance abuser's personality is a deeply ingrained set of self-destructive beliefs that may have been developing prior to drug usage, but most definitely developed as a result of sustained drug usage. This fourth inner layer of *self-destructive talk*, consists of 5 distinct beliefs. These beliefs create and sustain a set of emotional and behavioral responses best characterized as selfishness and hate. These beliefs make it difficult for the drug user to emit loving and sharing responses. These beliefs include:

1. *damnation of self* - it's all my fault

2. *damnation of others* - it's everybody else's fault

3. *tyranny of shoulds* - demanding reality be different

4. *awfulizing* - the situation is just terrible, insurmountable

5. *I can't stand it* - the hell with it all, I'll just go and get high, give up.

This inner layer of *self-destructive talk* makes it challenging for the recovering offender to refrain from drug use as these beliefs continue to foster a set of unpleasant emotions (e.g. resentment, self-pity, worry) that previously were diminished by the act of getting high.

While the first 3 layers of the "druggie" personality reinforced the obsession of wanting to get high, maintained a state of denial, and created an illusion of safety resulting in a refusal to ask for or accept help; layer 4, the *self-destructive talk*, requires the recovering offender to address the issue, "how do I begin to learn how to feel good now that I am no longer getting high." For it is this layer of the druggie self-defeating personality that maintains thoughts which can significantly impair and at times handicap the recovering offender from achieving maximum mental and emotional happiness.

ELEMENTS OF EFFECTIVE TREATMENT

Effective treatment for optimal results, for both the juvenile and adult offender suffering from the disease of chemical dependency, requires a long term, structured treatment program lasting, in some cases, for as long as 2 years. For most drug users, it takes a minimum of 4 months before their brain begins to function normally and before the obsession of wanting to get high diminishes. Penetrating the *denial* and *refusal* layers of the chemical dependent personality takes months of therapy. Prognosis for recovery is minimal, until an honest, sincere willingness and readiness to change is present. Continued structured aftercare is essential, in order that the offender might learn how to manage life without getting high and continue to address self-destructive tendencies minimizing a healthy recovery.

Treatment needs to be conducted in a drug free environment, where rules and expectations are clearly defined and the physical security of the client is maintained, (*i.e.* meets the basic needs of food, clothing, shelter and medical attention). The therapeutic environment should be free of physical and emotional abuse of threat and staffed by counselors who maintain a positive mental attitude, exemplify behaviors of warmth, empathy, and discipline, and live drug free life-styles. Group and individual therapy should be provided that openly and honestly discusses and confronts fundamental cultural values. Reality therapy and cognitive behavioral therapy, combined with a 12 step program of recovery, has been proven to be an effective treatment milieu. Access to positive peer influence is essential, as each recovering offender must learn accountability to a group of peers. Family therapy and supportive services are also essential ingredients.

It is critical that offenders court ordered to treatment be required to finish treatment or run the risk of contempt of court charges and eventual incarceration. Withholding prosecution and/or sentencing until treatment is complete, is highly recommended. Successful treatment requires that the offender firmly believes that no alternative but to change exists. Fear of incarceration drives home the reality and consequences of the disease and lays the ground work for developing a willingness and readiness to change. Defense lawyers, prosecutors, and judges could best serve the treatment needs of their chemically dependent clients, if they would negotiate with this fact in mind.

ZERO TOLERANCE

Perhaps the number one challenge facing recovering offenders is having to return to a society where drugs are readily available, used by many, and either glorified or tolerated by most. They must return to a society where zero tolerance for illegal drugs and responsible usage of alcohol are non-existent. This is reality for both the juvenile and adult recovering offender.

Twenty seven years ago, when I was 15 years of age, I did not have to make a decision whether to use drugs or alcohol. The option was simply not available to me. In contrast, today, 1 out of every 20 young people will have used pot and alcohol at least once before they finish the sixth grade. A teenager can travel to any community in Kentucky and within minutes obtain any drug of choice.

Illegal drug sales in this country exceed 100 billion dollars per year. Alcohol consumption exceeds 50 billion dollars.

Misuse of over-the-counter and prescription medicine contributes several billion dollars more to total drug sales. Some authorities now estimate that Americans consume yearly a quarter of a trillion dollars worth of unnecessary, and in most cases, harmful drugs. Kentucky is one of the nation's largest producer of marijuana. Alcohol is the most readily available drug to our youth. Legitimate control of alcohol in our state is insufficient. Fifteen year olds can purchase alcohol anywhere in the state.

By the time a young person reaches their senior year in high school, 90% are drinking, over 2/3 indicate usage of an illegal drug at least once, 1/3 are regular users of marijuana, 17% have tried cocaine, and 5% are getting high daily. These figures exclude those youth who dropped out of school before their senior year in high school. Usage among this group of teenagers is higher.

Further complicating the problem is a general acceptance and/or tolerance in the adult society that drug use is acceptable behavior. We as on adult society permit, and, in too many cases, encourage young people to use drugs through our examples and messages. A few illustrations will suffice to make this point clearer.

In the May 1984 issue of *Success: The Magazine for Achievers*, Letitia Baldrige recommends to business executives that, when offered a "recreational drug" at a business of social event the mannerly response is to say: "No thanks politely, in a way that suggest you may use drugs, but just not that one." She recommends this reply instead of a more traditional and emphatic "No thank you!"

A recent copy of the cartoon "Berry's World" pictures 2 avid sports fans paired off, facing each other with clenched fists yelling, "My super star athlete is less chemically dependent than yours."

In Kentucky, Maysville Mayor Hairiett Cartmell insists that "marijuana could be made a legal profitable cash crop." A Fayette county lawyer, running for the governor of the state, seriously believes that marijuana should be legalized to "insure the farming heritage of our state." Furthermore, he openly admits to having smoked pot regularly for the past 22 years and then explains: "I'm a responsible adult in a free society." Since when does breaking the law constitute responsible behavior?

Heavy metal and thrash music, movies, television programs and advertisements send countless "Do drugs" messages. And in too many cases, parents are relieved to learn that their children just do pot and alcohol.

It is now estimated that between 18 and 30 million young people in America are currently being crippled by alcohol and drug usage. As a society, we are contributing to the most massive case of child abuse in the history of mankind. And the tragedy is that these young people are our own children, grand children and neighbors.

Members of the legal profession interested in helping the chemically dependent juvenile and adult offender, must strongly advocate and support a position that will no longer accept the use of illegal drugs in the work place or in our homes, and, that will require the responsible usage of alcohol by those who are of legal age to drink it. Illegal drinking by teenagers can no longer be tolerated.

INADEQUATE LEGAL AVENUES

Assume the following facts. You have a son who is 19 years of age. He started his drug usage at age 12. He has done alcohol, marijuana, hash, hash oil, LSD, valium, rush, and cocaine. For the past 2 months, he has been getting high daily on cocaine. For the past 3 years, he has been smoking pot daily. He dropped out of school at age 17. He has not been able to maintain a job for the last year. He is often times belligerent, sometimes to the point of being violent. He appears unmotivated, has no concrete goals, and spends most of his daylight hours sleeping. Almost every night he goes out somewhere with his friends.

You, as his parent, seek the help and advice of a certified chemical dependency counselor. During a family counseling session with your son, you confront him about his drug problem and encourage him to get help. He refuses and does not enter treatment. "How about court ordering him into treatment," you ask? The counselor explains: "In Kentucky there is no legal remedy for a parent to require their of age son to enter treatment."

Three months later your son is arrested for breaking and entering. You must hope and pray that the judicial process will recognize your son's problem and sentence him to a treatment facility. Unfortunately, his defense lawyer has little knowledge about the disease of chemical dependency. She does however, have excellent knowledge of the legal process. She is able to plea bargain and get the young man shock probation.

Two months later this same young man is arrested for drinking under the influence. In addition, he also is charged with manslaughter. His car hit head on another car and killed the driver and 2 small children who were passengers. Three months later he is sentenced to spend 7 years in the state penitentiary. No drug treatment program exists at the prison.

In March of 1986, I proposed legislation to remedy this situation. House Bill #785, modeled after legislation enacted in Florida in 1976, would have enabled this chemically dependent young adult to be committed for evaluation and treatment to an appropriate facility for a minimum of 30 days with subsequent court review. Due process safeguards are clearly delineated in the proposed legislation. Unfortunately, this legislation failed to achieve appropriate support in the Senate thereby not being enacted into law. Existing avenues to advance the same objective either requires a chemical dependent person to break the law or declare them mentally incompetent. In the later case, the person will be court ordered to a state facility which has no provisions for the treatment of chemically dependent clients.

I encourage the legal profession to examine this proposed legislation and encourage its enactment in the next legislative session. Why must we wait for someone to break the law before we get them help for a disease that if gone untreated, will eventually kill the person and possibly other people? How many offenders currently fill our jails that, if provided effective treatment, would become productive, tax paying citizens.

SUMMARY

Chemical dependency is a disease of thinking that, if detected early, is treatable and manageable. Members of the legal profession need to become more knowledgeable about this disease. They need to examine how they can more effectively divert chemically dependent offenders into treatment. Furthermore the legal profession needs to advocate a policy of zero tolerance for illegal drug use and demand the responsible use of alcohol. Finally, the legal profession could help thousands of chemically dependent adults achieve recovery by endorsing legislation that provides for involuntary commitment procedures.

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When Rage Explodes, Brain Damage May Be The Cause

Two studies of a total of 29 murderers on death row in at least 4 states found that almost all had a serious brain injury that may have triggered their violence.

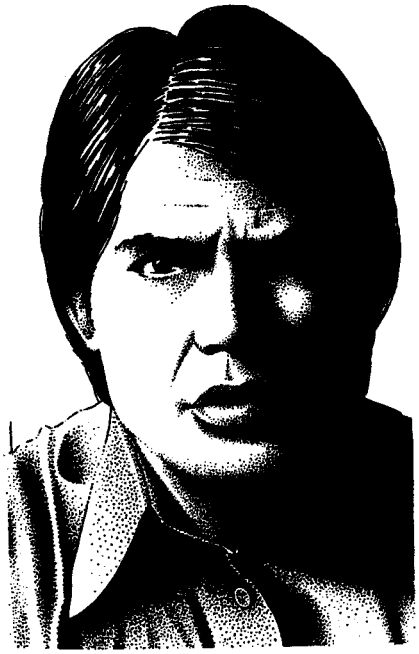
"He was a scientist, but he was acting strange," said Dr. Stuart Yudofsky, a psychiatrist who consulted on the man's case. "At work, when something didn't go right, he would scream and threaten his co-workers. At home, if his 4-year-old spilled some food at the table, he'd get so mad at her, he'd punch holes in the walls with his fist. It was completely out of character."

For several years the scientist was treated by a series of psychotherapists, who urged him to examine his childhood for deep-seated conflicts that might explain his rages. Then a psychiatrist prescribed a sedative. Nothing helped.

Finally the scientist was referred to a neurologist, who traced the beginning of the violent outbursts to an auto accident in which the scientist had received a severe head injury. When the scientist was treated with propanolol, a medication used to control blood pressure, his rages stopped.

The scientist's case exemplifies a new advance in understanding explosive anger: that the most common cause is brain injury or neurological disease, and that there are now medications that can control it far more effectively than can the approaches most commonly used by psychiatrists.

But researchers say that despite the advance in understanding the causes of violent rage, too little attention is being paid to people who suffer from such attacks, and that as a result they receive inadequate care. "The brain basis for violent rage often goes unrecognized, and a great many patients with the problem are being given improper care," said Dr. Yudofsky, chairman of the department of psychiatry at the University of Chicago Medical School. "This has been a huge unsolved problem for psychiatry."



The rage resulting from neurological impairment is distinct from ordinary anger. It is a sudden and unpredictable storm of overwhelming fury that is triggered by a trivial event and that builds into an explosion in an instant. It serves no purpose for the person who is swept away and typically leaves remorse and embarrassment in its wake.

The work on rage bears great significance for several groups, like the estimated 4 million people in the United States with Alzheimer's disease. Studies have found that about a third of Alzheimer's patients have uncontrollable rages. Inability to handle the patients' outbursts of rage is the single most common reason given by families of Alzheimer's patients for sending them to nursing homes or hospitals.

Apart from those with Alzheimer's disease, one million people suffer brain injuries each year from strokes, tumors or blows to the head; 180,000 of them are injured in auto accidents. Some degree of constant irritability or explosive aggression occurs in as many as 70% of those who suffer serious brain injury, studies have shown. For those working with such patients in hospitals, dealing with outbursts of anger is troubling and frightening.

INSIGHTS ON VIOLENCE

The research may also offer insights into some criminal violence: 2 studies involving a total of 29 murderers on death row in at least 4 states found that almost all had a serious brain injury that may have triggered their violence.

"Explosive rage is very common, since it can be a symptom of any malady that destroys brain cells," said Dr. Yudofsky. "And I suspect brain damage is, by far, the most frequent cause of these violent outbursts, though no one has exact numbers." The new treatments may mean a

HALLMARKS OF NEUROLOGICAL RAGE

Rage due to neurological impairment is typically an over-reaction. It is usually set off by a trivial event, ordinary anger by a provocation or great frustration.

Neurological rage is purposeless. It serves no psychological aim or social goal; anger has a psychological or social justification.

Rage is explosive. It arises in an instant, as though from nowhere; anger builds.

Rage is out of previous character. Rageseems unusual to those who knew the person before the problem began; ordinary anger strikes others as appropriate.

Rage feels "alien." People swept up by rage are upset about it or embarrassed afterward, feeling they were not themselves; in ordinary anger, people feel they were justified.

Source: Stuart Yudofsky

Signs of Mental Illness Which May Not Be Obvious

Mental illness of great enough significance to be a factor in criminal proceedings is most likely to be the product of a genetic disorder or brain damage. It is not all that uncommon for an individual to be experiencing and to be influenced by significant mental illness though he or she may show little or no outward sign of bizarre thinking or behavior. The few or subtle symptoms which may be identified either by defense staff or by mental health professionals should not be allowed to be discounted. Rather, in most cases they will represent the "tip of the iceberg" regarding the presence of severe disturbance in an individual. In cases where symptoms of mental illness are not evident prior to initiation of a mental health examination, other, collateral signs (not specifically symptoms of mental illness but commonly associated with it) may be a clue to the presence of significant but hidden mental illness. Many defendants will admit to some of the factors below, which may signal the presence of mental illness, when they will not display or admit to more obvious symptoms of mental illness. Some of these individuals are so reluctant to admit to mental illness that they will risk facing the electric chair before they will admit to symptoms of mental illness that they have genuinely experienced. The list of collateral signs below should not be considered exhaustive and does not guarantee the presence of significant mental illness. The presence of one or more of these factors, however, is frequently associated with such mental illness and indicates that further investigation by means of a mental health evaluation in warranted.

A genetic history of mental illness: blood relatives who--

1. have been hospitalized for mental illness
2. have been under psychiatric care
3. attempted or committed suicide
4. had severe and prolonged drug and alcohol problems
5. were incapacitated and unable to work and had to be cared for by family
6. suffered episodes of depression.

The defendant comes to every meeting carrying a sheaf of legal papers and seems overinvolved in filing motions or researching legal strategies.

The defendant admits to:

1. a history of psychiatric care
2. hospitalization for mental illness, "nerves," or a "mental breakdown"
3. chronic and severe alcohol or drug abuse problems
4. a chronic and severe history of fighting 5. a history of depression, or suicidal thinking or gestures
6. a history of many (5, 6, or more) marriages.

A violent/major crime with no prior criminal history.

Any of a series of factors which may produce or be related to brain damage. Some of these factors include--

1. a history of head injury from such things as falls from buildings, auto accidents, blows to the head with boards or baseball bats in fights, severe child abuse involving head beating
2. uncontrolled high blood pressure
3. poorly controlled diabetes
4. stroke or heart attack
5. cardiovascular surgery
6. major surgery (often seen in conjunction with some other factors described above)
7. severe poisoning
8. near drowning requiring resuscitation
9. chronic and severe alcohol or drug (esp. cocaine or amphetamine) abuse
10. birth trauma
11. premature birth
12. a lengthy period of high fever (104 degrees or more), particularly if it required hospitalization
13. a personal or family history of seizures
14. chronic and severe pulmonary disease (*e.g.* emphysema, chronic obstructive pulmonary disease)

A sudden onset of criminal and/or drug abuse activity late in adolescence or in the 20's after a benign prior history.

An odd reluctance to divulge even seemingly harmless information about themselves.

An unwillingness to *consider* a plea offer under circumstances where conviction appears to be almost inevitable (fingerprint evidence, eyewitness testimony, confessions, etc.) and where sentencing for conviction is likely to be harsh. Note an inability to account with rational reasons for the unwillingness to consider the plea offer.

A consistently hostile, argumentative, or angry defendant under circumstances where there is no apparent reason for this reaction.

A defendant who seems unwilling to contribute information to defense planning, who seems uninvolved and disinterested, particularly with serious charges. Similarly, defendants who are vague and inattentive in their responses to questions seeking information for defense planning or who are persistently unable or unwilling to account for significant evidence against them, seemingly entertaining the "magical" belief that this evidence is unimportant or will somehow (in an unspecified manner) be prevailed over.

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Robert has a criminal forensic practice that in the last 3 - 4 years approximately 90% has been spent in forensic evaluation of homicide defendants.

fresh start on life for people who have suffered from the attacks of rage.

Other experts caution that there are many cases of explosive rage that cannot be explained by brain damage. "There are a large group of people with brain damage who do not have explosive rage, and a sizable group of people with rage who have no brain injury," said Dr. Gary Tucker, chairman of the psychiatry department at the University of Washington medical school.

Even so, brain damage is increasingly being recognized as a cause of the problem. Dr. Louis J. West, chairman of the psychiatry department at the medical school of the University of California at Los Angeles, said, "The number of cases where brain damage explains in an explosive rage is not so small as we used to think."

In some studies, up to 70% of those with outbursts of rage were found to have neurological damage. A University of Pennsylvania study of 286 psychiatric patients prone to unprovoked attacks of rage found that 94% had some kind of brain damage. The cause ranged from head injuries and stroke to encephalitis and Alzheimer's disease.

DEATH ROW

Like violent psychiatric patients, violent criminals have also been found to have a disproportionate share of brain injuries. For example, of the 29 death row inmates all were found from hospital records or neurological tests to have had a head trauma, ranging from falls from trees in childhood to regular beatings.

"There is no question that much violent crime can be traced, in part, to brain injury, especially in criminals who are repeatedly violent," said Dr. Dorothy Otnow Lewis, a psychiatrist at New York University Medical School, who conducted the research on death row inmates.

But Dr. Lewis says that brain injury alone is not likely to provoke such intense violence. "The most lethal combination is a history of neurological damage and abuse in childhood," said Dr. Lewis. "When you have a kid who has some organic vulnerability, like a brain injury, and you add being raised in a violent household, then you create a very, very violent person."

Her conclusions stem from a study of 95 boys who were studied at a Connecticut correctional school in the late 1970's, then were tracked 7 years later using records of their subsequent arrests maintained by states and the Federal Bureau of Investigation.

Those who, as teen-agers, showed no sign of neurological problems or childhood abuse had not committed a violent crime as adults. Those who had some brain impairment, or who had been abused in childhood, committed an average of 2 violent offenses. But those who had both brain impairment and an abuse family history had committed an average of 5 violent crimes. Nine who had been convicted of murder were in this category.

AVENUE FOR CRIMINALS?

Experts in law and psychiatry doubt that the findings suggest an avenue for criminals to evade punishment for violent crimes. "Being swept away by emotion does not mean one did not know right from wrong," said Dr. Park Dietz, a psychiatrist in Newport Beach, Calif., and formerly a professor of law and psychiatry at the University of Virginia.

Nevertheless, he said, "It is legitimate to bring up a brain impairment at sentencing to mitigate the blame for the defendant and so get a lesser sentence." And, he said, it was becoming increasingly common for defense lawyers to raise neurological problems in their client as a defense of last resort when there is no other sign of mental illness.

Injuries to certain parts of the brain, such as the frontal areas of the cortex, are the most likely to result in attacks of rage, researchers say. According to one theory, these brain areas ordinarily control aggressive impulses that originate in lower brain centers. When the controlling areas are damaged, the inhibitions disappear, allowing rage to be expressed freely.

For that reason, a new diagnosis, a "disinhibited type" of dementia, has been proposed for inclusion in the next edition of the official psychiatric diagnostic manual. "There is good evidence that explosive rage is one sign of a disinhibition syndrome," said Dr. Tucker, who heads the committee studying such new diagnoses.

UNIQUE SYNDROME

Dr. Yudofsky, on the other hand, leads a group of psychiatrists who argue that explosive rage marks a unique psychiatric syndrome in itself and that a specific treatment in now available for it.

Dr. Yudofsky said that most patients treated for explosive rage were being given the wrong medications. "The majority of these patients are prescribed sedatives like heavy tranquilizers or antipsychotic medication," he said. "You see patients in hospitals looking like zombies. They've been oversedated to keep them under control."

One of the most promising new treatments for rage is propanolol, a beta-blocker more commonly used to treat hypertension that has none of the debilitating side effects of the sedatives.

In a study published in the spring issue of The Journal of Neuropsychiatry and Clinical Neurosciences, Dr. Yudofsky and colleagues showed that the drug was highly effective in calming rage in white rats.

The researchers first made lesions in the rats' brains in a procedure that "creates a very violent rat," Dr. Yudofsky said. The researchers then put the rats on a device that delivered a shock to their feet.

When the rats were paired, they attacked each other 4 out of 5 times when the shock was applied. But after they were given injections of propanolol, they attacked only about 1 in 5 times, or at the same rate as before the operation.

DRUG'S USEFULNESS

A number of studies in humans also suggest the usefulness of propanolol. One of the most recent, reported at the meeting of the American Psychiatric Association in May, was conducted by Dr. Jonathan Silver, director of neuropsychiatry at Columbia Presbyterian Medical Center in New York City.

That study used a group that is among the hardest to test: 21 patients whose violence has kept them in the locked ward of a psychiatric hospital for an average of 10 years. Overall, there was a 50% reduction in the number of angry outbursts, from an average of 1 incident a day, to 1 every other day. In 7 patients the reduction was greater than 75%.

In addition to propanolol, other medications have shown promise for controlling rage. Most mute the activity of catecholamines or serotonin, brain chemicals involved in emotions like anger. The other medications include lithium, used to treat manic-depression; buspirone, used to treat anxiety; and carbamazepine, used to control seizures.

DANIEL GOLEMAN

Psychological Experts

What is the difference between a psychologist and a psychiatrist? In some circles the answer to this question is "about $50,000 a year." But Marc Risman, of Las Vegas, suggested to attendees at a session sponsored by the General Practice Session that the crucial difference, from the viewpoint of a criminal practitioner, is that a psychologist is generally more useful than a psychiatrist as a witness at a criminal trial.

First, a psychologist's post-graduate training, which centers entirely on the social science of mental health, is at least equal to if not better than the training of a psychiatrist, Risman said. In the second place, the speaker pointed out, psychological examinations are based on standardized tests. This feature, he suggested, makes a psychologist's testimony less vulnerable to rebuttal than the testimony of a psychiatrist. Opposing counsel can minimize a psychiatrist's testimony by asking "this is only your opinion, isn't it, doctor?"; in contrast, the test results obtained by a psychologist should be essentially equivalent to the results obtained by any other psychologist. A third point in psychologists' favor is that they are less apt to use technical terms than psychiatrists and therefore communicate better to juries.

Risman suggested that even when a psychiatrist is used, a psychologist also be employed to interpret for the jury what the psychiatrist says. It is the psychologist, the speaker said, who can lay the foundation for the jury, show tests results, and give the jury something hard to take back to the jury room with them.

Turning to the question of choosing a psychologist, Risman stressed the importance of a good working relationship between counsel and the expert. Also, the expert must be comfortable in the courtroom, must understand the legal process, and must be able to think quickly on his or her feet. Willingness to learn new subject matters would also appear to be important, for Risman suggested several times that counsel ask their favorite psychologist-experts to read up on new areas.

In preparing a psychologist to give testimony, it is particularly critical to have the witness ready to respond to cross-examination concerning the accuracy of the test results, Risman noted. Opposing counsel may press for the expert to label the accuracy with a percentage, but no matter how much the prosecutor presses, a percentage should not be given, Risman said.

Risman said psychologists can be useful in all juvenile trials and at criminal trials involving offenses of adults against children. In addition to testifying at trial, psychologists' input at the pretrial and post-conviction phases can also be helpful. Referring especially to cases involving mandatory adult-court trials of youths charged with serious crimes, Risman said that extensive pretrial psychological testing, along with meetings in which the psychologist as well as defense counsel faces the prosecutor and perhaps the judge, can be invaluable. The psychologist's task at such meetings is to humanize the defendant by showing his psychological problems and thereby reduce or minimize the perhaps-grisly nature of the crime.

At the time of sentencing, whether after a trial or a plea bargain, it can be helpful to use the psychologist in finding the proper placement for the defendant, Risman continued. For this purpose the psychologist should become familiar with parole and probation officials and apprise them of the defendant's characteristics; similarly, by working with the warden of the prison, the psychologist can prepare prison authorities to send the defendant to the most appropriate institution with the best treatment program.

Risman made clear that he advocated the use, when possible, of privately retained mental health experts rather than those provided by the state. The latter can be "extremely gun shy" about recommending relatively lenient dispositions if similar recommendations have gone awry in previous cases.

Risman also discussed a non-testimonial use of mental health professionals: their use in jury selection. An expert is inevitably better than a lawyer at reading a prospective juror's body language and other indications of the desirability of having the person on the jury, he said. When asked how to explain the expert's presence during voir dire, Risman said the veniremembers would simply be told that the psychologist is a "colleague" who will be sitting with counsel during jury selection and at the beginning of the case. In response to another question he added that it is usually not cost effective to keep the psychologist in the courtroom during the entire trial. He suggested, however, that a visit by the psychologist to the trial could be helpful if counsel thinks he or she is having trouble communicating with the jury.

Reprinted with permission from *Criminal Law Reporter*, Vol. 45, p. 2396 (August 30, 1989).

ASK CORRECTIONS

Sentencing in Kentucky

Karen S. DeFew

SECTION 13, KENTUCKY CONSTITUTION

No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.

This regular *Advocate* column responds to questions about calculation of sentences in criminal cases. Karen DeFew is the Corrections Cabinet's Offender Records Administrator. For sentence questions not yet addressed in this column, call Karen DeFew (502) 564-2433 or Dave Norat, (502) 564-8006. Send questions for this column to Dave Norat, DPA, 1264 Louisville Road, Frankfort, KY 40601.

TO CORRECTIONS:

In the February, 1988 issue of *The Advocate* you listed the members of the Kentucky Board of Parole, could you please update that list?

TO READER:

There are 7 members on the Kentucky Board of Parole and they currently are:

Chair -- John C. Runda
Member -- Vacant
Member -- James Grider
Member --Phillip Hazle
Member -- Larry R. Ball
Member -- Lou Karibo
Member-- Phillip Baker

TO CORRECTIONS:

I have had a number of clients talk to me about their inmate file. What does an inmate file contain?

TO READER:

In order to maintain an organized and accurate record for each inmate incarcerated by the Kentucky Cabinet of Corrections, a master file is constructed and maintained for all written materials pertinent to the individual case. This master file will be maintained in the institution currently housing the inmate and will be transferred with the inmate as he progresses through the institutional system.

Inmate files maintained at each institution are divided into 6 major sections. These sections are provided to make specific information readily accessible to all those who are at liberty to view these files. All material placed in these files will be filed in one of the following 6 categories:

PAROLE INFORMATION: This section will contain all materials pertaining to parole which include:

Parole Board Actions
Parole Reports, Plans, and Certificates
Employment Placements
Parole Violation Warrants
Information relating to Revocation of Parole

PROGRAM PROGRESSION: Material related to an individual's program progression in reference to classification will include:

Pre-Sentence Investigations
Psychological/Psychiatric Evaluations
Academic/Vocational School Progress Reports
Classification Information
FBI Sheets

MOVEMENT INFORMATION: Material in reference to an individual's movement into or out of the institution will include:

Transfer Recommendation and Authorization Forms
Information related to Furloughs

CUSTODY/DISPLINARY INFORMATION: This section contains all material relating to an inmates custody, record of discipline, and adjustment during his institutionalization. Examples of forms contained in this section include:

Order for Appearance of Prisoners Detainers
Physical Identification Forms
Incident Reports

MISCELLANEOUS INFORMATION: All miscellaneous information and material not relative to one of the other five specific categories will be filed in this section. Examples of material filed in this section include:

Academic/Vocational School Diplomas received during incarceration
Property and/or Money Receipts
Letters and Correspondence not pertaining to Parole
Work Reports
Good Time Restoration and Awards

ADMISSION, TIME, AND SENTENCE DATA : This section contains all materials related to admission, sentence, or time computations. Examples of materials contained in this section will include:

Commitment Orders
Court Orders
Resident Record Card
Notice of Discharge

Only materials pertaining to the six categories listed above will be maintained in the inmates master file.

TO CORRECTIONS:

What can a client review from their file? What procedure do they follow in order to make such a request?

TO READER:

Inspection of State Agency Records is governed under KRS Chapter 61.872 through 61.884 which deals with Open Records. At present, the Kentucky Corrections Cabinet is attempting to revise the list of materials available, to include information that has been made part of an institutional file since the original list was published.

KAREN DEFEW
Corrections Cabinet
Offender Records Administrator
State Office Building, 5th Floor
Frankfort, KY 40601
(502) 564- 2433

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)

DPA New Attorney Training

New Attorneys: (Left to right) **Debbie Bailey, Harolyn Howard, Dilissa Milburn, Donna Hale, Bob Sexton, Bill Donaldson, Teresa Gray, Jim Chambliss, John West.**

DPA is committed to insuring that our new attorneys have the best possible litigation skills and legal knowledge. Training is a means of continuing to ensure we meet our duty of advocacy on behalf of indigent citizens accused of crimes. On September 4, 1990 - October 5, 1990 our attorneys received 4 weeks of focused education before beginning to represent clients. The new attorneys were given feedback from veteran attorneys during practical application of the skills and information learned. The new attorney training was followed several weeks later with the 1990 DPA Trial Practice Institute, October 28- Nov. 4. which is an intensive week of trial skills practice.

Our New DPA Attorneys

Debbie Bailey is a 1990 graduate of the University of Kentucky School of Law. She joined the Hazard office.
Jim Chambliss is a 1989 graduate of the University of Denver College of Law. **Bill Donaldson** is a 1990 graduate of the Valparaiso School of Law. They joined the Morehead office.
Teresa Gray is a 1990 graduate of the University of Kentucky College of Law. She joined the Somerset office.
Donna Hale is a 1990 graduate of the University of Kentucky School of Law. She joined the Stanton office.
Harolyn Howard is a 1990 graduate of the University of Oklahoma School of Law. She joined the Pikeville office.
Dilissa Milburn is a 1990 graduate of the University of Kentucky School of Law. She joined the Hopkinsville office.
Bob Sexton is a 1990 graduate of the University of Kentucky School of Law. **John West** is a 1990 graduate of the Catholic University of America. They joined the Somerset office.

Starting Salaries

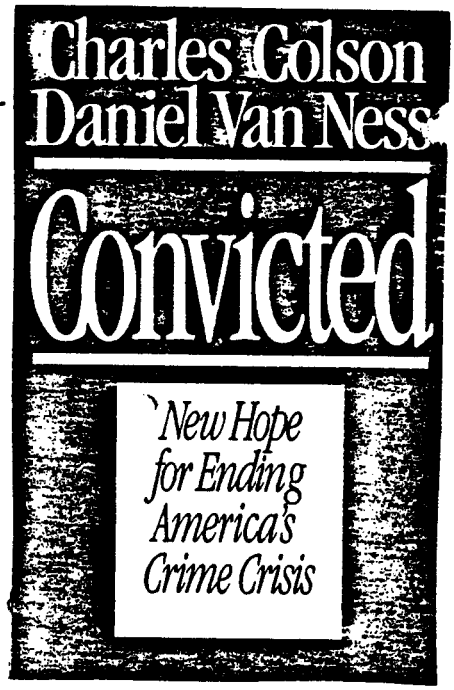
In 1974, beginning attorneys with DPA received a salary of $11,400. New attorneys now make $21,600, yet that is still $3,567 less than the average salary of the 7 surrounding states. U of L graduates on the average make $35, 482 and U of K graduates have an average salary of $32,439.

Vacancies

Despite the influx of new attorneys, DPA has the following vacancies in the field offices: Hopkinsville (1) LaGrange (TS) (1) Pikeville (1) Hazard (2).

BOOK REVIEW

Convicted: New Hope for Ending America's Crime Crisis
Charles Colson & Daniel Van Ness
Crossway Books
Westchester, Illinois 60154
$5.95 paperback



"We Need Criminal Justice Reform, ...The Current System Does Not Work."

These words describe the state of the criminal justice system in Charles Colson's and Daniel Van Ness' book, *Convicted: New Hope for Ending America's Crime Crisis.*

After spending time in a federal prison due to his Watergate convictions Charles Colson is now 180 degrees from his get tough on crime statements written as special counsel to Richard Nixon.

To make the point that our justice system is in a crisis, Colson lays down the facts:

- 1. Nearly half of the people now in prison nationwide are there for non-violent offenses. (In Kentucky that figure is 42%.[1])
- 2. U.S. Department of Justice figures indicate that it costs an average of $80,000 to build a maximum security cell. (The cost was $70,000 a cell to build the Eastern Kentucky Correctional Complex [EKCC], a medium security prison in Morgan County, Kentucky.[1])
- 3. The average annual cost to house a maximum security prisoner is $15,900. (Kentucky's annual maximum security prisoner cost is $16,199.[1])
- 4. State prisons operate between 105 to 120% of capacity. (In Kentucky for FY 91 prisons were 133% of capacity.[1])
- 5. Last federal fiscal year state and federal governments spent almost 5 billion dollars building new prisons. (Kentucky's newest prison EKCC cost 72 million dollars. The 1990-92 biennial budget for the Kentucky Corrections Cabinet is 421.4 million dollars.[1])
- 6. Over the next 10 years the National Council on Crime and Delinquency forecasts that prison populations will increase by 50%. (Kentucky's Corrections Cabinet projects a 58% prison population increase by 1999.[1])
- 7. Prisons can't be built fast enough. Prisons will still be overflowing regardless of how many are built. (Kentucky's Corrections Cabinet projects 4,200 prisoners in controlled intake [local jails] for 1999 due to no prison beds. Even taking into account present and planned prison construction through FY 1992.[1])

Colson's reason why our justice system is in crisis is because crime is presently viewed as an act against the state and not against the victim. This was not the Biblical and early historical focus. Colson advocates a change from the current focus which is "...why did offenders break the law, and how could they be punished so that they would not do it again?" back to the Biblical focus, which is the victim.

The Biblical basis for Colson's 180 degree turn is found in the Hebrew word *Shalom*, commonly translated as peace. Used in the Biblical context:

"*Shalom* meant the existence of right relationships, harmony, wholeness, completeness. It characterized the ideal relationship between individuals, the community, and God. ...Crime destroyed *Shalom*. Offenders broke the harmony that was to exist between them and their victim, the community and God." p. 49.

The act to right the wrong was not to throw the offender in prison but "...to restore the right relationship - *Shalom* - between the parties." Restitution (in Hebrew, *Shillum*) was essential to this process.

From this Biblical perspective comes Colson's proposed new approach to criminal justice, Restorative Justice. This approach "...seeks to repair wounds caused by crime as it seeks to prevent new crimes from being committed." Restorative Justice is based on 3 principles:

1. Crime causes injuries that must be repaired.

2. All affected parties must be included in the response to crime.

3. Government and local communities must play cooperative and complimentary roles.

With the proposal of this approach and the realization that "...the 'get tough' policy on crime fails on the very counts on which it is defended - deterrence and incapacitation." Colson and Van Ness urge citizens to become involved in the reform of our criminal justice system. One way they advocate is to become familiar with criminal justice issues.

To do this they suggest that one should read their book *Convicted* as well as newspapers, contact public and corrections officials, state representatives, community and victim service programs.

Colson's and Van Ness' book *Convicted* and its new hope of Restorative Justice for ending America's crime crisis is a quick way to become informed (111 pages) of the crisis we are now facing.

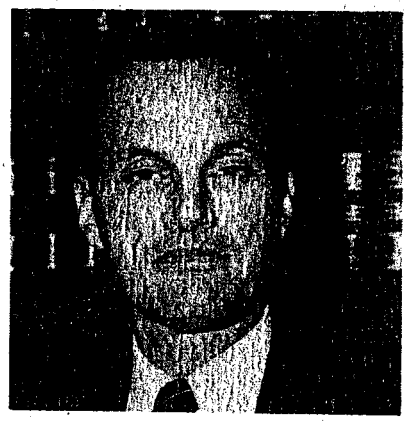
When you get past the religious perspective of the book, Colson is right on point by stating that a new approach to the criminal justice crisis in America is needed. His approach of Restorative Justice is not far from the Department of Public Advocacy's Alternative Sentencing Program though coming at it from a different historical document. The Bible versus the Constitution.

DAVID E. NORAT
Director
Defense Services
Frankfort

SOURCES

[1]Facts and figures obtained from the Kentucky Corrections Cabinet.

PUBLIC DEFENDER BOB CARRAN GIVEN PRESTIGIOUS NATIONAL AWARD



ROBERT W. CARRAN, who has headed up the Kenton County public defender program since 1971, has been awarded the National Legal Aid and Defender Association's (NLADA) prestigious national Reginald Heber Smith Award. Headquartered in Washington, D.C., NLADA is a 25,000 member national organization dedicated to developing and supporting high quality legal help for America's poor.

The "Reggie" Award recognizes dedicated service and outstanding achievements of an attorney while employed by the organization supporting such services. This award is named for the former counsel to the Boston Legal Aid Society and the author of Justice and the Poor, published by the Carnegie Foundation in 1919. Carran was nominated by Ed Monahan, Assistant Public Advocate and DPA's Director of Training, for Bob's 19 year public defender commitment to equal justice.

In announcing the Award, F. William McCalpin, President of NLADA told Bob, "your commitment is evidenced by your unflagging pursuit of adequate funding for the Kenton, Gallatin, Boone Public Defender System; the development and training of attorneys within the System; your tireless advocacy for indigents accused of crimes in many areas - from the courtroom to the committee room; and your exemplary willingness to share your experience and expertise with your colleagues. NLADA salutes your achievements and dedication to the cause of equal justice in America."

The Award was presented on Friday, November 16, 1990 at the Awards dinner at NLADA's 68th Annual Conference, which had the theme, "A New Decade for Justice." In presenting Carran the Award before the 600 conference attendees, Monahan said, "Bob Carran is a common person doing the uncommon. Bob's administration of the many Kenton Co. public defenders has assured zealous representation of thousands upon thousands of indigent clients accused of crime. Day in and day out for the last 19 years Carran's leadership has breathed life into the individual guarantees of our Bill of Rights. He is an Officer of our Bill of Rights. He is a Bill of Rights Enforcer."

In accepting the Award, Carran expressed his appreciation to the scores of Northern Kentucky attorneys who have, under his guidance over the last 2 decades, worked for unfairly low compensation on behalf of poor clients, and he argued as to cost aside the Ivan Boskey value of greed and return to President Kennedy's service to our poor.

Kentucky's Public Advocate, Paul F. Isaacs, has known Bob Carran since 1973 when Isaacs first came to the Department of Public Advocacy. "From that initial acquaintance until now," Isaacs said, "I have been continually impressed with Bob's dedication to his clients and to insuring that his program provides every citizen needing the services of a lawyer not only gets a lawyer but receives the best representation possible. Since 1984, I have had the opportunity to work with Bob in his role as a member of the Public Advocacy Commission and my admiration continues to grow. His commitment is an inspiration to all of us and I think that it is extremely appropriate that he receive the Reginald Heber Smith Award for his dedication to equal justice for all."

Knowing that adequate compensation of attorneys is necessary for adequate representation, Bob strenuously worked in 1988 to have the fiscal court ordered to adequately fund Gregory Wilson's capital defense. In the wake of Wilson's case, Carran has successfully obtained adequate hourly rates from the fiscal court, especially in complex cases and capital cases. In Kentucky, Bob is in the forefront of insuring that the fiscal court meets its obligation to adequately fund indigent defense. This battle to obtain fair funding has been waged by Bob with significant personal and financial sacrifice. His message to the public has been clear: resolutions of conflict between the treasury and the fundamental constitutional rights of the individual poor accused must be in favor of the individual.

Reflecting on Bob's work, William R. Jones, Chairman of Kentucky's Public Advocacy Commission and Professor of Law and former Dean of Chase Law School, asked us to "keep in mind that the job of Kenton Co. public defender administrator is not a full-time position, and pays very little for the effort that is required. Without a doubt, his private law practice, the main-stay of his existence, has suffered from the amount of time he devotes to public defender work, and from the many battles he has had to fight in the local courts. Yet, with a gentlemanly demeanor, he persists in his quiet and efficient way to do a job which very few would want."

Recognizing the consequences of Bob's local and state leadership in delivering legal services to the indigent accused, William T. Robinson III, Past President of the KBA observed, "Bob's commitment to public advocacy has, from time to time, put him in direct conflict with political leaders in the community whose primary concern must be the government budgets which are generally underfunded by taxes."

"Here in Northern Kentucky," Robinson said, "Bob Carran has fought long and hard for increased funding of public advocacy by the local Fiscal Court, especially in capital cases, When others would have 'backed off' because of social or community cynicism about the real worth of community funded legal representation, especially for those accused of heinous crimes, Bob has been a persuasive and persistent 'advocate' for the poor of our community. He has contributed substantial amounts of time and talent in this effort and has received little or no compensation for his efforts."

Bob Carran and Phillip Taliaferro have tried several cases together. Carran was lead counsel in the O'Donnell and Dunn murder cases. In 1980, a jury acquitted O'Donnell on the basis of temporary insanity, even though he shot his ex-wife 25 times. This was the only jury acquittal for insanity in the history of Northern Kentucky.

In 1990, Carran and Taliaferro obtained an acquittal for Jacqueline Dunn, a woman accused in the killing of her husband. The basis for this jury verdict was narcolepsy. According to Taliaferro, this was the first and only jury acquittal for narcolepsy in the history of this country.

"Bob Carran is a brilliant trial attorney and a great asset to this community," according to Taliaferro. "He is the best criminal lawyer we have practicing in Northern Kentucky, and we have him to thank for our Public Defender System."

Public defender work takes a lot out of people. Most public defenders do not last 19 years. There are few public defender administrators in this country who have kept at it for that long. Bob stands out as a model to the nation as someone who is willing to serve the needs of others and to do what is right even at great personal costs.

Reginald Heber Smith began his 1919 book, Justice and the Poor, recognizing that "freedom and equality of justice are essential to a democracy and that the denial of justice is the short cut to anarchy." It is therefore fitting as we approach the 200th anniversary of our Bill of Rights for us in the name of Reginald Heber Smith to honor Bob Carran's service of the public in the defense of the very values which distinguish this country from all others and which insure our democracy- our fierce protection of individual liberties for all people no matter their means.

FUTURE SEMINARS

Mark Your Calendars

1991

ICOPA V

The Fifth International Conference on Penal Abolition (ICOPA V) is a place where reformers, activists and academicians come together to engage in dialogue, and to create a greater understanding of what we can do about crime, other than imprisoning and punishing offenders. Crime and punishment are a form of civil war. The Fifth Conference will bring together the people and groups representing the international civil peace movement. This Conference will be held May 21-25, 1991 in Bloomington, Indiana. For more information, contact Hal Pepinsky at Criminal Justice Department, Indiana University, Bloomington, Indiana 47405.

19th ANNUAL PUBLIC DEFENDER CONFERENCE
June 2-4, 1991
Quality Inn Riverview
Covington, KY
(502) 564-8806

DPA Death Penalty Trial Practice Institute
Nov. 3-8,1991
Kentucky Leadership Center
Faubush, KY

DEPARTMENT OF PUBLIC ADVOCACY
1264 Louisville Road
Frankfort, KY 40601

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