# THE ADVOCATE

A Publication of the Kentucky Department of Public Advocacy

*Advocacy Rooting Out Injustice* **Volume 13, #4 June, 1991**


**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**

## FROM THE EDITOR: CLIENTS, POVERTY & PUBLIC DEFENDERS

In our state of limited resources, many Kentuckians are poor. Public defenders have as their honor the providing of legal services to poor Kentucky citizens accused of crime. In providing this service, it is important for us to know how poverty influences the client-attorney relationships. Cessie Alfonso and Frank Badillo, forensic and psychiatric social workers with much criminal justice experience, help us understand poverty's influence in our work, and lead us to a client-centered approach: viewing our poor clients as persons of dignity—worth.

## MANY POOR ACCUSED ARE UNREPRESENTED

In FY 1990, Kentucky public defenders represented 25% of the estimated 255,000 persons charged with a crime in district court. Who represented the rest? Or were many of those 191,000 represented at all? Counsel is critical to the effective functioning of our criminal justice system. When will we commit ourselves to providing counsel for all poor Kentucky citizens? The 200th Anniversary of the 6th Amendment would be a fitting time.

ECM

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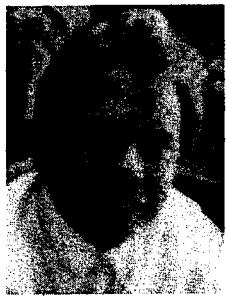
# THE ADVOCATE FEATURES

*Rob Riley, LaGrange Trial Office*



**ROB RILEY**

Rob Riley, Director of the LaGrange trial office, is a 1982 graduate of the University of Tennessee School of Law. He has been a public defender since graduation. He assumed the position as Director in 1990 with the resignation of Bette Niemi. He is married to Natalie Kline and they have a 16 month old daughter, Morgan Kline Riley.

### THE WAR ON INDIVIDUAL LIBERTIES

Rob was influenced by a Justice William O. Douglas biography- *Independent Journey*, which talks about the belief that the Constitution was designed to keep government off the backs of the people. Rob observed that this concept seems all but forgotten today:

> As a society, we are all willing to voluntarily relinquish our rights in the name of a perceived momentary security.
>
> Throughout our history, the justice system has struggled with the concept of relaxed diligence in the protection of individual liberties in the face of a perceived national problem. National hysteria fueled in part by self-interested politicians has created a War on Drugs, a War on Crime, a War on Rights, *etc* that has led to the truth-in-sentencing laws, the DUI Bill, restriction of judicial discretion at sentencing, and the escalation of the death penalty. In the 1980s and 90s cherished personal freedoms were, and are, sacrificed out of a misguided belief that societal problems can be solved, at little or no cost, within prison walls.
>
> The criminal justice system needs to better protect each individual's rights, not to protect the power of the state or the interests of the majority.

Rob holds out hope that "what is left of the Constitution can still be used by zealous Advocates to slow the juggernaut of paranoia that is currently sweeping this country."

### PUBLIC ADVOCATE SERVING TWO MASTERS

Rob is disappointed that the very agency that has the most zealous advocates of an individuals' right to a fair process doesn't take a leadership role in battling the popular causes such as drunk driving legislation and the war on drugs which are knee-jerk reactions to public pressures:

> Sadly the agency with the most information and experience to expose this problem to public debate, The Department of Public Advocacy, has remained suspiciously quiet, apparently content to grumble quietly from the sideline, rather than actively participate in the struggle. This, coupled with continued chronic underfunding, puts indigent clients at a fundamental disadvantage that only the most zealous Public Advocate can hope to even partially offset.
>
> The head of the Department, whose job it is to advocate in favor of the most unpopular group, criminal defendants, serves at the pleasure of a Governor who is elected and runs on a platform that, invariably, negatively impacts that group. It is a system whereby complacency is rewarded, but nothing is ever improved.

### POLITICAL AGENDAS

Working at the Commonwealth Attorney's Office in Jefferson Co., Rob learned that there are "good people doing an honorable task, but politics does corrupt the system." Rob feels that no person should be punished or not punished, due to "someone's private political agenda."

Rob believes public advocates need to find new ways to "rock the boat." He enjoys "seeing the effect, however slight, that continuous advocacy, on behalf of those whom others would ignore, can have on a seemingly unmoveable system."

### CLIENTS

He, and the LaGrange office he manages, try to have clients come away from the criminal justice system having met "someone in a suit" that "neither pitied them or abused them, nor tried to take something away from them." Rob's caseload and commitment allows him to spend time with clients and to work on "solving the causes of problems as opposed to merely reaching a good disposition in the immediate case." He attempts to "craft a resolution that is not only good for the client, but actually benefits society as a whole."

### TAKING IT ALL IN STRIDE

Rob approaches the job, as he does life, with humor, "Where else can you work this hard in a system that neither appreciates your efforts, nor understands your motives, for so little pay? Besides that, you get to wear cool ties because everybody thinks you're weird anyway."

Rob is probably the most principled person I know and he consistently governs his behavior by what he believes. It is something that I highly admire in him. He will not drink Coke or Coke products, because they haven't divested from South Africa. He is not afraid to speak out for what he believes, irregardless of his belief's popularity or acceptance. He is refreshingly honest.

Rob has a dogged determination, he's very energetic and fights hard for his clients. Time is not a factor for Rob. He stays with the client until the job is done. He gives 120%. Rob sees public defender work as a viable career option, even though the money is not the greatest. He has a sense of commitment and does a great job despite the lack of support he feels from the leadership, as he tries to disregard politics and give his client's the best representation.

On his own iniative, Rob put together a DUI notebook for his client's DUI cases, gathering resources from all over the country. The entire legal community of LaGrange relies on Rob for information on DUI cases.

- Bette Niemi

# Poverty and its Impact on the Client-Attorney Relationship

**Cessie Alfonso**

Discussions of poverty typically focus on several issues:

What is poverty?
Who are the poor?
What is the relationship between poverty and crime?
What impact do education, employment, and other factors have on poor people?

An understanding of these issues is crucial not only to the public defender, but indeed to all criminal justice professionals. Just as important, however, although rarely discussed, is a consideration of how poverty affects the attorney-client relationship. Only in more fully understanding poverty and its effects can the public defense attorney provide the highest level of legal assistance to the client. For it is the public defender, more than any other practitioner, who provides legal aid to the myriad of America's poor.

We will first address the question of "what is poverty" from the perspective of social workers; we then discuss the many dimensions and effects of poverty regarding clients and move on to consider the impact of poverty on the attorney-client relationship. To help attorneys recognize their clients' issues as well as their own responses to these, we highlight these dynamics in three examples. We conclude by presenting techniques for attorneys that enhance their relationship with clients.

## POVERTY: LACK OF RESOURCES

While the clients who seek the services of public defenders vary with regard to race, ethicity, and gender, they all have in common their poverty. Poverty is the primary criterion for legal services in the nation's public defenders system. In Kentucky, to qualify for public legal assistance, the poverty level annual income is $6,624 for a single individual; $8,880 for a family of two; $11, 148 for a family of three; and $13, 424 for a family of four. Although various definitions of poverty may be helpful, the fundamental definition — *poverty as a lack of resources* — prevails. Discussions of lack of resources generally focus on the financial, educational, and familial. As criminal justice professionals, we must also include within the definition of poverty, limitations of cognitive, problem-solving resources.

Having financial, educational, and familial resources give individuals the opportunity and capacity to develop, identify, and utilize life options. With such resources cognitive and problem-solving skills are nurtured and enhanced. In contrast, poverty does not offer individuals the opportunity to develop a repertoire of options to life situations. At the same time, the condition of poverty generates a range of emotions, such as depression, anxiety, fear, anger, helplessness, despair, and emotional isolation. These emotions may be managed in adaptive behaviors, or in maladaptive or criminal behaviors.

Because poverty inhibits the ability to develop a repertoire of socially acceptable management skills, individuals may develop those behaviors that are self-destructive and that, ultimately, are destructive to society as a whole. For example, such individuals may use school delinquency, mind-altering substances, manipulation, nomadic lifestyle, sexual deviance, or violence to manage the conditions (emotional and material) of poverty. In general, persons who receive emotional and material nurturance are able to expand the repertoire of life management to attain their goals and to achieve a greater degree of emotional equilibrium.

## LIVING IN THE STATE OF POVERTY

Like many poor people, the public defender's clients must often contend with a severe shortage or absence of even the most basic resources. Many live daily in apartments with no heat, hot water, cooking facilities, or sanitary bathing facilities. Increasingly, recent studies reveal the extreme shortage of adequate health care in poor communities, and attribute the rise of AIDS and higher incidence of HIV positive persons to the absence not only of medical facilities, but also to the absence of educational structures. Such structures are needed to encourage and support poor people - who are at highest risk of AIDS and other diseases - in using the medical care available.

Data from the Centers for Disease Control, for example, reveal that AIDS is the leading cause of death among black women between the ages of 15 and 44, in New York and New Jersey. Significant proportions of the poor population are victims of childhood abuse, are caught in a generational cycle of violence, alcoholism and drug abuse, and disorganized home environment. Reports of child abuse and neglect have risen over 200% from 1980 to 1988. Total reports of child abuse secondary to drug use rose by 72% between 1986 and 1987; and alcoholism is implicated in over 70% of all murders and violent crimes.

Thirty-nine percent of our nation's crimes (homicide, rape, aggravated assault, burglary, arson, larceny, and motor vehicular theft) are committed by youth. Nationwide, the high school dropout rate is increasing, along with adolescent delinquency, substance abuse, and violent behavior. Studies show that high school dropouts demonstrate higher rates of antisocial behavior and are more apt to be unemployed. It is estimated that one million teenagers will drop out of school this year; and recent national data reveals that homicide is the leading cause of death among young black males between the ages of 15 and 24 (and among adult black males between the ages of 18 and 44).

From 1978 to 1987, firearms accounted for 78% of homicides among young black males. Overall, firearm related homicides accounted for 96% of the increase in the homicide rate for young black males from 1984 to 1987. Other data reveal that for men 25 to 34 years of age, the black homicide rate is seven times that of whites; the homicide rate for Hispanics is two and a half times higher than that of whites.

Homelessness has now become another of the many faces of poverty in America.

From 1981 to 1988, the number of homeless individuals rose by 250%. Disintegration of the family has resulted in the rejection and abandonment of our youth. Homelessness of entire families intensifies the family's pressure to meet other responsibilities, such as providing security, health care, and education for young children. The U.S. Bureau of the Census estimates that 13 million children, or 1 out of 5 children, in America is poor. Our nations' youth, at the brink of adulthood, sell their bodies or illegal substances to meet life's basic needs for food, shelter, and protection. It is currently estimated, for example, that 35 to 40% of homeless persons are in need of drug treatment, and that many engage in criminal activities to support their habits.

An additional component for the person living in the state of poverty is isolation. Poverty physically and psychologically isolates the individual. It precludes the opportunity to experience people in positions of authority or power as peers or equals. The poor client has little opportunity to develop relationships with professional, educated members of society, and, therefore, is generally uncomfortable relating to the attorney.

## THE CLIENT-ATTORNEY RELATIONSHIP

Despite the harsh realities poor people face daily, many professionals, including attorneys, generally expect poor clients who seek legal assistance to perform and behave in ways familiar to their own experience. Often these professionals' knowledge of poor people is limited to what they read in magazines or newspapers, or the images they view nightly on television broadcasts. It is imperative that public defenders understand their clients' experience so as to engage the clients in the defense process. Anyone, including attorneys, who interacts with individuals who are feeling despair, helpless, frustrated, and angry will be affected by such feelings. Our experience has shown that these behaviors may generate in the professional, in this case the attorney, feelings of fear, anger, anxiety, frustration, and withdrawal.

The following examples highlight how clients' feelings and behaviors can generate in attorneys responses that impede the defense process:

**Example 1.**

*The client* is a young black woman who is inarticulate and illiterate. The never-wed mother of four children, has received public assistance since the age of 15, when she gave birth to her first child. She feels hopeless and helpless. In this emotional state, she abdicates her responsibility to participate in the defense process.

*The attorney* responds to the client's behavior by feeling angry and frustrated, and by labeling the client as "difficult" or "truculent." The attorney tells this client: "I can only see you two more times. Then I'll have to present you to the judge." Or, the attorney tells the client: "Please fill out these applications. Leave them in the folder outside."

**Example 2.**

*The client* is black, in his early thirties, muscular, wears an earring, and always dresses in a clean, long, white flowing garment and turban.

*The attorney* feels frustrated and threatened by the client, and labels the behavior as "bizarre," "acting out," and "hostile." Consequently, the attorney fails to build on the client's areas of competence and avoids the client. The attorney tells this client: "Well, I already have 300 cases," or "I've been in court and the judge has said, 'Let's get this case over with!'"

**Example 3.**

*The client* is white and in his early twenties, homeless prior to arrest, he is dirty and lice carrying, moves and speaks aggressively, and is apparently high from an illegal chemical substance.

*The attorney* fails to take into account what this client has to say on his or her own behalf. The attorney tells his fellow-public defenders: "These clients always lie," or "They're just being manipulative." The client's behavior generates in the attorney anger, contempt, and fear. The attorney attempts to distance himself or herself from the clients' anger, frustration, and impatience by not giving serious consideration to the client's concerns.

In each case, the attorney responds to the poor client by being insensitive, judgmental, punitive, and by stigmatizing, labeling, and denying the client a voice.

The following behaviors are likely to have a deleterious effect on the attorney - client relationship and the defense process as a whole:

- The attorney's limited interaction conveys the message that the client is unworthy, "you're not worthy of my time."
- The attorney's silence communicates disinterest and disengagement.
- The attorney's body language (avoiding eye contact, failing to shake hands, moving away, and so on) can convey discomfort, fear, contempt, or emotional distance.

It is important that the attorney provide a relationship that is different from the client's experience and expectations, at the same time recognizing that the clients may likely re-create the negative interactions that have characterized their lives.

## ENHANCING THE CLIENT-ATTORNEY RELATIONSHIP

The public defender can enhance the relationship with clients by recognizing and identifying those behaviors that impede the defense process. Through empathy and objectivity, the attorney can view clients' behavior within the context of their poverty. This perspective helps the attorney better understand what the client is experiencing, and the limited repertoire with which the client attempts to cope with poverty.

In enhancing the attorney-client relationship it is critical for attorneys to understand how the stimulus (the clients' anger, anxiety, frustration, and so on) affects them. They also must recognize that although they may be unable to change that stimulus, nonetheless as professionals, they can identify their feelings generated by the client and can learn to manage these feelings.

The attorney may use the following techniques to improve management of their feelings and to achieve a more effective relationship with clients. The attorney needs to:

- acknowledge the feelings of the client, regarding fears and resistance to legal assistance, but avoid becoming consumed by such feelings.
- set limits and structure where appropriate, while being sensitive to the client's feelings.
- give some degree of support directly to the client, so as to help him or her cope with the reality of difficulties and conflicts concerning the charges.
- maintain an active role in the client's defense, to further the relationship.
- remain objective while communicating understanding.
- share emotional reactions when appropriate; avoid hiding behind intellectualization or position.

# POVERTY TRENDS IN KENTUCKY 1979-1986

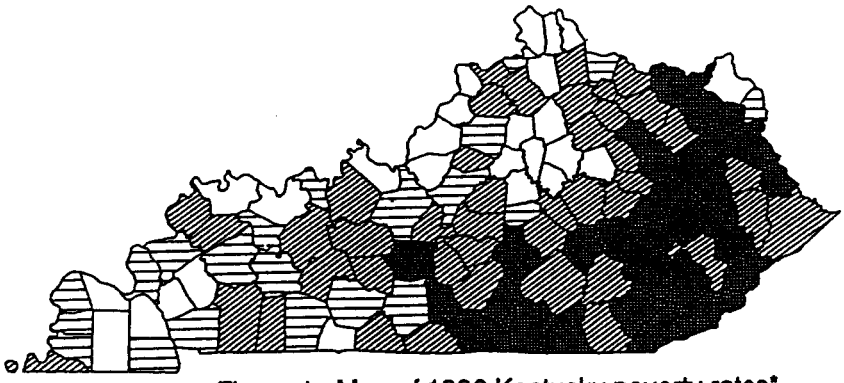


Figure 1: Map of 1986 Kentucky poverty rates*

POV86 <=15.0 15.1-20.0 20.1-30.0 30.1+

The estimates indicate that poverty has increased in Kentucky in the 1980s when compared with the poverty rate for 1979. The estimated 1986 rate is 18.2%, slightly above the 1979 rate of 17.6%. The number of people estimated to be in poverty was 678,000, a 36,700-person increase (5.7%) over 1979. However, the trend since 1983---when poverty hit its most recent peak of 19.9% or 739,300 people---has been one of steady decline.

Eastern Kentucky continues to have the largest number of counties with high poverty rates. (See Figure 1.) Many counties in that region had poverty rates of 30% or higher in 1986. Nine counties had poverty rates above 40%, including the seven contiguous counties of Elliott, Morgan, Wolfe, Breathitt, Owsley, Clay, and Knox. The other two counties with such high poverty rates are McCreary and Clinton in the Lake Cumberland region. The county with the highest poverty rate is Owsley County, where an estimated 52.9%of the population was in poverty in 1986.

Not only does eastern Kentucky have a high rate of poverty, the rate has increased since 1979. (See Figure 2.) Fifteen of the 22 counties where poverty rates between 1979 and 1986 increased by 4 or more percentage points are in eastern Kentucky. Elliott and Wolfe counties have the unenviable position of being on the list of top ten counties in the state in terms of both the overall rate of poverty and the increase in that rate.

In contrast to eastern Kentucky, most counties in the Bluegrass Region have low poverty rates, which have continued to decline even further. Among the ten counties with the lowest poverty rates in 1986 were Fayette, Anderson, Woodford, and Franklin. The other six counties were in the Louisville and Cincinnati metropolitan areas: Jefferson, Bullitt, Oldham, Boone, Kenton, and Campbell. The estimates indicate a decrease in the poverty rate for 24 counties. But the only significant decreases were in the Lexington metropolitan area, where the poverty rate estimates declined by 8 points in Woodford County, 4 points in Fayette County, and 2 points in Clark and Scott counties. The substantial decline in the estimated poverty rate for Woodford County was the result of per capita income increasing by 33.6% while per capita income maintenance payments fell by 30.0 percent (in constant dollars). In Fayette County, constant dollar *per capita* income increased by 12.5% and *per capita* income maintenance payments fell by 17.2 percent.

Jefferson County had the largest number of persons estimated to be in poverty in 1986 (75,500) and the largest decline in the number of persons in poverty between 1979 and 1986 (-8,900). Fayette County was second in both the number of persons in poverty (20,700) and the decline in this number (-6,700). In contrast, Pike County, with the third largest poverty population (20,300 people), had the largest increase in persons below poverty (4,700). Urban counties have larger numbers of persons in poverty but lower poverty rates, relative to rural counties. Many rural counties have relatively small poverty populations but high poverty rates because they have fewer people overall. Obviously, the pattern of the geographic distribution of poverty one sees is dependent on whether absolute numbers or percentages are used.

Another perspective on the geographic distribution of poverty is provided by dividing the number of persons in poverty by the geographic size of the county rather than by its population size. This measures the number of persons in poverty per square mile of the county (*i.e.*, the spatial density of the poverty population).

No single measure provides the best estimate of the spatial distribution of poverty but each of the three measures presented provide valuable information. As a percentage of total population in a county, rural counties---particularly in eastern Kentucky---are most affected by poverty. In actual number of persons in poverty and in the spatial density of poverty, urban counties are more affected. Any comments or questions about these estimates should be directed to the authors at the Urban Studies Center.

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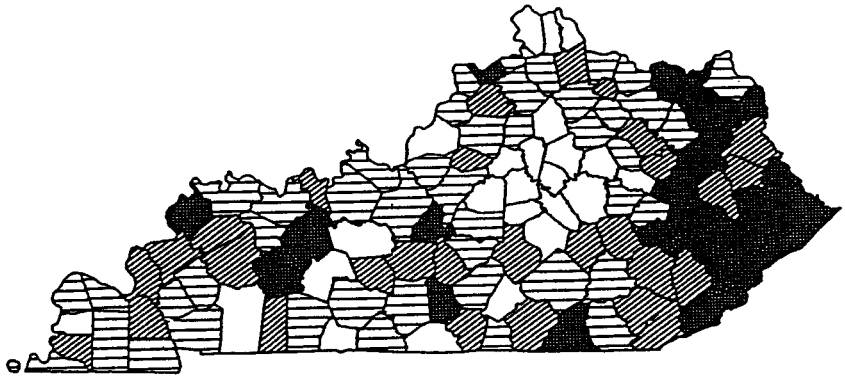

Figure 2: Map of change in Kentucky poverty rates, 1979--1986*

CHG < 0.0 0.0-1.9 2.0-3.9 4.0+

- be aware of his or her attitudes and mannerisms.
- re-frame situations so as to give the client a sense of control and options.
- remain aware of body language and eye contact.
- enable the client to understand the reality of the situation: what is the client's role, what is the attorney's role in the defense.
- avoid making assumptions. Whether this is the client's first, second, or third experience with the criminal justice system, the attorney must discuss step-by-step the legal process.

Rather than suggesting that attorneys should not be affected by the clients' behavior, we offer these techniques to increase their awareness of various issues and their ability to manage them. The management process involves three steps.

First, the attorney *identifies* these feelings, bringing to the conscious level anger, frustration, and indifference, and resisting ambivalence about seeing the client. It is helpful for the attorney to pay attention to the client's feedback. Is the client saying, I don't trust you, I don't want to work with you, You're impertinent and impatient; or I'd rather have another lawyer.

Second, the attorney *labels* the feelings. For instance, he or she may note, I'm feeling angry, contemptuous, or frustrated. In labeling the feeling, the attorney is able to pinpoint the area of difficulty and to focus on this area, apart from other emotions or concerns.

Third, the attorney *manages* the feelings. He or she acknowledges the feelings and how they affect the relationship with the client. The attorney can now make a conscious decision to control the feelings through the management techniques outlined earlier. In addition, attorneys can discuss these feelings with colleagues, which can further aid in overcoming resistance they may have in their clients' defense. The process of airing concerns enables attorneys to reduce burnout, a major problem for public defense lawyers.

## CONCLUSION

In undertaking this process through identification, labeling, and management, public defenders become *client - centered.* That is, as professionals, they hold to a belief in the *fundamental worth of their clients as human beings.* Only in establishing mutual respect, recognizing their clients' feelings, and managing their own responses can attorneys build the most effective defense. Public defenders, in their commitment to poor clients, provide a service vital to society as a whole. We have suggested these approaches in the hope that they will provide attorneys with additional resources for working at the highest level of legal assistance.

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*Frank Badillo is a psychiatric social worker who serves as Mental Health Consultant and Forensic Consultant to the U.S. Department of Labor, Job Corps, and Alfonso Associates; serves as Corporate Trainer for private EAP firms, and is Clinical Supervisor at Riker's Island, under Montefiore Prisons Health Services, the largest jail in the world. He received the MSW from Columbia University in 1980. He lectures nationwide on minority mental health, substance abuse, and inmate issues.*

[1] The Mentally Ill in Prisons: A Review. Ron Jemelka, Ph.D; Eric Trupin, Ph.D: John A. Childs, M.D.: *Hospital and Community Psychiatry* May 1989. Vol. 40. No. 5 pp. 481 - 491.

[2] "An Overview of Psychiatric Treatment Approaches to Three Offender Groups. " Joseph D. Bloom, M.D.; John McD. Bradford, M.B.; Lial Kofoed, M.D. *Hospital and Community*, February 1988. Vol. 39. No. 2 pp. 151 - 158.

[3] *The Forgotten Half Pathways to Success for America's Youth and Young Families.* The William T. Grant Foundation Commission on Work, Family and Citizenship. Nov. 1988.

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[5] "New Poor in America.: Isolationism in an International Political Economy. " *Social Work*, May, 1989 Vol. 34. No. 3 pp. 227 - 233.

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[9] William Raspberry's article, "Excess Deaths" Friday, October 26, 1990, *Washington Post.*

[10] Arnold P. Goldstein and Harold Keller. Aggressive Behavior: Assessment and Intervention Pergamon Press. New York, 1987.

[11] Era L. Feindler and Randolph B. Ecton: A Adolescent Anger Control. Cognitive - Behavioral Techniques. Pergamon Press., New York, 1986.

### HOPELESSNESS

The behaviors displayed by inmates because of poverty are multi-faceted. Perhaps the most striking of these behaviors is that of apathy and hopelessness. It is displayed in many ways, but most frequently is expressed as mistrust and anger. The mistrust is directed at anyone representing the "system" including their attorneys, teachers, and others trying to assist. Within a correction setting this mistrust often turns to anger, not only at staff, but other inmates. Incidents of verbal aggression and physical assault result. The results of such incidents become a cycle that only isolates the inmate, but in fact reinforces their feelings of hopelessness. As a barrier to helping the inmate, it may become insurmountable.

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# 22% of Kentucky Kids in Poverty

*13th Worse in the Nation*

More than 1 of every 5 children in Kentucky lives in poverty, according to a study from a Washington research group. The "Kids Count" report, issued by the Center for the Study of Social Policy, ranked Kentucky's child impoverishment rate as the 13th worst in the nation. The report noted that 22.2% of Kentucky's children lived in poverty in 1989, compared to 21.6% in 1979.

The overall results, however, gave officials some optimism that the lives of Kentucky's children are improving. But they say much more work is needed. "There's a long way to go to meet our responsibility to kids," said David Richart, executive director of Kentucky Youth Advocates, a non-profit organization interested in the welfare of children. "But we're certainly set in the right direction."

The study used census information and vital statistics to compare conditions of children in or around 1980 with their conditions in the later part of the decade. Most of the latest figures were from 1988. Kentucky ranked 34th among the 50 states and the District of Columbia, based on eight indicators dealing with the health and welfare of children. The state's ranking dropped two spots from a year ago, although it showed improvement in five of the indicators, including the infant mortality rate and juvenile incarceration. Between 1980 and 1988, the infant mortality rate improved from 12.9 deaths per 1,000 live births to 10.7, the report says.

Kentucky's incarceration rate for youth was only 69 per 100,000 juveniles, down from 77 in 1979. The national average is 166. Richart said the incarceration statistics are misleading because the report did not include Kentucky youth who are held in juvenile sections of adult jails. About 3,500 juveniles a year are placed in those facilities, he said.

Judith Weitz, who coordinated the study, was not optimistic about the situation nationally. She said the 1980s were a "decade of deterioration for children" across the nation. "America's fate in the 21st century depends on how we treat our children," said Ms. Weitz.

## Ranking the Well-being of Kentucky's Children

| | AVERAGE | | |
|---|---|---|---|
| | Kentucky | National | Rank |
| Percent of babies with low birth weight (1988) | 6.7% | 6.9% | 24th |
| Mortality rate per 1,000 births (1988) | 10.7 | 10 | 35th |
| Death rate per 100,000 children (1988) | 34.3 | 33.2 | 32nd |
| Violent death rate per 100,000 teens (1988) | 79.9 | 69.7 | 34th |
| Percent of teens as unwed mothers (1988) | 8.4% | 8.2% | 30th |
| Jail rate per 100,000 youths (1987) | 69 | 166 | 4th |
| Percent of children in poverty (1985 - 1989) | 22.2% | 20.1% | 38th |

According to the findings, child poverty, births to unmarried teens and teen-age violent deaths increased dramatically nationwide in the last decade. While Kentucky ranked 34th overall, Ohio ranked 23rd and Indiana 30th. The state of Vermont, which ranked first, was the only state to meet all three national health goals for the year 2000 for infant mortality, child death rates and the percentage of babies born with a low birth weight.

Kentucky was one of 41 states which showed an increase in child poverty during the 1980s, Ms. Weitz said.

The report said Kentucky made progress during the 1980s on improving its high school graduation rate. The survey found that 69% of Kentucky's youth graduated from high school in 1988, up from 65.9% in 1982, but below the national average of 71.2%.

Ranking the well-being of Kentucky's children. Kentucky ranked 34th among the 50 states and the District of Columbia based on a composite rating of eight child well-being indicators.

**ADAM CONDO, Kentucky Post** Washington Bureau. SOURCE: The Center for the Study of Social Policy, Washington. Reprinted by permission. *The Kentucky Post*, February 2, 1991.

# Kentucky's Poor Children

*Combining the Will with the Way*

Childhood poverty has increased such that *the United States has became the first civilization in history in which the poorest population group is children.* Not coincidentally, between 1978 and 1987, national spending on programs for children dropped 4%.

How can the 1991 gubernatorial candidates ignore the fact that almost 1 in 3 Kentucky children are poor? We suspect that they will not. We suspect that we will hear the time-worn phrases, the rhetoric about children as our greatest natural resource, talk of investing in children and saving money in the long run. But will the candidates address the real issues surrounding solutions to childhood poverty?

### SELF-SUFFICIENCY

A buzz word for the 1990s is self-sufficiency. The idea that individuals and families both should and can provide for themselves - if they just work hard enough - has broad appeal. How many Kentuckians say "Well, I grew up poor, and I turned out all right?"

Despite this claim, there are a number of trends that suggest self-sufficiency will continue to be an elusive goal for many families no matter how hard they are willing to work. Many jobs simply do not pay enough to support a family, given the rising costs of child care and health care. Too few people realize that most poor families are working families. In fact, at least 1 in 6 poor children has a full-time employed parent. A study conducted in Louisville several years ago estimated that a single parent with two children would need to earn over $7 per hour to meet the family's most basic needs.

Although education and training programs for the unemployed are laudable, the benefits of these programs without economic development are dubious. We can train people for jobs, but where will they work? In spite of job training programs, a large number of children will continue to live in poverty because their parents will have no jobs, only part-time jobs, or jobs that only pay the minimum wage with little chance of advancement.

### USE WHAT WE KNOW

Simply spending money on children will not necessarily improve the quality of children's lives - the money must be spent in the right way. Lisbeth Schorr, in her important book ***Within Our Reach: Breaking the Cycle of Disadvantage***, points out that we really do know how to make a difference in children's lives, how to change what she calls "rotten outcomes."

After reviewing a number of successful model programs, Ms. Schorr concludes that they succeed in helping children and their families because they are intensive, comprehensive, and flexible. We have the beginnings of programs with these characteristics in Kentucky in the family-based services model for child protective services, the family resource and youth service centers in the Kentucky Education Reform Act, and the plans developed to serve children with serious emotional disturbances. In these and other current and future programs, we must heed Ms. Schorr's warnings against the "lure of replication through dilution" and the heavy hand of bureaucracy. In the first instance, the temptation is to look at a model program that is working and expand it but without the same amount of thought and resources. The second warning addresses the fragile nature of the helping relationship and the negative impact that standardization can have on that relationship.

Our challenge to the gubernatorial candidates is not more talk about the needs of Kentucky's poor children but implementation of real solutions. Lou Harris in a landmark 1986 poll of American attitudes towards children found "people not only want to help children generally, they want particularly to help children who are living in poverty." He warned that politicians who ignore these pleadings do so at their own risk. And, we would add, at the risk of our own futures.

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## 4.21 MILLION FAMILIES RECEIVE AFDC

**Who gets AFDC?**

The American Public Welfare Association reported Feb. 27 that, as a result of the recession, AFDC benefits are going to a record 4.21 million families, nearly half a million more than at the height of the 1981 recession. And, according to the 1990 "Green Book," the authoritative congressional source of poverty program data:

The average family size for welfare recipients is three (a mother and two children), though more than 40 percent of women on welfare have only one child.

More than 85 percent of welfare families are headed by women who are divorced or separated from their spouses (34.6 percent) between ages 20 and 24.

Just over 6 percent of AFDC mothers work either full or part time.

While a significant percent of all persons on welfare will be enrolled for less than two years (30 percent) or less than four years (50 percent), a majority of persons enrolled in AFDC at a point in time are in the midst of what will be long periods of welfare receipt (65 percent): - the average monthly payment to an AFDC two-person household varies from state to state, from Alabama's $88 to Alaska's $752.

In fiscal year 1989, AFDC expenditures, which are shared by the Federal government and the states, totaled $17.5 billion. Other costs are incurred because AFDC families are automatically eligible for other government assistance programs, such as Medicaid and Food Stamps.

Until October of 1990, only single, non-working mothers with dependent children were automatically eligible for AFDC.

The 1987 Family Support Act, however, extended benefits to families where the father is unemployed for up to six months in any 12-month period. That same legislation emphasized child-support enforcement and job training for AFDC heads of households.

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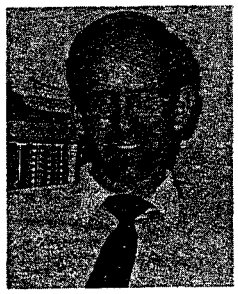
# THE CRIMINAL CASELOAD IN KENTUCKY TRIAL COURTS:

## *A COMPARATIVE ANALYSIS OF CASES FILED VS THE DPA CASELOAD*



**BILL CURTIS**

### CASE COUNTING DIFFICULTIES

Determination of the criminal caseload in Kentucky is a confusing and difficult task given the data available and the manner in which it is organized. This is true for both the Administrative Office of the Courts (AOC) and the Department of Public Advocacy (DPA).

At present, neither agency's data gathering and compilation systems are capable of providing a precise criminal caseload count. In each agency's caseload data summaries there are categories of cases which include both criminal and non-criminal cases. It is commonly known that many cases in the trial courts are not criminal. There are thousands of civil cases. What may not be commonly known is that several types of cases requiring representation by the DPA are not criminal in nature. For example, the DPA's Division of Protection and Advocacy provides representation to indigent developmentally disabled persons, KRS 31.030 (9).

A significant problem with the DPA'S case count is that contract attorneys in many counties consistently report no cases. During Fiscal Year 1990 no defender cases were reported from Anderson, Bell, Bracken, Crittenden, Cumberland, Fleming, Grant, Hancock, Jessamine, Lawrence, Mason, Scott, Spencer, Union, and Webster counties. Additionally, during FY 1990 the Fayette County caseload was under reported by an estimated 5,000 cases. As a result of these reporting problems, the numbers of cases presented for the DPA in this article are significantly less than the "real" caseload.

### DPA'S CASE RESPONSIBILITY

The types of cases requiring representation by a public advocate are set forth in the Kentucky Revised Statues, Chapter 31. Eligible for representation are needy persons charged with a felony, a misdemeanor, a traffic offense or any offense any penalty for which includes the possibility of confinement or a fine of $500 or more; or any legal action which could result in the detainment of a defendant. The DPA is also required to provide representation to needy persons in involuntary commitment proceedings, KRS Chapter 202A. These cases are not criminal. Additionally, the DPA is required by statute to provide representation to needy juveniles charged with felonies, misdemeanors and status offenses, KRS 31.100. Status offenses are not crimes. They are offenses for which persons may be detained by virtue of their age, *e.g.*, truancy, curfew violation, runaway.

### CASELOAD FIGURES

Table 1 shows District Court AOC summary data for FY 1985 through FY 1990. Civil, small claims, probate, and domestic violence cases are not listed. The first column, felonies, includes all persons charged with serious offenses. These offenses, punishable by a year or more in

### KRS 31.110 Persons benefited

(1) A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having commited, or is being detained under a conviction of, a serious crime, is entitled:

(a) To be represented by an attorney to the same extent as a person having his own counsel is so entitled; and
(b) To be provided with the necessary services and facilities of representation including investigation and other preparation. The courts in which the defendant is tried shall waive all costs.

(2) A needy person who is entitled to be represented by an attorney under subsection (1) is entitled:

(a) To be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation or parole;

### KRS 31.100 Definitions

(4) "Serious crime" includes:

(a) A felony;
(b) A misdemeanor or offense any penalty for which includes the possibility of confinement or a fine of$500 or more;
(c) Any legal action which could result in the detainment of a defendant; and
(d) An act that, but for the age of the person involved, would otherwise be a serious crime.

TABLE 1

**AOC KENTUCKY DISTRICT COURT CRIMINAL CASELOAD FY 85- FY 90**

| | FEL | %Change | MSD | %Change | JUV | %Change | TRAF | %Change | MH&DIS | %Change | TOT AL | %Change |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| FY85 | 30,305 | | 174,018 | | 36,175 | | 255,103 | | 5,027 | | 245,525 | |
| FY86 | 33,480 | 10.5 | 175,856 | 1.1 | 39,254 | 8.5 | 279,498 | 9.6 | 3,942 | -21.6 | 252,532 | 2.9 |
| FY87 | 35,540 | 6.2 | 145,677 | -17.2 | 40,769 | 3.9 | 297,754 | 6.5 | 4,055 | 2.9 | 226,041 | -10.5 |
| FY88 | 35,636 | .3 | 142,731 | -2.0 | 30,113 | -26.1 | 280,690 | -5.7 | 4,114 | 1.5 | 212,594 | - 5.9 |
| FY89 | 40,065 | 12.4 | 152,125 | 6.6 | 32,709 | 8.6 | 274,804 | -2.1 | 4,761 | 15.7 | 229,660 | 8.0 |
| FY90 | 43,290 | 8.0 | 168,401 | 10.7 | 37,834 | 15.7 | 317,542 | 15.6 | 5,458 | 14.6 | 254,983 | 11.0 |
| 6 Yr Avg. | 36,386 | | 159,801 | | 36,142 | | 284,232 | | 4,560 | | 236,889 | |

**TABLE 2**

**DPA DISTRICT COURT CASELOAD FY85-FY90**

| | FEL | %Change | MSD | %Change | MH&DIS | %Change | TOTAL | %Change |
|---|---|---|---|---|---|---|---|---|
| FY85 | 13,854 | | 31,689 | | 1,698 | | 47,241 | |
| FY86 | 16,328 | 17.9 | 36,060 | 13.8 | 1,720 | 1.3 | 54,108 | 14.5 |
| FY87 | 18,258 | 11.8 | 37,710 | 4.6 | 1,744 | 1.4 | 57,712 | 6.7 |
| FY88 | 18,120 | -.8 | 35,912 | -4.8 | 1,593 | -8.7 | 55,625 | -3.6 |
| FY89 | 21,694 | 19.7 | 38,216 | 6.4 | 1,817 | 14.1 | 61,727 | 11.0 |
| FY90 | 23,668 | 9.1 | 38,350 | .4 | 2,051 | 12.9 | 64,069 | 3.8 |
| 6yr. Avg. | 18,654 | | 36,323 | | 1,771 | | 56,747 | |

prison, are defined by statute. Felony cases in which a district judge rules that there is a probable cause to believe a felony offense has been committed are bound to the Grand Jury for a hearing. If the Grand Jury rules that there is sufficient evidence to believe that a felony has been committed, a felony indictment is returned. The case then goes to the circuit court. (See Table 3, AOC Circuit Court Criminal Caseload FY 1985 - FY 1990.)

Of the 43,290 felonies filed in district court during FY 1990 only 13,532 resulted in indictments by the Grand Jury. Many cases bound to the Grand Jury are dismissed by the Grand Jury due to a lack of evidence. In addition, many cases initially filed as felonies in the district courts are dismissed by the court or amended to misdemeanors.

The AOC district court data (Table 1) indicate that for the felony category from FY 1985 through FY 1990 there were increases each year with significant increases in 1986 and 1989, 10.5% and 12.4 %, respectively. The DPA district court caseload follows a similar trend (See Table 2, DPA District Court Caseload FY 1985 - FY 1990) during the same time period, but with more substantial increases during FY 1986 (17.9%) and FY 1989 (19.7%).

The AOC district court misdemeanor column (Table 1) contains all persons charged with the less serious crimes, punishable by a jail sentence of twelve months or less and/or a fine of $500. All misdemeanor offenses are defined by statute. Table 1 indicates that misdemeanor cases in Kentucky decreased significantly (17.2%) in FY 1987 and increased significantly (10.7%) during FY 1990.

The overall trend from FY 1985 through FY 1988 is one of decline. Although misdemeanors increased substantially during FY 1989 and FY 1990, they still have not reached the peak level of 175,856 cases filed during FY 1986.

A direct comparison between the DPA misdemeanor (Table 2) and the AOC district court misdemeanor columns cannot be made due to the fact that the DPA includes all of its juvenile and traffic cases with its felonies and misdemeanors. Most juvenile and traffic cases for which the DPA provides representation are either felonies or misdemeanors. Nevertheless, over the six year period, the trend of DPA misdemeanor cases is one of steady increase, except for FY 1988 when there was nearly a 5% decrease.

From FY 1985 to FY 1990 the DPA misdemeanor caseload increased by 21%. During the same period the AOC district court caseload went up and down, but the FY 1990 caseload was 3% lower than it was in FY 1985.

The juvenile column for AOC district court (Table 1) includes several non-criminal cases. These are dependency/neglect cases, termination of parental rights cases, status offenses, and paternity cases. Additionally, it includes all juveniles accused of criminal offenses. Table 1 shows steady increases in the district courts except for FY 1988 when there was a substantial decrease (26.1%) and during FY 1990 when there was an increase of 15.6%. The DPA district court caseload (Table 2) does not have a juvenile column because, as previously mentioned, these cases are placed in the appropriate felony or misdemeanor category.

The AOC district court column labeled Mental Health and Disability (Table 1) includes involuntary commitment cases and disability cases. The disability cases mostly involve competency issues. The court appoints attorneys to represent needy persons in disability cases. The DPA has no responsibility for representation in this area. The DPA District Court Mental Health column (Table 2) contains only involuntary commitment cases. There were significant increases during the last two years, 14.1% in 1989 and 12.9% in 1990, likely the result in changes in the law which has made all mental health cases involuntary. Since detainment is possible in all cases, all indigents involved in these cases are

## THE SECRET OF NO COUNSEL IN DISTRICT COURT

The hidden little secret in the criminal justice system is that many, if not most, of the people dealt with in district court do not have lawyers, and would be eligible for a public defender. The sad fact is that we have not funded counsel for all those who are eligible to be appointed. We could not represent the 50-75% or so of the people who are eligible in district court. So, people plead guilty without counsel and often without knowing why they need counsel.

Yet, increasingly misdemeanors are used later against our clients. A lengthy misdemeanor record hurts both in a Truth in Sentencing hearing before the jury and at sentencing before the Court. Prior DUIs and suspended licenses can have serious ramifications. Unfortunately, the reliability of many of these pleas of guilt is suspect because many of them are entered without the advice of counsel.

Another interesting part of this is that DPA was underfunded in 1985. From 85-90, DPA's district court caseload increased by 36%. We have yet to catch up, but instead go further in the hole each year. Funding continues to be the crux of the problem. And because we are underfunded, we don't have the resources to attack the failure to appoint eligible persons.

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**TABLE 3**
**AOC CIRCUIT COURT CRIMINAL CASELOAD FY85-FY90**

| | FELONY | %Change |
|---|---|---|
| FY85 | 12,612 | |
| FY86 | 13,380 | 6.1 |
| FY87 | 13,184 | -1.5 |
| FY88 | 12,518 | -5.1 |
| FY89 | 14,411 | 15.1 |
| FY90 | 13,532 | -6.1 |
| 6Yr. Avg. | 13,273 | |

**TABLE 4**
**DPA CIRCUIT COURT CRIMINAL CASELOAD FY85-FY90**

| | FELONY | %Change | %of IND. |
|---|---|---|---|
| FY85 | 7,638 | | 60.6 |
| FY86 | 7,370 | -3.5 | 55.1 |
| FY87 | 6,946 | -5.8 | 52.7 |
| FY88 | 6,573 | -5.4 | 52.5 |
| FY89 | 6,865 | 4.4 | 47.6 |
| FY90 | 7,034 | 2.5 | 52.0 |
| 6Yr. Avg. | 7,071 | | |

## ATTITUDES NEED CHANGING

Many accused indigent citizens who appear in district court are unrepresented by counsel. Often, the assumption is that anyone who has a job does not qualify for a public defender. Obviously, there are many defendants who are marginally employed and cannot afford to hire counsel. If family or friends do not have money and retain an attorney, the defendant may end up representing himself. Sometimes the judge will appoint a public defender at arraignment because the defendant is in jail or unemployed, but will permit the public defender to withdraw when he informs the judge: 1) the defendant now has a job; or 2) a cash bond has been posted for the defendant; or (even) 3) the Commonwealth does not routinely seek jail time for this offense (although a substantial jail term may be available).

District court is just not taken seriously by some participants, and indigent defendants unrepresented by counsel are an everyday occurrence. This is unlikely to change unless there is a change in attitude by the key participants in the system - judges, prosecutors and public defenders.

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eligible for the services of a public advocate.

The traffic column is by far the largest single category of cases reported by the AOC (Table 1). These totals include all felony and misdemeanor traffic offenses and all moving violations which are not criminal cases. DUI cases are in this category. There were 46,094 DUI arrests in Kentucky during 1990. It is safe to say that nearly all of them found their way into the district courts. The DPA is responsible for providing representation to needy persons charged with felony and misdemeanor traffic offenses, but not for moving violations. The DPA traffic cases are included in their respective felony and misdemeanor columns in Table 2.

## DISTRICT COURT CRIMINAL CASELOAD ESTIMATES

Given the data available, is it possible to tabulate a total district court criminal caseload? If a couple of assumptions are made, a reasonable estimate can be offered. However, a precise number cannot be obtained. Since the large majority of traffic cases are not criminal, it makes sense not to include them in the Total column (Table 1). It also seems reasonable to attempt to cancel some of the discrepancy caused by not including criminal traffic offenses in the total by including all juvenile and all mental health and disability cases in the total even though some of these cases are not criminal.

If these caseload/case counting assumptions are accepted, it is possible to discuss a "total" district court criminal caseload as shown in the Total column in Table 1. The data indicate that the "total" district criminal court caseload decreased significantly in 1987 (10.5%) and 1988 (5.9%). During 1989 (8%) and 1990 (11%) the total criminal caseload increased significantly. However, the 1990 total of 254,983 represents an increase of 4% over the 1985 total of 245,525 cases.

The DPA total district court caseload has increased steadily, with the exception of 1988. The 1990 total of 64,069 cases represents an increase of 36% over the 1985 total of 47,241 cases. (Note that these totals are somewhat low due to some non-reporting and under reporting of cases in 16 counties.)

Particularly noteworthy is the fact that many indigents are without counsel even though the DPA provided legal representation to 64,069 needy persons accused of crimes in 1990 in the district courts. However, this figure constitutes only 25% of the total number of criminal cases filed in the district courts (if the caseload/case counting assumptions accepted).

A crucial question which should be raised is who provided representation for the other 75% or 190,914 district court cases. Did they all retain private counsel? It is highly unlikely since it can be conservatively estimated that 75% of the people appearing in the criminal courts are indigent.[1] In any event, this is a rather important question which deserves a precise answer.

Tables 3 and 4 show the circuit court criminal caseload as summarized by the AOC and the DPA. Analysis of this data is far less complicated than for the district courts.

The data listed in table 3 lists the number of indictments returned or felony cases filed in the circuit courts from FY 1985 through FY 1990. In three of the five years the number of cases decreased, but due to a 15% increase during 1989 the 1990 total is 7.3% higher than the 1985 total. Table 4 reflects that due to three successive years of decline the DPA circuit court caseload was 8% lower in 1990 than it was in 1985.

The data in tables 3 and 4 indicate the fact that the DPA provides representation in slightly more than half or approximately 7,000 defendants per year charged with crimes in the circuit courts. Who provides counsel for the other half?

AOC staff conducted an analysis of their 1988 circuit courts data and found that in 48% of the cases a public advocate provided representation. This finding supports the DPA data which indicates that it is providing representation in about half of the cases filed in the circuit courts. 32% of the defendants were represented by private attorneys. 0.6% of the defendants represented themselves. And, finally, there was an unknown category of 13.6%. The AOC is making a concerted effort to obtain and provide on an annual basis data on types of rep-

## THE DAMAGE OF BEING UNREPRESENTED

The majority of people who appear in District Court cannot afford to hire counsel; yet, a public defender is not appointed to represent them despite the mandate in RCr 3.05 that a Judge shall appoint counsel unless the defendant elects to proceed without counsel. Never have I seen a judge inquire as to whether a defendant without counsel has voluntarily, knowingly, and understandingly waived counsel. Most of these people who are not represented by an attorney plead guilty without knowing the elements of the crime, without knowing any possible defenses they might have to the charge. Most of these guilty pleas are subject to challenge because there is no plea colloquy and no finding that the plea is entered voluntarily and intelligently.

Lured by the prospect of merely paying a fine, many indigent clients are so happy they will not be incarcerated that they promise to pay a fine--a promise they find difficult to fulfill when their only source of income is welfare or a minimum wage job. And, if they cannot pay the fine, once again they often are without counsel to defend themselves in court on a contempt charge for non-payment of the fine. All too often the fine that looks so good when they pleaded guilty is then converted into a jail sentence that they must serve.

The consequences of a misdemeanor conviction are rarely understood by the defendant. Only later, they find out that the conviction for DUI, Driving While License Suspended, Trafficking in Marijuana, Unauthorized Use of a Motor Vehicle are all enhanced upon a subsequent offense. In addition, these misdemeanor convictions are often used by the prosecution during the Truth in Sentencing hearing of a felony trial. A long list of relatively minor misdemeanor convictions is damaging evidence to a jury that now must sentence the defendant.

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## THE MANY UNREPRESENTED

My first reaction to the statistical data is that the comparison with AOC's statistics and DPA's is not reflective of the experience in the Paducah office. In Circuit Court, virtually no one goes through unrepresented by someone, whether it's a DPA attorney or private attorney. In reviewing the last couple of months in McCracken County and Graves County, it would appear that DPA represents 75 to 80% of the cases. The remainder would logically be represented by private counsel.

A larger question is what has happened to all these people in District Court. We know from experience that a substantial number enter pleas at arraignment. It can be safely stated that the vast majority of those who do not have representation by DPA go through the system unrepresented. From our experience in this office, the overwhelming majority of cases in District Court that are represented by counsel are represented by DPA. If the statistics prove out that in fact DPA only represents 25% of District Court cases, I believe it would be safe to say that about 70% go unrepresented.

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resentation in both the district and circuit courts.

## CONCLUSION

In sum, neither the DPA nor AOC at present is able to provide the data necessary to answer some very basic questions about Kentucky's criminal caseload. For example, what precisely is the state's criminal caseload? Exactly how many cases is DPA handling? The DPA has recently purchased a new computer system and is in the process of designing a new caseload data collection and reporting system which will provide answers to nearly any question about its caseload. We expect the new system to be operational by July 1. Constant efforts are being made to obtain caseload data from counties where there is either under reporting or no reporting.

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*Bill began with DPA in 1980 as the assistant project director of the Southeastern Public Advocacy Region (SEPAR) with primary responsibility for establishing the DPA'S network of regional offices which now stretches from Pikeville to Paducah. He designed and implemented the DPA's caseload data collection system presently in operation. He is the DPA's chief research analyst and statistician. Being a very resourceful type of person Bill is constantly looking for new ways to better serve our clients. In the immediate future he will be branching out into the areas of jury challenges and change of venue surveys. He has a B.A. Sociology, Washington State University, 1968 and a M.A. Sociology, Kansas State University, 1972.*

## AFFORDING THE RIGHT TO COUNSEL

It is my impression that the fact that DPA handled only 25% of the District Court criminal cases filed in Kentucky in 1990 invites scrutiny. I would expect the misdemeanor percentage to be lower than the felony percentage of cases handled by DPA for a variety of reasons including but not limited to the following:

A. the tendency of more persons charged with offenses below the felony level to proceed *pro se*, and
B. the tendency of many Judges to require defendants to retain their own counsel in misdemeanor matters as opposed to felonies due to the much lower cost of retaining counsel in less serious matters.

I do know that in Boyd County, Kentucky, the rights of indigents to Court-appointed counsel in the non-felony District Court matters is protected to the maximum degree due to judicial diligence in adhering to the requirements of KRS Chapter 31. Although I have no precise figures to cite, it would appear to me that my office is handling far more than 50% of all District Court matters involving clients represented by counsel.

The major concerns from my standpoint are to ensure that the right to counsel is protected fairly and uniformly across the state and that proper accounting and reporting is taking place so that the DPA figures are accurate.

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## FOOTNOTE

[1] J. Thomas McEwen and Elaine Nugent. *"National Assessment Program: Survey Results for Public Defenders."* Institute for Law and Justice. Alexandria, Va., 1990.

## IS FULL KNOWLEDGE OF RIGHT TO COUNSEL PROVIDED?

The number of persons unrepresented by counsel at the District Court level in Kentucky may well deserve greater scrutiny; however, the issue needs refinement. The central inquiry should relate to determining the number of individuals who proceed through the system without an attorney in the absence of a knowing, intelligent and voluntary waiver. A valid waiver of the right to counsel is of no particular consequence to the Department. The problem arises where judges and prosecutors, while not necessarily acting maliciously, concern themselves more with clearing dockets than insuring that each defendant acts with full knowledge of his right to counsel. A probing inquiry into a defendant's true understanding of the pitfalls of proceeding without an attorney seldom accompanies the "processing" of relatively minor crimes. A defendant is, at best, told that if he wants to take this "really good deal" and walk out of court that day that all he needs to do is waive his right to a lawyer and enter a plea. After going through this process several times, the Commonwealth lowers the boom after which appointed counsel finally arrives and faces a substantial criminal history accrued by a defendant never represented by an attorney who could have held the process partially in check. Elimination of this problem rests with the court insuring that every defendant truly understands the consequences of proceeding without an attorney and the corresponding entitlement to free representation if indigent.

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# NATIONAL ASSESSMENT PROGRAM:

## *1990 SURVEY RESULTS FOR PUBLIC DEFENDERS*
## *75% of Accused Are Indigent*

### INTRODUCTION

The National Institute of Justice (NIJ) has conducted the National Assessment Program (NAP) over the past nine years as a means of identifying and prioritizing the needs of local criminal justice agencies. In 1986 and again in 1990, NIJ contracted with the Institute for Law and Justice (ILJ) to administer the NAP survey of local agencies. NIJ published several Research in Action issues detailing the 1986 results. There were also several follow-up research projects including the investigation of high-speed police pursuits, computer crime, drug testing in police agencies, narcotics enforcement in public housing, and the use of microcomputers in law enforcement. For the 1990 survey, ILJ again mailed questionnaires to over 3,000 criminal justice practitioners and policy officials to determine concerns and trends among such things as problems with the criminal justice system, workload, operations and procedures, staffing, and department budgets.

The survey sample included 375 counties across the country. Of these counties, 175 had populations greater than 250,000, and 200 counties had populations less than 250,000. Public defenders in the largest city of each county received questionnaires to complete. Of the 292 surveys mailed to public defenders, 194 were returned--a response rate of 66 percent.

The following sections highlight the key findings from the 194 public defender surveys. Attached to this report are the detailed results in survey format.

### BACKGROUND

The survey found that the median budget for public defenders' offices is $753,000. The median budget in the overall jurisdiction was $987,364 for indigent defense systems. Over 80 percent noted that this was an increase from three years ago. Twenty percent said the increase was greater than 30 percent. Two-thirds of the respondents said they received funding from the county government. Almost 60 percent also received funding from the state government. Despite the increased budget in the past three years, more than 70 percent felt the financial resources available to their office were inadequate.

Ninety-four percent of the respondents felt the public defender's budget was less than the prosecutor's budget that covers indigent defense cases. Ninety-one percent said the portion of the prosecutor's budget that covers the cases the public defender's office handles is higher. Furthermore, less than 1 percent of the respondents said their office received money from the federal government for activities related to indigent defense. Of those who do receive federal funding, the median amount was $50,000. Sixty-two percent of the respondents said the prosecutor's office received money for indigent defense cases. The median amount of federal funding was $100,000. In addition, more than 60 percent felt the attorney salaries were lower for public defenders than for prosecutors.

The survey also found that the typical public defender's office is staffed with six attorneys. According to the survey results, the majority of public defenders' responsibilities include misdemeanors, felonies, death penalty trials, drug and juvenile cases, and mental health. In 1990, the typical public defender's office was assigned 1,500 felony cases and 1 death penalty trial. *The median figure for the percent of accused who qualify for indigent defense was 75.* Ninety percent of accused who qualify for representation are represented by the public defender. Forty percent of the respondents said their indigent defense system was both public defender and court-appointed counsel. One-quarter said it was public defender only. Furthermore, in those areas where there is court-appointed counsel, the majority of respondents said judges administer the system.

In larger jurisdictions, public defenders' offices are staffed with 99 attorneys. The median operating budgets for larger offices is $10,624,292. The overall budget for the jurisdiction for indigent defense is $16,900,000. Large offices are also busier. In 1990, the typical large office had 18,000 felony cases and 2.5 death penalty trials assigned to it.

Rates for the average public defender's office were the same for both criminal and civil cases--$40.00 in-court and $30.00 out of court. In the larger jurisdictions, the in-court rate for criminal cases is $40.00, and the rate for out of court criminal cases is $27.50. In-court civil case rates are $36.00, and out of court rates are $31.00. The average hourly overhead rate for private attorneys was $70.00. The hourly rate for private attorneys in large jurisdictions was $150.00. Maximum court-appointed counsel fees for specific cases are as follows:

| Type of Case | Average Agency Max. Fee | Large Agency Max. Fee |
|---|---|---|
| Misdemeanors | $500.00 | $500.00 |
| Felonies | 1,200.00 | 1,225.00 |
| Death Penalty | 3,500.00 | 17,500.00 |
| Juvenile | 775.00 | 500.00 |
| Mental Health | 212.50 | -- |

### CASELOAD

The survey found that an increasing caseload is a major concern of public defenders. Respondents were asked to rate the degree to which certain factors had contributed to the increased workload. The results are listed below.

- 88 percent of the respondents felt the increased caseload was caused by increased drug cases.
- 82 percent said a major cause was that prosecutors overcharge people when they indict them.
- 82 percent also said increased sentencing for certain crimes was a problem.
- 79 percent felt the number of attorneys was inadequate for the caseload.
- 78 percent also stated that a cause was the lack of resources.
- 77 percent said the number of public or contract defenders has not kept pace with increasing caseload.

- 73 percent of the respondents noted that mandatory sentencing contributed to the increase.
- 73 percent also said a major cause was that police overcharge people when they arrest them.

In addition to the overall increased workload, survey respondents noted increases in the number of particular types of cases including drug and child victim cases. Furthermore, the survey found that felony cases are becoming increasingly complex, contributing to the burgeoning caseload. Some of these results are shown below.

- Nearly two-thirds of the respondents felt that child victim cases had increased.
- 63 percent said the number of drunk driving cases had increased.
- 58 percent stated that felony cases are becoming increasingly complex.
- 54 percent said the number of sexual abuse cases had increased in the past three years.
- Half of the respondents cited an increase in the number of death penalty cases.
- 49 percent noted an increase in the number of domestic violence cases.

Increased caseload has also affected plea bargaining. More than three-quarters of the respondents said that the number of plea bargains per attorney has risen as the number of defense cases has risen. More than half of the respondents felt that high court caseloads have increased judge pressure on the defense as well as the prosecution to settle cases.

Respondents were also asked how certain factors contributed to court delays in their jurisdiction. The survey found that the majority of public defenders felt poor case scheduling, failure of the prosecution to comply with discovery rules, and inadequate computer information systems were the primary causes of court delay.

## STAFFING

Staffing problems have always plagued the criminal justice system, including public defenders. Most of the respondents noted shortages in all aspects of staffing. Specific results include the following:

- 80 percent expressed a need for more attorneys.
- 68 percent said they needed additional investigators.
- 65 percent stated that they needed more clerical staff.
- Half noted a need for more paralegals.

Staff recruitment and retention are also problems for public defenders. Low salaries, a lack of resources, and heavy caseload have all contributed to the problem. Specific survey results are as follows:

- 66 percent of the respondents said low salaries or court fees were a problem for staff recruitment. 68 percent said it was a problem with staff retention.
- 65 percent stated that heavy caseload made it hard to recruit staff. 76 percent said burnout from heavy caseloads were a major problem with staff retention.
- 65 percent felt that lack of resources contributed to staff recruitment problems. 50 percent felt the same way in respect to staff retention.

In respect to staff training, public defenders were asked which areas they felt more training was needed in. Some of the results are listed below.

- Two-thirds of the respondents felt advanced trial practice skills were needed.
- 66 percent said training was needed for stress management.
- 60 percent expressed a need for new defender or court-appointed attorney training.
- 55 percent noted a need for more training on death penalty defense.
- 53 percent expressed a need for basic trial practice skills.
- Half of the respondents wanted training on computers for access to legal resources such as Westlaw and Lexis.

## THE EFFECT OF NARCOTICS CASES ON PUBLIC DEFENDERS

As noted earlier, increasing numbers of drug cases are a major cause of increased workload in the court system. With increasing narcotics cases, public defenders noted an increase in the number of drug cases going to trial, mandatory sentencing, and multiple defendant cases. Respondents also noted a need for alternative sentencing and diversion programs for drug offenders. Some results found by the survey are as follows:

- 87 percent expressed a need for drug diversion programs.
- 84 percent felt there is a need for alcohol diversion programs.
- 64 percent of the respondents said a larger percentage of drug cases are going to trial.
- 22 percent noted increases in the number of multiple defendant cases.
- 20 percent said there was a need for the suspension of driver's licenses for drug offenses.

## OPERATIONS/PROCEDURES

The changing nature of crime and criminals in the past few years has had an impact on the operations and procedures of public defenders' offices. The survey found that adequate sentencing alternatives and diversion programs are a major concern of public defenders, particularly in the area of narcotics and alcohol.

- 85 percent of the respondents expressed a need for pretrial diversion programs.
- 68 percent said intensive probation was needed.
- 68 percent felt more community service programs were needed.
- 65 percent called for conditional dismissal (e.g., suspended proceedings).
- 64 percent also said there was a need for work release jail programs.
- 62 percent expressed a need for short-term community incarceration.
- 37 percent said shock incarceration (*i.e.*, boot camps) was needed.

Pretrial problems also plague public defenders' offices. Some of the results found by the survey are listed below.

- 76 percent said a lack of effective early screening by prosecutors was a major problem.
- 52 percent noted pretrial release procedures as a problem.
- 35 percent stated that a lack of formally accepted procedures for plea negotiations was a problem.

In terms of courtroom procedures, respondents cited problems in the following areas: calendaring system, lack of foreign language interpreters, system of voir dire, and management of victim-witness appearances.

The survey also identified a need for various management information systems. The needs which ranked highest

were prior criminal history of defendant, caseload reports and analysis, and victim/witness names. Specific results are as follows:

- Two-thirds said improvements needed to be made on prior criminal history of defendant.
- 57 percent said caseload reports and analysis needed to be improved.
- Half of the respondents expressed a need for improvement on victim/witness names.
- 49 percent said there was a need for a management information system on co-defendant information.
- 48 percent felt improvements should be made in attorney schedule conflict.
- 47 percent expressed a need for pretrial diversion evaluation.

The results of the survey offer little surprises in terms of organization problems. As always, there are significant budgetary and staffing problems. However, it is evident from the results of the survey that the criminal justice system is facing many changes. The effect of narcotics cases on public defender's offices has been substantial. Drug cases have caused increased workload and court delays as well as changes in sentencing guidelines, laws, and more. As one public defender in South Carolina said, "The caseloads dictate many decisions in the dispositions of cases, *i.e.*, a more favorable plea bargain will be offered because there is a need to move the case or a defense lawyer will accept an unfavorable plea bargain because of the [burden] of a large caseload."

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# National Assessment Program Questionnaire for Public Defenders N=194

## Background

**1. What type of indigent defense system does your jurisdiction have? (Check one only.)**

| | | |
|---|---|---|
| 24.2% | a. | Public defender only. |
| 2.1% | b. | Court-appointed counsel only. |
| 7.2% | c. | Contract defender only. (for profit = 4; non-profit = 5) |
| 40.2% | d. | Public defender and court-appointed counsel. |
| 8.2% | e. | Public defender and contract defender. (for profit = 5; non-profit = 5) |
| 12.4% | f. | Public defender and court-appointed counsel and contract defender. (for profit = 13; non-profit = 6) |
| 5.2% | g. | Court-appointed counsel and contract defender. (for profit = 2; non-profit = 6) |

**2. If there is a court-appointed counsel system in your jurisdiction, who administers it? (Check one only.)**

| | | |
|---|---|---|
| 16.5% | a. | Full-time administrator. |
| 10.3% | b. | Part-time administrator. |
| 12.9% | c. | Defender. |
| 30.4% | d. | Judge. |

**3. What percentage of accused in your jurisdiction qualify for indigent defense representation? Median = 75.0**

**4. What percentage of accused who qualify for representation does your office represent? Median = 90.0**

**5. What is your office's 1989 operating budget? Median = $753,000**

**6. What is the current operating budget of the overall indigent defense system in your jurisdiction? Median = $987,364**

**7. What is the source of funding for your office? (Check all that apply.)**

| | | |
|---|---|---|
| 3.1% | a. | Federal government. |
| 59.8% | b. | State government. |
| 65.5% | c. | County government. |
| 8.2% | d. | City government. |
| 1.0% | e. | Foundation grants. |
| 0.5% | f. | Donations. |

**8. Does your office get any money from the Federal government for activities related to indigent defense? If so, how much? Median = $50,000**

**9. a. Does the prosecutor's office get any money from the Federal government for activities related to prosecuting cases involving indigent defendants?**

61.5% Yes If "yes," how much? Median = $100,000
38.5% No

**10. a. How does the indigent defense system budget in your jurisdiction compare to the portion of the prosecutor's budget that covers indigent defense cases? Is the indigent defense system budget? (Circle one only.)**

| | |
|---|---|
| Greater than the prosecutor's | 2.9% |
| Equal to the prosecutor's | 3.5% |
| Somewhat Less than the prosecutor's | 25.0% |
| Significantly Less than the prosecutor's | 68.6% |

**b. How does your budget compare to the portion of the prosecutor's budget that covers the cases your office handles?**

| | |
|---|---|
| Greater than the prosecutor's | 1.1% |
| Equal to the prosecutor's | 8.0% |
| Somewhat Less than the prosecutor's | 23.4% |
| Significantly Less than the prosecutor's | 67.4% |

**11. Are the attorney salaries in your office in comparison to those in the prosecutor's office? (Circle one.)**

| | |
|---|---|
| Greater than the prosecutor's | 4.3% |
| Equal to the prosecutor's | 32.8% |
| Somewhat Less than the prosecutor's | 31.7% |
| Significantly Less than the prosecutor's | 31.2% |

**12. If there is a court-appointed counsel system in your jurisdiction, what hourly rate do counsel earn for the following:**

| Median In-Court | Out of Court | |
|---|---|---|
| $40.00 | $30.00 | a. Criminal Cases |
| $40.00 | $30.00 | b. Civil Cases. |

**13. Are there maximum court-appointed counsel fees for certain types of cases? If so, what are the maximum for:**

| | Median |
|---|---|
| Misdemeanors | $500.00 |
| Felonies | $1,200.00 |
| Death Penalty | $3,500.00 |
| Juvenile | $775.00 |
| Mental Health | $212.50 |
| Other: | n = 10 |

**14. What is the average hourly overhead rate for a private attorney in your jurisdiction? Median = $70.00**

**15. In comparison to three years ago, was your current operating budget? (Circle one number.)**

| | |
|---|---|
| More than 30% higher | 20.4% |
| 20-30% higher | 22.1% |
| 10-19% higher | 24.9% |
| 1-9% higher | 16.6% |
| Unchanged | 3.9% |
| 1-10% Lower | 5.0% |
| More than 10% Lower | 7.2% |

**16. Please indicate whether each of the following activities is a responsibility of your program, and if your program is a public defender or a contract defender, indicate the number of attorneys assigned for calendar year 1989.**

| Assignment | Responsibility Yes | No | Number of Full-Time Equivalent Attorneys |
|---|---|---|---|
| Misdemeanors | 90.6% | 9.4% | 5.0 |
| Felonies | 96.8% | 3.2% | 8.5 |
| Death Pen. Trials | 77.5% | 22.5% | 2.0 |
| Death Pen. Appeals | 41.9% | 58.1% | 2.0 |
| Drug Cases | 97.8% | 2.2% | 4.0 |
| Juvenile | 85.0% | 15.0% | 2.0 |
| Mental Health | 59.2% | 40.8% | 1.0 |
| Patern./Child Support | 46.1% | 53.9% | 1.0 |
| Child Advocate | 27.5% | 72.5% | 1.0 |
| Guardian *Ad Litem* | 20.9% | 79.1% | 1.0 |

**17. What was the total number of death penalty trials your program was assigned to handle in calendar year 1989?**

Median = 1.0 What was the total number of death penalty appeals? Median - 0.0

**18. What was the total number of felony cases assigned to your program in calendar year 1989? Median = 1,500.0**

**19. How would you rate the financial resources available to your office? (Circle one only.)**

| | |
|---|---|
| Very adequate | 1.6% |
| Adequate | 28.1% |
| Inadequate | 50.5% |
| Very Inadequate | 19.8% |

## Criminal Justice System Problems

**20. Listed below are some of the most serious criminal justice system problems identified in a previous nationwide survey. Please rank them according to which one you think is your most significant local problem (1), the next most significant problem (2), and so on through the 7 problems.**

| First Rank | Average | Criminal Justice System Problem |
|---|---|---|
| 3.2% | 5.4 | a. Lack of Staff Skills. |
| 11.3% | 3.7 | b. Prison Crowding. |
| 2.7% | 5.3 | c. Agency Management. |
| 50.8% | 2.2 | d. Staff Shortages. |
| 17.8% | 2.9 | e. Jail Crowding. |
| 4.8% | 4.3 | f. Coordination Among Criminal Justice Agencies. |
| 9.9% | 3.9 | g. Public's Lack of Understanding of Criminal Justice Agencies. |

## Caseload

Overloads of cases and accompanying court delays are problems in many urban areas throughout the country. Workload increases (where the same types of cases are taking longer to prepare and dispose of) are also problems. The National Institute of Justice would like to learn more about some of these problems.

**21. Caseload Contributors. On a scale from 1 to 4, please rate the degree to which the following problems have contributed to increases in caseloads in your program in the past three years.**

| Not a Problem | Minor Problem | Moderate Problem | Major Problem | Caseload Contributors |
|---|---|---|---|---|
| 8.3% | 14.6% | 22.9% | 54.2% | a. Number of Public or Contract Defenders Has Not Kept Pace with Caseload. |
| 27.8% | 33.0% | 24.2% | 14.9% | b. Cases are Delayed in the Court. |
| 5.7% | 15.5: | 22.7% | 56.2% | c. Number of Attorneys is Inadequate for the Caseload. |
| 28.0% | 22.8% | 28.5% | 20.7% | d. Prosecutor's Use of Plea Bargaining is Restricted. |
| 5.7% | 12.4% | 37.6% | 44.3% | e. Increased Sentencing for Certain Crimes. |
| 9.3% | 17.6% | 29.5% | 43.5% | f. Mandatory Sentencing. |
| 12.0% | 24.0% | 40.1% | 24.0% | g. A Larger Percentage of Drug Cases are Going to Trial. |
| 12.0% | 30.4% | 38.7% | 18.8% | h. Felony Cases are Increasingly Complex. |
| 8.4% | 26.2% | 40.3% | 25.1% | i. Child Victim Cases Increase. |
| 33.3% | 17.7% | 24.7% | 24.2% | j. Death Penalty Cases Increase. |
| 1.1% | 10.5% | 24.2% | 64.2% | k. Drug Cases Increase. |
| 18.3% | 33.0% | 34.0% | 14.7% | l. Domestic Violence Cases Increase. |
| 9.9% | 36.1% | 35.1% | 18.8% | m. Sexual Assault Cases Increase. |
| 15.2% | 21.5% | 36.6% | 26.7% | n. Drunk Driving Cases Increase. |
| 43.1% | 34.6% | 16.5% | 5.9% | o. Joinder of Multiple Defendants. |
| 60.7% | 15.6% | 11.6% | 12.1% | p. Death Penalty Appeals Increase. |
| 71.5% | 21.0% | 4.8% | 2.7% | q. Bifurcated Trials. |

**21. Caseload Contributors. (Continued.)**

| Not a Problem | Minor Problem | Moderate Problem | Major Problem | Caseload Contributors |
|---|---|---|---|---|
| 5.2% | 21.8% | 42.5% | 30.6% | r. Police Overcharge People When They Arrest Them. |
| 5.7% | 12.5% | 45.3% | 36.5% | s. Prosecutors Overcharge People When They Indict Them. |
| 30.5% | 31.6% | 20.0% | 17.9% | t. Lack of Pretrial Discovery. |
| 37.0% | 28.6% | 13.5% | 20.8% | u. Restricted Pretrial Discovery. |
| 5.3% | 16.8% | 245.7% | 53.2% | v. Lack of Resources. |
| 13.6% | 16.8% | 33.0% | 36.6% | w. Lack of Adequate Investigative Support. |
| 17.2% | 26.6% | 27.6% | 28.6% | x. Lack of Adequate Sentencing Support |
| | | | | y. Other: n=33 |

**22. Plea Bargaining.**

**Have excessive caseloads/workloads had an impact on plea bargaining?**

| | |
|---|---|
| 75.7% | Yes |
| 24.3% | No |

If yes, please rate the degree to which the following impacts have occurred:

| Not at all | Minor degree | Moderate degree | Major degree | |
|---|---|---|---|---|
| 7.2% | 24.6% | 45.7% | 22.5% | a. As defense caseloads/workloads have increased, the number of plea bargainings per attorney have increased. |
| 69.8% | 19.4% | 6.5% | 4.3% | b. Due to high defense caseloads/workloads, supervisory staff pressure attorneys to recommend that clients accept bargains that would not otherwise be recommended. |
| 15.1% | 41.0% | 34.5% | 9.4% | c. High prosecution caseloads/workloads pressure prosecutors to offer defendants plea bargains that would not otherwise have been offered. |
| 17.1% | 27.9% | 35.7% | 19.3% | d. High court caseloads/workloads have increased judge pressure on the defense to settle cases. |
| 22.3% | 30.9% | 35.3% | 11.5% | e. High court caseloads/workloads have increased judge pressure on the prosecution to settle cases. |

**23. Court Delay. Please indicate the degree to which the following contribute to court delay in your jurisdiction:**

| Not a Problem | Minor Problem | Moderate Problem | Major Problem | Court Delay Contributors |
|---|---|---|---|---|
| 35.3% | 42.6% | 16.3% | 5.8% | a. Too Many Continuances. |
| 22.0% | 33.0% | 26.2% | 18.8% | b. Failure of Prosecutor to Comply With Discovery Rules or Orders. |
| 18.2% | 27.1% | 32.8% | 21.9% | c. Poor Case Scheduling. |
| 53.4% | 28.8% | 11.5% | 6.3% | d. Use of Open Court for Actions Which Could Be Completed in Chambers. |
| 67.2% | 22.9% | 7.3% | 2.6% | e. Delay in Assignment of Defense Counsel. |
| 44.6% | 33.2% | 16.6% | 5.7% | f. Poor Procedures for Notification of Witnesses. |
| 33.9% | 26.5% | 19.6% | 20.1% | g. Inadequacy of Computer Information System. |
| 53.4% | 22.5% | 13.1% | 11.0% | h. Abuse of Discovery. |
| | | | | i. Other: n = 30 |

## *LATE NIGHT COURT TO BE HELD ONLY IN UNUSUAL AND COMPELLING CIRCUMSTANCES*

**Tennessee v. McMullin, 801 S.W.2d 826 [Tenn. Crim. App., 1990].**

A judge sitting on a first degree murder case held court the first day 9:00 a.m. - 11:45 p.m. and the next day 9:20 a.m. - 11:50 p.m. "Of the 38 hours and 50 minutes that elapsed between the jurors being sworn and the end of the trial, court was in session all except 9 hours and 35 minutes." At 827.

The reviewing court held that there was no compelling reason for the schedule. That the jury was sequestered, the entire jury was composed of women and the holidays were approaching [December 20] were held not to be "unusual and compelling circumstances" as cited in *Hembree v. State*, 546 S.W.2d 235 (Tenn. Crim. App. 1976).

The protection of the right of the defendant to the assistance of competent counsel requires that the court schedule not be such that counsel competency is eroded by unusually long in-court hours.

The defendant's right to due process of law requires that the jury deciding guilt or innocence be shielded from fatigue that affects their mental and physical ability to function at normal levels. "Judges must also bear in mind that many jurors hesitate to complain to the court, and are greatly influenced by what the will of the judge is perceived to be. Judges, in deciding the competency of jurors to continue working, should rely upon more than just their expressed agreement to continue. A careful objective judgment should be made. " At 831.

Late night court in criminal jury cases should be scheduled only when unusual circumstances require it, and not then if either defense counsel or any juror objects upon reasonably based grounds having to do with the lateness of the hour. At 801.

## Staffing

The changing criminal justice setting of the past three years has uncovered many staffing problems. The National Institute of Justice would like to have more information about some of these.

**24. Number of Personnel. Please indicate the degree to which you are facing shortages in each of the following areas:**

| Not a Problem | Minor Problem | Moderate Problem | Major Problem | Staff Types |
|---|---|---|---|---|
| 5.7% | 14.6% | 32.3% | 47.4% | a. Attorneys. |
| 27.0% | 23.2% | 20.5% | 29.2% | b. Paralegals. |
| 12.0% | 23.0% | 33.5% | 31.4% | c. Clerical Staff. |
| 11.0% | 21.5% | 28.3% | 39.3% | d. Investigators. |
| 29.0% | 31.7% | 22.6% | 16.7% | e. Administrative Staff. |
| 44.4% | 14.4% | 17.2% | 23.9% | f. Social Workers. |
| 34.4% | 17.5% | 21.9% | 26.2% | g. Sentencing Specialists. |
| | | | | h. Other: n = 21 |

**25. Staff Recruitment. Please indicate the degree to which you have had problems with recruitment of staff attorneys and/or court-appointed counsel due to the following reasons:**

| Not a Problem | Minor Problem | Moderate Problem | Major Problem | Recruitment Problems |
|---|---|---|---|---|
| 16.8% | 17.8% | 21.5% | 44.0% | a. Low Salaries (or Low Court Fees for Court-Appointed Counsel). |
| 31.6% | 32.6% | 22.1% | 13.7% | b. Public Image of Defenders. |
| 26.7% | 29.8% | 27.2% | 16.2% | c. Shortage of Qualified Applicants. |
| 13.2% | 21.7% | 30.2% | 34.9% | d. Heavy Caseloads and Workloads. |
| 15.2% | 19.9% | 33.0% | 31.9% | e. Lack of Resources. |
| 29.8% | 31.4% | 21.5% | 17.3% | f. Lack of Adequate Investigative Support. |
| 39.4% | 34.6% | 14.4% | 11.7% | g. Lack of Adequate Sentencing Support. |
| 79.3% | 13.8% | 4.8% | 2.1% | h. Court Location. |
| 84.9% | 9.2% | 4.3% | 1.6% | i. Civil Service Procedures. |
| | | | | j. Other: n = 19 |

**26. To what degree have you had problems in retaining attorneys due to the following reasons?**

| Not A Problem | Minor Problem | Moderate Problem | Major Problem | Recruitment Problems |
|---|---|---|---|---|
| 14.8% | 17.5% | 30.2% | 37.6% | a. Low Salary or Fee Increases. |
| 8.9% | 15.3% | 33.2% | 42.6% | b. "Burnout" Due to Heavy Caseloads. |
| 46.6% | 31.2% | 16.9% | 5.3% | c. Moving to Other Public Offices. |
| 18.9% | 34.7% | 27.4% | 18.9% | d. Moving Into Private Practice. |
| 50.5% | 31.6% | 12.1% | 5.8% | e. Poor Image of Defense Work. |
| 82.6% | 16.3% | 1.1% | 0.0% | f. Drug or Alcohol Abuse by Attorneys. |
| 28.4% | 27.4% | 28.4% | 15.8% | g. Lack of Promotional Opportunities. |
| 87.9% | 8.9% | 0.5% | 2.6% | h. Political Patronage. |
| 27.9% | 22.1% | 25.8% | 24.2% | i. Lack of Resources. |
| 36.8% | 28.4% | 22.1% | 12.6% | j. Lack of Investigative Support. |
| 52.1% | 34.7% | 10.5% | 2.6% | k. Lack of Training. |
| | | | | l. Other: n = 15 |

**27. Staff Training. Please indicate the degree to which training for staff attorneys and/or court-appointed counsel needs improvement in each of the following areas:**

| Not A Need | Minor Need | Moderate Need | Major Need | Training Areas |
|---|---|---|---|---|
| 25.8% | 27.4% | 33.3% | 13.4% | a. Appellate Decision Updates in Criminal Law. |
| 40.0% | 26.5% | 25.4% | 8.1% | b. Appellate Practice and Procedure. |
| 28.5% | 40.3% | 25.3% | 5.9% | c. Statutory Updates. |
| 23.9% | 43.1% | 26.6% | 6.4% | d. Interviewing Skills. |
| 13.4% | 20.9% | 41.2% | 24.6% | e. Stress Management. |
| 24.3% | 31.7% | 29.6% | 14.3% | f. Word Processing. |
| 14.8% | 31.7% | 40.2% | 13.2% | g. Basic Trial Practice Skills |
| 18.6% | 44.1% | 29.8% | 7.4% | h. Criminal Procedure. |
| 27.6% | 48.6% | 19.5% | 4.3% | i. Laws. |
| 27.7% | 46.7% | 20.1% | 5.4% | j. General Management. |
| 9.6% | 24.1% | 42.8% | 23.5% | k. Advanced Trial Practice Skills. |
| 23.7% | 26.3% | 29.0% | 21.0% | l. Computer Training for Access to Legal Resources (*e.g.*, Westlaw and Lexis). |
| 31.3% | 13.2% | 29.1% | 26.4% | m. Death Penalty Defense. |
| 14.3% | 25.4 % | 33.9% | 26.5% | n. New Defender or Court-Appointed Attorney Training. |
| 52.9% | 18.0% | 16.9% | 12.2% | o. Death Penalty Appeals. |
| | | | | p. Other: n = 15 |

## Operations and Procedures

**28. Diversion and Sentencing Alternatives. Some indigent defense administrators believe there are inadequate sentencing alternatives to permit the most effective sentences for offenders. Please indicate the degree to which you feel your court system is in need of the following sentencing alternatives.**

| Not A Need | Minor Need | Moderate Need | Major Need | Diversion and Sentencing Alternatives |
|---|---|---|---|---|
| 4.2% | 8.9% | 16.7% | 70.3% | a. Drug Diversion Programs. |
| 4.7% | 11.4% | 28.0% | 56.0% | b. Alcohol Diversion Programs. |
| 5.3% | 10.1% | 34.9% | 49.7% | c. Other Pretrial Diversion Programs. |
| 13.6% | 18.3% | 36.1% | 31.9% | d. Intensive Probation. |
| 15.5% | 16.6% | 30.1% | 37.8% | e. Community Service Programs. |
| 14.6% | 21.9% | 27.1% | 36.5% | f. Work Release Jail Programs. |
| 28.4% | 39.5% | 20.5% | 11.6% | g. Restitution. |
| 15.9% | 22.2% | 33.3% | 28.6% | h. Short-Term Community Incarceration. |
| 14.7% | 20.4% | 24.1% | 40.8% | i. Conditional Dismissal (*e.g.*, Suspended Proceedings). |
| 36.3% | 26.8% | 21.6% | 15.3% | j. Shock Incarceration (e.g., Boot Camp). |
| 61.3% | 18.8% | 12.4% | 7.5% | k. Suspension of Driver's Licenses for Drug Convictions. |
| | | | | l. Other: n = 21 |

**29. Pretrial Problems. Please indicate the degree to which your staff has had the following pretrial problems.**

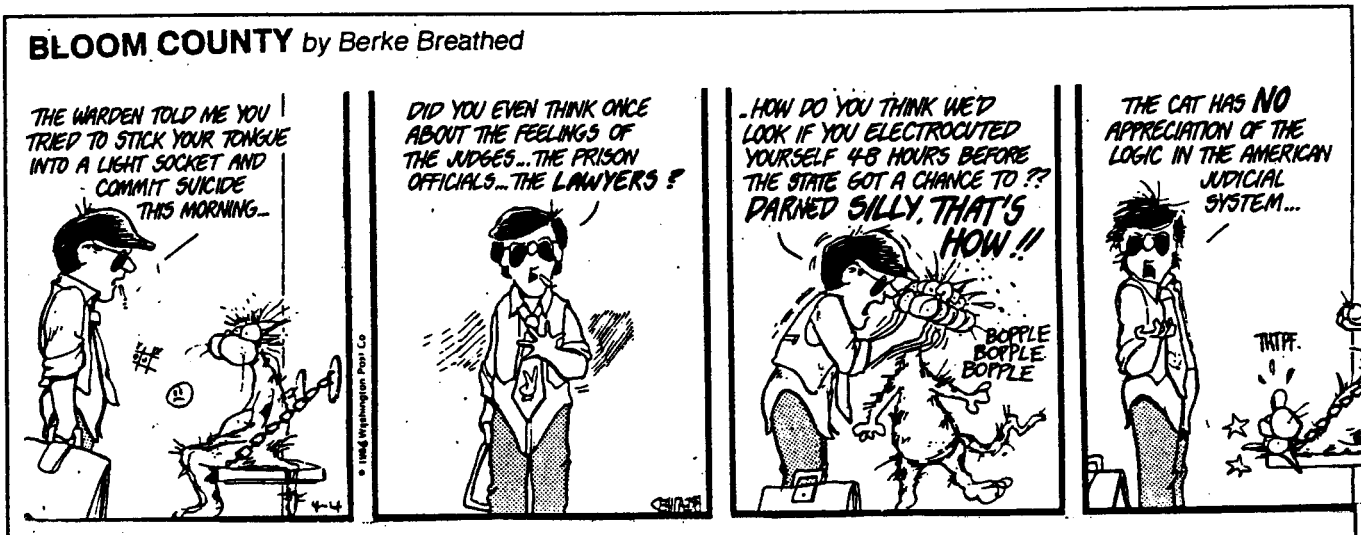
| Not A Problem | Minor Problem | Moderate Problem | Major Problem | Pretrial Problems |
|---|---|---|---|---|
| 19.2% | 29.0% | 31.6% | 20.2% | a. Pretrial Release Procedures. |
| 38.2% | 27.2% | 19.4% | 15.2% | b. Lack of Formally Accepted Procedures for Plea Negotiations. |
| 6.7% | 17.1% | 34.2% | 42.0% | c. Lack of Effective Early Screening By Prosecutor. |
| 27.6% | 40.6% | 19.8% | 12.0% | d. Motions Procedures. |
| 60.6% | 28.5% | 7.8% | 3.1% | e. Assignment of Case to Defender Officer or Court-appointed Counsel. |
| 47.9% | 32.8% | 13.0% | 6.3% | f. Lack of Pretrial Conferences. |
| 43.8% | 27.1% | 15.1% | 14.1% | g. Problems or Delays Getting Access to Clients in Custody. |
| 41.7% | 34.9% | 17.7% | 5.7% | h. Continuance Policy. |
| | | | | i. Other: n = 20 |

**30. Courtroom Procedures. Please indicate the degree to which you have had problems with the following courtroom procedures.**

| Not A Problem | Minor Problem | Moderate Problem | Major Problem | Courtroom Procedures |
|---|---|---|---|---|
| 40.4% | 34.2% | 15.5% | 9.8% | a. Trial Continuance Procedures. |
| 28.5% | 22.8% | 24.4% | 24.4% | b. Calendaring System. |
| 40.4% | 30.1% | 17.6% | 11.9% | c. System of Voir Dire. |
| 41.4% | 34.6% | 12.6% | 11.5% | d. Management of Victim-Witness Appearances. |
| 46.3% | 27.9% | 15.8% | 10.0% | e. Procedures for Victim Impact Statements. |
| 28.0% | 35.8% | 25.4% | 10.9% | f. Lack of Foreign Language Interpreters. |
| 59.9% | 22.9% | 12.5% | 4.7% | g. Courtroom Security Procedures. |
| | | | | h. Other: n = 13 |

**31. Management Information Systems. While a number of defender and/or court-appointed counsel management information systems have been developed, questions remain as to whether existing systems provide the information needed by defenders and/or court-appointed counsel administrators. Please indicate the degree to which your office needs management information system improvements in the following areas.**

| Not A Need | Minor Need | Moderate Need | Major Need | Information Areas |
|---|---|---|---|---|
| 37.6% | 29.1% | 19.0% | 14.3% | a. Original Police Charges. |
| 31.6% | 33.2% | 24.1% | 11.2% | b. Plea Negotiations. |
| 40.1% | 30.5% | 17.1% | 12.3% | c. Dates of Hearings. |
| 12.2% | 22.2% | 24.3% | 41.3% | d. Criminal History of Defendant. |
| 28.3% | 21.9% | 27.8% | 21.9% | e. Victim/Witness Names. |
| 40.3% | 42.5% | 12.9% | 4.3% | f. Continuances. |
| 49.2% | 30.5% | 13.4% | 7.0% | g. Arresting Officer Names. |
| 44.6% | 34.2% | 14.7% | 6.5% | h. Other Defense Counsel Involved in the Case. |
| 26.7% | 25.7% | 27.8% | 19.8% | i. Attorney Schedule Conflict |
| 36.4% | 27.8% | 21.9% | 13.9% | j. Bail/Jail Status. |
| 33.7% | 38.0% | 19.3% | 9.1% | k. Speedy Trial Status. |
| 24.6% | 28.3% | 21.9% | 25.1% | l. Pretrial Diversion Evaluation. |
| 15.6% | 35.5% | 28.0% | 21.0% | m. Information on Co-Defendants. |
| 23.5% | 19.3% | 25.1% | 32.1% | n. Caseload Reports and Analysis. |
| 35.1% | 35.7% | 14.6% | 14.6% | o. Prosecutor. |
| 33.9% | 38.2% | 20.4% | 7.5% | p. Motions. |
| 31.7% | 28.5% | 20.4% | 19.4% | q. Court Schedules. |
| | | | | r. Other: n = 12 |



# WEST'S REVIEW

Linda 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

### MANSLAUGHTER - DUI, DEATH OF INFANT BORN AFTER ACCIDENT

*Jones v. Commonwealth*
**38 K.L.S. 3 at 9**
**(March 1, 1991)**

While intoxicated, Jones drove his car into a car driven by Kimberly Lynch who was then 32 weeks pregnant. Within a few hours of the accident, Lynch's daughter was delivered by Caesarean section. The infant died the next day due to injuries sustained in the accident. Jones was subsequently indicted for manslaughter.

Jones moved to dismiss the indictment, relying on *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983) for the proposition that a fetus is not a "person" within the meaning of the criminal homicide statutes. In *Hollis*, the fetus died while still *in utero* and was later delivered stillborn. The Court of Appeals viewed this distinction as controlling. Because the infant in the case before it was born alive, *Hollis* did not apply. "Where, as here, there is no question that the baby was alive, breathing, and maintaining a totally separate existence, then the converse is true. There can be a prosecution for the wanton killing of another "person" under KRS 507.040."

### DUI - LICENSE REVOCATION

*Commonwealth v. Mullins*
**38 K.L.S. at 9**
**(March 29, 1991)**

Mullins' driver's license was revoked and the order revoking was signed by the Acting Commissioner of the Transportation Cabinet. Mullins contended that the order was invalid in that it should have been signed by the Secretary of the Transportation Cabinet. The Court of Appeals disagreed, finding it "immaterial who signed the order of suspension so long as that individual did so in an official capacity."

## KENTUCKY SUPREME COURT

### DOUBLE JEOPARDY/PFO - AGE AT PRIOR OFFENSE

*Tyler v. Commonwealth*
**38 K.L.S. 3 at 23**
**(March 14, 1991)**

Tyler was convicted of second degree assault and promoting contraband in the first degree based on his act of stabbing a fellow inmate with a homemade knife. The Kentucky Supreme Court rejected Tyler's argument that the convictions offended the prohibition against double jeopardy. The Court observed that promoting contraband in the first degree within a detention facility, requires *possession* of dangerous contraband which, by definition, may fall within the confines of a 'dangerous instrument,' while assault in the second degree contemplates the *use* of a deadly weapon or dangerous instrument, KRS 508.020. Applying the *Blockburger* test, the Court found no double jeopardy violation.

The Court did, however, reverse Tyler's PFO conviction based on the failure of the commonwealth to adduce any proof of Tyler's age at the time he committed his prior offenses. *See Hon v.Commonwealth*, 670 S.W.2d 851 (Ky. 1984).

### JURISDICTION - FELONIES AND MISDEMEANORS

*Jackson v. Commonwealth*
**38 K.L.S. 4 at 26**
**(April 11, 1991)**

In this case separate indictments were returned: one for a felony, the other for a misdemeanor. The two indictments were never consolidated by the circuit court and the felony indictment was dismissed. The circuit court then proceeded on the misdemeanor.

Based on these facts, the Kentucky Supreme Court held that the Court of Appeals properly granted a writ of prohibition prohibiting enforcement of the circuit court's judgment. The Court cited the language of KRS 24A.110(2)

that: "[T]he district court has exclusive jurisdiction to make a final disposition of any charge for a public offense denominated as a misdemeanor or violation, except where the charge is joined with an indictment for a felony...."

**OPINION EVIDENCE/ DISCOVERY**
*Sargent v. Commonwealth*
**38 K.L.S. 4 at 32**
**(April 11, 1991)**

The appellants in this case were convicted of trafficking in marijuana after approximately fifteen pounds of marijuana was found in the trunk of their car. At trial, two police officers were allowed to testify as experts to their opinions that the marijuana was for sale and not for personal use. The Kentucky Supreme Court held that this testimony was indeed admissible as expert opinion. "Both detectives testified about the marijuana trade which is certainly specialized in character and outside the scope of common knowledge and experience of most jurors. The opinion of the police aided the jury in understanding the evidence and resolving the issues." Chief Justice Stephens and Justices Combs and Leibson dissented from this portion of the opinion.

The Court also held that trial defense counsel's announcement of "ready" waived the commonwealth's failure to provide the defense with the results of lab tests of the marijuana as required by the trial court's discovery order.

**POLYGRAPH/CONFESSION**
*Morgan v. Commonwealth*
**38 K.L.S. 4 at 28**
**(April 11, 1991)**

The principal evidence at Morgan's trial for the murder of his wife consisted of Morgan's incriminating admission. The admission was made at 3:15 a.m. at the conclusion of eight hours of interrogation, including a polygraph examination. Morgan sought, without mentioning the polygraph, to suggest to the jury that the conditions of his interrogation reduced the credibility of his admission. As part of this strategy, Morgan asked one of the interrogating officers who had been previously described as an officer with 'special interrogation skills,' whether there was a two-way mirror in the room in which Morgan was questioned. The officer then fully described the room, including the fact that the polygraph machine was present. The Kentucky Supreme Court held this was reversible error: "In context, we believe [the officer's] telling the jury that the interrogation took place in a room with a polygraph instrument amounted to a virtual banner headline that appellant had been given a polygraph examination." Justices Wintersheimer, Reynolds and Spain dissented from this portion of the opinion.

Turning to the voluntariness of Morgan's statement, the Court upheld the trial court's ruling that the statement was voluntary despite the prolonged interrogation and psychiatric testimony as to Morgan's diminished capacity at the time. "While the duration of appellant's interrogation may have exceeded that which some would consider reasonable, evidence was presented from which the trial court could have believed, and clearly did believe, that appellant retained the capacity to make rational decisions and was not coerced into making the incriminating statements."

**SENTENCING**
*Smith v. Commonwealth*
**38 K.L.S. 4 at 33**
**(April 11, 1991)**

Smith was convicted of rape and sodomy. The jury fixed his penalty at two life terms and recommended that they be served consecutively. Since, under KRS 532.110(1)(c), life sentences may not be served consecutively, and since parole eligibility on a life sentence is 12 years, the result of the jury's sentence was an indeterminate sentence of 12 years to life. The trial court, however, sentenced Smith to two consecutive 25 year terms which, because Smith was a violent offender who would be eligible for parole only after serving half his sentence, amounted to a sentence of 25 to 50 years.

Smith argued on appeal that the trial court acted outside its authority in that the sentence it imposed was harsher than that fixed by the jury. The commonwealth argued that the trial judge had in fact *reduced* Smith's sentence. KRS 532.070(1) permits a trial judge to modify a jury sentence if the judge determines that sentence to be unduly severe. The Kentucky Supreme Court rejected the commonwealth's argument and held that "considering the anomalies of current parole disability legislation" the trial court had indeed unlawfully imposed a harsher penalty. Justices Wintersheimer and Spain, and Chief Justice Stephens dissented.

## UNITED STATES SUPREME COURT

**INVOLUNTARY CONFESSION - HARMLESS ERROR**
*Arizona v. Fulminante*
**48 CrL 2105**
**(March 26, 1991)**

In a profound break with past precedent, the Supreme Court held in *Fulminante* that the admission of a coerced confession may be harmless error under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Chief Justice Rehnquist, writing for the majority, characterized the admission of a coerced confession as a "classic trial error." This position departs radically from the Courts long-standing position, as stated by Justices White, Marshall, Blackmun and Stevens in dissent, of treating a coerced confession as "fundamentally different from other types of erroneously admitted evidence...."

Applying harmless error analysis, the dissenters gained the vote of Justice Kennedy to hold that the state had not met its burden of showing that the admission of Fulminante's confession was harmless. The majority opinion on this issue emphasized that a confession "is like no other evidence" in its power to sway the jury and that coercion renders a confession inherently unreliable. The majority urged "extreme caution" in determining the admission of a coerced confession to be harmless. Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Souter dissented and would have held admission of Fulminante's confession to be harmless.

***BATSON* - STANDING**
*Powers v. Ohio*
**49 CrL 2003**
**(April 1, 1991)**

In this case the Court held that racial identity between a defendant and members of his petit jury venire is not required for the defendant to assert that the prosecution's exercise of its peremptory challenges was racially motivated in violation of the Equal Protection Clause. In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Court held that the defendant must be a member of the cognizable racial group whose members the prosecution has struck. *Powers* overrules this portion of *Batson*. The Court in *Powers* noted that the equal protection rights at stake were those of the excluded jurors. The Court reasoned that third-party standing should be granted a defendant to assert those rights since racial discrimination may cast in doubt the fairness of the trial, since the defendant can be counted on to be a zealous defender of those rights, and since the jurors' rights would otherwise likely go unasserted. Chief Justice Rehnquist and Justice Scalia dissented.

**HABEAS CORPUS - SUCCESSIVE PETITION**
*McCleskey v. Zant*
**49 CrL 2031**
**(April 16, 1991)**

This case, the latest in the Court's conservative restructuring of habeas corpus, limits the federal courts' consideration of successive habeas petitions. The majority held that a state prisoner has committed abuse of the writ and is not entitled to relief if he failed to raise his claim in his original petition due to "inexcusable neglect." It is not necessary that he deliberately abandoned the claim in his original petition. Moreover, failure to previously raise the claim is excusable only if the petitioner can meet the standard applied to procedural defaults, *i.e.* the petitioner must show cause and prejudice with respect to the omitted claim.

Justices Marshall, Blackmun, and Stevens dissented.

**LINDA WEST**
Assistant Public Advocate
Post-Conviction Branch
Frankfort

# EMPLOYMENT OPPORTUNITIES WITH DPA

## RECRUITMENT

Criminal defense work is entering a new age. There is a growing realization that competent representation demands a team approach. A defense lawyer does not possess the expertise needed to comprehend, communicate and defend his or her client's position. As our society tends toward specialization, the competent defense lawyer relies on the skills of a psychologist, psychiatrist, social worker, sentencing specialist, statistician and others to aid in the defense of an accused citizen. These same "people resources" have long been available to and utilized by the prosecution. In an attempt to assist its attorneys in meeting their opponents on fairer ground, the Department of Public Advocacy is seeking to enlarge its vision of the defense team. Presently, there are vacant positions within the agency for alternative sentencing specialists and paralegals. We hope to have a wider variety of support positions available in the future.

Recognizing this new age, the Department of Public Advocacy has seen fit to place more emphasis on recruiting. Through the efforts of the Recruitment Coordinator and Personnel Administrator, the agency can strive to recruit and retain the best, brightest, most committed attorneys and support staff.

As reflected in the last *Advocate*, while maintaining my other responsibilities, I assumed the duties of Recruitment Coordinator this last March. Roy Collins continues to perform as Personnel Administrator. With the help of Department Supervisors and Directing Attorneys, Mr. Collins and I hope to further this agency's statutory mission of competent, legal representation for those citizens, criminally accused, who qualify for our agency's services under Chapter 31.

To that end, we will use this column to advise you of opportunities for employment with the Department of Public Advocacy.

**REBECCA BALLARD DiLORETO**
Assistant Public Advocate
Frankfort

## OPPORTUNITIES WITH DPA

The Department is seeking qualified applicants for the positions listed below:

| | |
|---|---|
| **Alternative Sentencing Specialist** | Our Paducah field office has a vacancy for an Alternative Sentencing Specialist. The job description involves the preparation and submission of alternative sentencing plans for our clients. The plans are presented for approval to the sentencing judge in Circuit Court felony cases. |
| **Assistant Public Advocate** | Our Morehead, Northpoint, Hazard, Hopkinsville, and Pikeville field offices are seeking qualified lawyers to provide zealous representation for our clients. |
| **Paralegal** | Our Eddyville and LaGrange offices are seeking qualified paralegals to do research, interview inmates, and perform as intricate members of our post-conviction defense team. |

If you are interested in one of these positions, please contact Roy Collins or Rebecca Ballard DiLoreto at (502) 564-8006 for further information.

# THE DEATH PENALTY

*The Bill of Rights: Slip-Sliding Away in the Rush to Kill*

***EIGHT AMENDMENT, UNITED STATES CONSTITUTION***
***Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment 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 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.

**FIRST, THE GOOD NEWS:**

The Supreme Court has denied *certiorari* in Paul Kordenbrock's case, [1] thereby letting stand the Sixth Circuit's ruling in *Kordenbrock v. Scroggy*, 919 F.2d 1091 (1990). The Court's decision was especially welcome in view of an *amicus* brief filed by the Attorneys General of 17 states in support of granting *cert.* and reinstating Paul's death sentence. The States were arguing for a ruling 1) that *Miranda* violations should be subjected to the harmless error standard for non-constitutional violations, and 2) closing the federal habeas doors on *Miranda* issues which had already been litigated in state court. In view of the Court's decisions in *Fulminante* and *McCleskey*, which will be discussed in this column, there was plenty of cause for concern here, and the denial of *cert.* comes as a great relief. When *Fulminante* was announced in March, Boone Commonwealth Attorney Willie Mathis, who prosecuted Kordenbrock, told the *Kentucky Post*, "I looked at [the ruling] and thought that Paul Kordenbrock is going to have a bad day." [2] When the denial of *cert.* was announced on April 15, Ed Monahan restrained himself from saying anything to the *Post* about Willie Mathis having a bad day, but I'll say it for him. The case now goes back to Boone Circuit Court for re-trial. Again, congratulations and good luck to Paul and his attorneys, Burr Travis, Tim Riddell and Ed Monahan.

**_ARIZONA V. FULMINANTE_: NO HARM, NO FOUL**

In Professor Joseph G. Cook's treatise, *Constitutional Rights of the Accused*, [3] is found the following statement: "The Supreme Court has never found the admission into evidence of an illegally obtained confession harmless error. There is some authority suggesting that such an error could never be harmless." *Id.* Section 5:39.

Not so fast, Professor. In an opinion so convoluted that the essential holding is found in the dissenting opinion, the Court has with one stroke reversed a century of precedent and declared that even a *coerced* confession must be subjected to "harmless error" analysis under the *Chapman* [4] standard. *Arizona v. Ful-*

## Kentucky Death Facts

**As of May 1, 1991**

| | |
|---|---|
| Number of people executed since statehood | 470 |
| Number of people executed in the electric chair | 162 |
| Number of people who applied for the position of executioner in 1984 | 150 |
| Number of people now on death row | 28 |
| Number of Vietnam Veterans on death row | 1 |
| Number of women on death row | 1 |
| Number on death row who were under age 21 at time of offense | 5 |
| Number of inmates on death row who have committed suicide | 1 |
| Number on death row whose trial lawyers have been disbarred or had their license suspended | 5 |
| Number who can afford private lawyer on appeal | 0 |
| Percentage of KY homicide victims who were black, 1985-90 | 18% |
| Number sentenced to death for killing a black person | 0 |
| Percentage of death row inmates who are black | 17% |
| Percentage of Kentucky population that is black | 7% |
| Number of black prisoners who were sentenced by all white juries | 2 |
| Number of persons sentenced to death in Kentucky and later proved innocent | 1 |

*minante*, 111 S.Ct. 1246 (3-26-91), is a death-penalty case in which the accused allegedly confessed guilt to a fellow inmate, a paid FBI informant, who demanded the information in return for "protection" for Fulminante from other inmates.

Although a majority of the Court agreed with the Arizona Supreme Court [5] that the confession was impermissibly coerced, the Reagan-Bush bloc of Justices went on to declare for the first time that even a coerced confession may be harmless beyond a reasonable doubt in a given case, and that the issue must therefore be subjected to a *Chapman* analysis. Ironically, Justices Kennedy and Souter then defected from the bloc to form a majority holding that the error in Fulminante's case was not harmless. (The Arizona Court had concluded that it was harmless error, before deciding in a supplemental opinion that harmless error analysis did not apply. 778 P.2d at 626-27). So, while Oreste Fulminante will receive a new trial, the Court has unnecessarily removed one of the basic pillars of protection for the individual against the State's abusive use of its power.

One defense attorney told the *Kentucky Post* that "the days of the back room, the rubber hose and the bright lights have been over for some time." But have they? Even as the Court announced its decision in *Fulminante*, America was watching the videotape of the Los Angeles police brutalizing Rodney King, whose apparent offenses were speeding and being black. If King had confessed to speeding in order to stop the pounding, should that have been "harmless error" if it was corroborated by the radar gun?

In Arkansas, Barry Fairchild remains on death row, on the strength of a confession which he alleges was beaten out of him by police in 1983. At a federal court hearing this year, more than a dozen black men from Little Rock testified that they had been beaten and threatened with revolvers by police who sought to extract a confession to the 1983 murder of a white woman. The police were successful with Fairchild, whose I.Q. has been measured at 62.

Then there's *Cooper v. Scroggy*, [6] in which the Sixth Circuit reversed two men's convictions because the Owensboro Police had beaten confessions out of them. Of course, most instances of coerced confessions involve techniques much more subtle than the "rubber hose"; *Fulminante* provides a prime example. Americans who saw the tapes of our captured fliers in Iraq, denouncing their own "aggression against the peace-loving Iraqi people," have accepted that strong

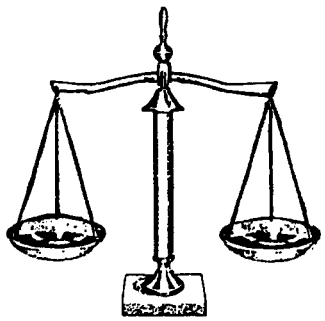
## Opinions

The Kentucky Post, Wednesday, April 24, 1991

# The death penalty

The United States Supreme Court's decision not to review a U. S. Court of Appeals' ruling overturning Paul Kordenbrock's death sentence raises troubling questions about the death penalty.

The appeals court gave Mr. Kordenbrock a new trial because police violated his constitutional rights when obtaining a confession used as evidence in his trial for killing a store clerk during a 1980 killing spree.



Our first reaction is that it's a miscarriage of justice to give an admitted murderer another chance on a technicality. What about the victim who didn't get another chance? And how about the victim's family? Haven't they been victimized repeatedly as appeal after appeal wound its way through the legal system during the last 10 years?

But then there is, of course, the matter of Mr. Kordenbrock's rights and the constitutional rights of every American citizen. There is the issue of the police continuing their interview after he said he didn't want to talk anymore. His court-appointed attorney Ed Monahan also questions whether the death sentence is the appropriate punishment for a man who claims he was so high on drugs and alcohol at the time of the shooting that he didn't know what he was doing. And, there is — as always — the nagging doubt about whether court-appointed defense is adequate in matters grave enough for the state to take a life.

Nevertheless, Mr. Kordenbrock confessed to the crime, and Mr. Monahan does not dispute that his client killed.

Indeed, there are many aspects of this case that give rise to anger and indignation. But most of our outrage is focused on a system that continues to hold out the death penalty as the ultimate punishment when, in fact, the penalty is rarely carried out.

At some point, we must ask if a death sentence represents justice when appeals are interminable and there is an understandable resistance to carrying it out. More and more the death penalty is a rhetorical ticket to get politicians elected and to give us a false sense of security that it is a deterrent to capital offenses. Mostly, it deters justice by tying up valuable and limited resources in interminable appeals in which technicalities easily overturn verdicts. Obviously, the judiciary does not take lightly the burden of condemning anyone to death.

Consider the hours of legal work and taxpayer dollars required to defend Mr. Kordenbrock and others like him against the death penalty. The program for court-appointed attorneys is under funded. Is it right to divert what little resources there are for public defenders in capital cases when the courts are filled with people who need their services? The question has another serious dimension as well. Often public defenders have little experience in trying capital cases, leaving the door open for appeals on the basis of an inadequate defense.

The need for reform of our public defender system is imperative to ensure every individual the fair trial provisions guaranteed of the U. S. Constitution — regardless of an individual's ability to pay.

We must also reckon with the death penalty, which clearly undermines our justice system. It is time Kentucky has a punishment that is both appropriate for the hideous crime and one the convict will surely serve. At least 29 states already have passed legislation for a penalty of life in prison without parole. The Commonwealth would be better served with such a penalty. Mr. Kordenbrock should never breathe free again; a guarantee of life imprisonment would be far better justice than a death penalty dismissed on a technicality.

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men can be coerced into admitting that which they do not believe they have done. But instead of maintaining the constitutional bulwark against such abusive conduct by the state, the Reagan-Bush Court has given the authorities an incentive to beat, threaten, bribe, manipulate or otherwise coerce the criminal defendant - as long as they're sure he's guilty. This is hardly a fitting birthday observation for the *Bill of Rights*.

## *McCLESKEY V. ZANT*: THE COURT PLAYS "CALVINBALL"

Readers of the comic strip "Calvin and Hobbes" are familiar with CalvinBall, the game in which Calvin makes up the rules as he goes along. Calvin, of course, always wins. Apparently the Supreme Court recognizes a good idea when it sees one, and has resorted to playing CalvinBall with Warren McCleskey's life.

You remember Warren McCleskey. He is the Georgia death-row inmate who argued in 1987 that the overwhelming statistical evidence showing Georgia's death-penalty scheme to be racist in its operation amounted to both an Equal Protection and Eighth Amendment violation. The Supreme Court disagreed, [7] putting its stamp of approval on a capital system every bit as racist and arbitrary as that condemned 15 years earlier in *Furman v. Georgia*. [8] CalvinBall, round 1.

McCleskey then, in the course of a second state habeas proceeding, obtained a 21-page statement given to the police in 1978, shortly before his trial, and withheld by the state for 9 years. The statement was given by an inmate informant, Evans, who testified at trial as to incriminating statements made by McCleskey. Evans' statement provided evidence, for the first time, that Evans was not just a fortuitous bystander but had been acting in direct concert with the police, and had deliberately elicited McCleskey's admissions in violation of his Sixth Amendment right to counsel. [9] The statement then led McCleskey's counsel to a former jailer, Worthy, who testified that Evans had been moved to McCleskey's cell at the request of someone in authority. These facts had been steadfastly withheld by the State of Georgia all through the proceedings in McCleskey's case.

But when this issue reached the Supreme Court, the rules suddenly changed, and McCleskey was punished for the State's transgressions. *McCleskey v. Zant* [10] may go down in history as the case where the Supreme Court stopped even trying to make it look good. With nary a word of criticism for the State's actions (which had caused the District Court to grant habeas relief), the Court came down on McCleskey with full force, charging him with "abuse of the writ," finding him guilty, and stripping him of his *Massiah* claim. McCleskey's offense? He had made a general assertion of a *Massiah* claim in his *first* state habeas petition, but had then failed to include it in his first federal habeas. Why? Because his counsel, having obtained no evidence to sustain the claim at the State habeas level, concluded that its inclusion in the federal habeas would be futile. Why was there no evidence at the state habeas hearing? Because the State withheld it. Whose fault is that? McCleskey's, said the Court, and his second federal habeas petition became an "abuse of the writ."

But in order to reach this conclusion, the Court had to take some extraordinary steps. First was the creation of a new, strict-liability standard governing abuse claims. From now on, whenever the government has shown that a claim is appearing for the first time in a successor federal habeas petition, the condemned "must show cause for failing to raise it and prejudice therefrom, as those concepts have been defined in our procedural default decisions," 49 CrL at 2038. In other words, the claim will be excluded not only if it had been deliberately abandoned, but also if the failure to pursue it earlier was caused by "inexcusable neglect." But in assessing whether neglect was "inexcusable," the Court looks only to the *petitioner's* conduct, not to the State's. Here, the Court decided that since McCleskey had raised a generally worded *Massiah* claim in his first State habeas, he obviously knew or should have known that the State was covering something up; in essence, it's his own fault for letting them get away with it. Inexcusable neglect.

What made the creation of this test all the more extraordinary is that the Court did not put the parties on notice, and the State *did not request* adoption, of this new rule. In fact, the rule is remarkably similar to part of the habeas reform package that was considered *and not adopted* by Congress last year. This from a bloc of judges who were all touted by their appointers as "strict constructionists, not legislative activists." It seems that when Rehnquist couldn't get his "speedy execution" package through Congress, he chose to enact it by judicial fiat instead. The next time Bush spouts his nonsense about judicial appointees who won't "legislate from the bench," some member of the narcoleptic Washington press corps would do well to ask about *McCleskey*.

But even if the Court is free to play CalvinBall with the rules in federal habeas cases, isn't there a question of fairness to Warren McCleskey? After all, he filed and presented his habeas under the previously prevailing "good-faith" [11] standard, with no clue that the standard was about to be changed. The Court has constructed elaborate artifices to protect the State from "suffering" retroactive effects of adverse Court rulings, starting with *Teague v. Lane*. [12] But no such consideration applies to Warren McCleskey; the Court simply declares a new rule and applies it to him retroactively. Justice Marshall, writing for the usual three dissenters, put it simply:

> The Court's utter indifference to the injustice of applying its new, strict-liability standard to this habeas petitioner stands in marked contrast to this Court's eagerness to protect States from the unfair surprise of "new rules" that enforce the constitutional rights of citizens charged with criminal wrongdoing. *See Butler v. McKellar*, [13] *Saffle v. Parks*, [14] *Teague v. Lane* [15]. 49 CrL at 2046.

But in fact, the dissenters were being unfair to the majority, which was certainly concerned about injustice. It says so right here: "The history of the proceedings in this case, a*nd the burden upon the State in defending against allegations made for the first time in federal court some 9 years after the trial*, reveal the necessity for the abuse of the writ doctrine." 49 CrL at 2040 (emphasis added). Imagine the State's burden if they'd withheld the evidence for 18 or 27 years.

One more round of CalvinBall needed to be played. Ordinarily, when the Supreme Court announces a new rule which had not been applied by any of the lower courts hearing a case, the case would be remanded for fact-finding in light of the new rule. Such fact-finding in this case, of course, could well have resulted in a finding that the State deliberately and unjustifiably withheld Evans' statement for nine years, to McCleskey's prejudice. A finding like that could sidetrack the execution express bearing down on Warren McCleskey. Since the Court's majority had already made up its mind that he should die, why waste any more time? So the Court, without benefit of any opportunity for the parties to present evidence or brief the case under its new rule, did its own fact-finding and constructed this Orwellian artifice:

> The *Massiah* violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination. *The very statement McCleskey now seeks to embrace confirms his guilt*. 49 CrL at 2040 (emphasis added).

As to the last statement, any former trial practitioner should know better. The general point seems to be, "Look - we know he did it, so let's get on with it." Since McCleskey had no apparent opportunity to brief the question of whether Evans' testimony of his jailhouse "boasts," had it been properly excluded from the jury, might have affected the *sentence*, the Court didn't need to deal with it. Contrast this attitude with that stated by Judge Merritt for the majority in *Kordenbrock v. Scroggy*:

> 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. [16]

What lessons can we learn from this case? I believe each of the following are true:

1) The 200th anniversary of the *Bill of Rights* may be the last. If *Alabama v. White* [17] drove a wooden stake through the heart of the Fourth Amendment, then *Fulminante* does the same for the Fifth. Now the concept of "fundamental fairness inherent in due process of law" may be interred with McCleskey.

2) In an otherwise insightful editorial reprinted on page 25, the *Kentucky Post* observed: "Obviously, the judiciary does not take lightly the burden of condemning anyone to death." Obviously, the Post did not have *McCleskey* in mind. The Supreme Court has all but abandoned its intended purpose of protecting the liberties of our citizenry, in favor of pursuing the administration's legislative agenda. The *Post* is right on target, of course, in stating that the death penalty "clearly undermines our justice system." It is the lust for blood retribution that leads the Court to trample the *Bill of Rights*.

3) The press, not to mention the public, is blissfully unconcerned about this erosion of rights. [18] Far more attention has been devoted to such important issues as Gen. Schwarzkopf's political affiliation, Nancy Reagan's sex life, Donald Trump's sex life, Gen. Powell's political affiliation, Ted Kennedy's sex life, and Merv Griffin's sex life. The gun lobby wails loud and long about infringement of the Second Amendment, but they're missing an important point: as his price for enacting what's left of the Brady Bill, Bush is also insisting on expansion of the federal death penalty, legislative repeal of the exclusionary rule in federal cases, and continued dismemberment of federal habeas corpus procedures. The gun lobby should force the rest of us to evaluate whether this trade-off is worthwhile.

4) More than ever, capital cases must be won or resolved at the trial level.

5) All trial practitioners should rely on the State Constitution at all times.

6) All post-conviction practitioners should include all conceivable claims at every step of litigation, whether there is evidence to support them or not. This, of course, drives courts crazy, and with good reason; but *McCleskey* seems to demand it.

7) Police and prosecutors now have an incentive to commit continuing *Brady* violations, at least in death cases; the *McCleskey* Court has rewarded their efforts.

8) Warren McCleskey, who proved the State of Georgia to have been overtly racist in its capital proceedings and blatantly dishonest in its prosecution of him, will soon be executed.

## WE WON'T HAVE *STARE DECISIS* TO KICK AROUND ANYMORE.

Less than four years ago, in *Booth v. Maryland*, [19] the Supreme Court prohibited the use of victim impact statements in capital cases. The 5-4 decision was written by Justice Powell. Two years later, in *South Carolina v. Gathers*, [20] the Court relied on *Booth* to prohibit the prosecution's use of the victim's possessions (a religious tract and a voter registration card) to argue for a death sentence based on the victim's positive character. The 5-4 decision was written by Justice Brennan; Justice White, who had dissented in *Booth*, concurred in *Gathers* strictly due to the *stare decisis* value of *Booth*. [21]

*Booth* had a profound effect on capital cases in Kentucky. Prior to *Booth*, an argument against the admission of "victim's character" evidence was found "totally offensive to the Court," *McQueen v. Commonwealth*. [22] But after *Booth*, no fewer than three capital cases - *Sanborn v. Commonwealth* [23], *Morris v. Commonwealth* [24], and *Dean v. Commonwealth* [25] - were reversed at least in part because of *Booth* evidence. [26]

But now, the Supreme Court shows all the signs of being ready to overrule *Booth* and *Gathers*. On February 19, 1991, the Court issued an order on *Payne v. Tennessee*, [27] directing the parties to brief and argue whether *Booth* and *Gathers* should be overruled, a question presented by neither party. What changed? The cynical among us might observe that Justice Powell, author of *Booth*, and Justice Brennan, author of *Gathers*, have left the Court and been replaced by Justice Kennedy, author of *McCleskey*, and Justice Souter, protege of Sununu. Neither one dissented from the *Payne* order, which carried the usual 6-3 majority; nor did Justice White, who may be less solicitous of *stare decisis* when he's not the swing vote. The case was put on an expedited schedule and was argued on April 24. A decision will likely be handed down at about the time this issue of the *Advocate* is printed.

And what will be the practical effect of overruling *Booth*? Some commentators have projected that penalty phase hearings will become trials of the victim's character, which is distressing enough. But the long-term effect will probably be to further polarize the race and class distinctions inherent in the death penalty: more than ever, execution will be the fate of those who kill white, middle-class people with articulate, sympathetic survivors who contrast with the accused and his family. As for the doctrine of *stare decisis*, it seems that must yield when necessary to reverse the liberal depredations of Justice Powell.

## JUSTICE SCALIA BROOKS NO NONSENSE

At the beginning of the current term, the Chief Justice reassigned Justice Scalia's supervisory responsibilities from the Sixth Circuit to the Fifth, which covers the death-belt states of Mississippi, Louisiana and Texas. Scalia, who replaced Justice White in the Fifth, wasted little time in letting it be known who's in charge. In *Madden v. Texas*, [28] Scalia denied an application for extension of time in which to file a petition for writ of *certiorari*, and only grudgingly granted three others, warning, "I shall not [do so] again."

Such applications, particularly in capital cases, are granted as a matter of routine. They generally occur when counsel has not yet been located to prepare the petition, or where counsel has been located but is unfamiliar with the case file. In the other death-belt circuit, the 11th, Patsy Morris of the Georgia Resource Center told *The National Law Journal* [29] that requests for extensions in capital cases had been granted since 1976. But Scalia took the opportunity to "set forth my views on application of the 'good cause' standard of Rule 13.2 [and] it is possible that those views are more restrictive of extensions than what the Fifth Circuit bar has been accustomed to." [30] Well, possibly.

In Madden's case, the extension was requested because Madden's appellate counsel had never prepared a *cert.* petition in a capital case, and wanted the assistance of the Texas Resource Center. David DeBlanc's appellate counsel had

been elected to Congress, and the Resource Center had been unable to locate new counsel. Alvin Goodwin's appellate counsel had a conflict forcing him to withdraw, and again the Resource Center could not locate new counsel. And in Karl Hammond's case, a Resource Center lawyer agreed to prepare the *cert.* petition himself after a futile search for counsel, but requested more time because of the death of his father. Scalia did not find good cause in any of these circumstances. Texas, it should be noted, does not provide funding for lawyers to file *cert.* petitions for indigent clients.

The Texas Resource Center, of course, was set up by Congress in large part to recruit volunteer attorneys to represent condemned inmates, and to provide the necessary specialized assistance to those attorneys. That went right by Scalia, who called "the desire of Madden's appellate counsel for the assistance of the Texas Resource Center entirely unremarkable; all petitioners can honestly claim that they would benefit from additional advice and consultation." [31] And even when new counsel is recruited for the awesome task of pursuing a Supreme Court capital appeal, it can take weeks just to transfer the case record from the appellate lawyer to the newly recruited firm, which is frequently not even in the same state. Obviously, restricting the time allowed for filing a *cert.* petition will only serve to deter many firms from volunteering.

Steven Bright of the Southern Prisoners Defense Committee, in a remarkably restrained understatement, told the *National Law Journal*, "you just have to wonder that Justice Scalia could be so unfamiliar with what is going on." We don't have to wonder, of course, because he is quite familiar with what's going on. In Madden's case, the execution date had been set for two days after the end of the regular 90-day filing period. Scalia declared that extending the deadline for filing a *cert.* petition "to a point after an established execution date is either futile or will disrupt the State's orderly administration of justice." [32] Apparently the "orderly administration of justice" would countenance a man's execution without a petition for *cert.* being filed on his behalf, because a willing lawyer was not immediately available.

But don't let it be said that Scalia is not a fair man. Ten days after his order in Madden, he denied a request for a 30-day extension sought by the State of Mississippi. [33] The State cited budget cuts, which had "resulted in a reduction in appellate staff," *Id.* Scalia noted that "like any other litigant, the State of Mississippi must choose between hiring more attorneys and taking fewer appeals." *Id.*

Perhaps Anatole France foretold the coming of Scalia when he wrote, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." [34]

Then again, maybe not. This morning's paper brings word of a rule change adopted by the Court (per the usual 6-3 vote) by which it reserves the right to revoke the *in forma pauperis* status of litigants who, it believes, are abusing the privilege. As Justice Marshall noted, "Strikingly absent...is any similar provision permitting dismissal of 'frivolous or malicious' filings by paying litigants." [35]

## NEW DEATH VERDICTS IN KENTUCKY

### *BOWLING*

After going nearly a full year without a death verdict, three death verdicts have been returned in Kentucky in the first part of 1991. Thomas Clyde Bowling was sentenced to death in January, convicted of shooting a husband and wife in Lexington. Even after the trial, many issues including motive remain unresolved.

### *HUNTER*

In March a Clark County jury returned a death verdict against 18-year-old James Hunter, accused and convicted of arson/murder in the death of his wife. Hunter was at home at the time the fire broke out, and received burns which hospitalized him for about a month.

Although there were numerous indications of mental and emotional disorders, no evaluation was presented at trial, and the Court refused to allow a one or two-day delay to permit completion of an evaluation prior to penalty phase. Mr. Hunter's attorneys, who had no prior capital experience, did not seek assistance from the DPA's Capital Trial Unit or any other experienced capital practitioners. Mr. Hunter has been finally sentenced, and his appeal is being prepared.

### *SANBORN*

And on April 5, a Jefferson County jury returned a death verdict against Parramore Lee Sanborn, convicted of rape, sodomy and murder in the 1983 death of a Henry County woman. Sanborn had previously been convicted and sentenced to death, but the conviction was reversed by the Kentucky Supreme Court, [36] primarily because of blatant and repeated prosecutorial misconduct which the Court likened to a "lynching." [37]

On retrial, venue was changed to Jefferson County. After two weeks of trial in which Sanborn's identity as the killer was conceded, the jury was instructed to begin its penalty phase deliberations at about 11:00 p.m. on Friday night. The death verdict was returned in less than an hour. It was the first death verdict imposed by a Jefferson County jury in nearly five years.

As this is written, final sentence and a new trial motion are pending. Among the issues to be litigated are the Court's conduct of voir dire (the jury was selected in less than two days, with the judge conducting the entire voir dire), the court's refusal to admit expert testimony in the guilt phase as to Sanborn's extreme emotional disturbance, and the admission of testimony by a minister as to his conversations with Sanborn prior to the first trial, when he had met with him at defense counsel's request in preparation for a potential penalty phase.

## THINGS ARE TOUGH ALL OVER

Even the New Jersey Supreme Court, which had reversed twenty-five consecutive death verdicts, has finally affirmed one, *State v. Marshall.* [38] Readers may recognize the case as having been the subject of a best-seller by Joe McGinniss and a TV movie starring Robert Urich. In a 110-page opinion, the Court identified no less than eleven constitutional errors, including *Brady* violations and prosecutorial misconduct in drawing negative inferences from Marshall's request for counsel during an interrogation, but concluded that all errors were harmless. In dissent, Justice Handler stated,

> Finally, the bell tolls. This Court for the first time affirms both the murder conviction and death sentence of a defendant prosecuted for capital murder. The Court's decision and judgment serve only to confirm the intractable constitutional infirmities of our capital-murder jurisprudence, its unfathomable incoherence and unmanageable contradictions. [39]

Amen.

**STEVE MIRKIN**
Assistant Public Advocate
Capital Trial Unit
Frankfort

[1] *Scroggy v. Kordenbrock*, 49 CrL 3017 (4-15-91).

[2] *Post*, 3-30-91, p. 9K.

[3] 1986, Lawyers Cooperative Publishing Company.

[4] *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[5] *State v. Fulminante*, 778 P.2d 602, 609-10 (1988).

[6] 845 F.2d 1385 (6th Cir. 1988).

[7] *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

[8] 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *See* also *The Advocate*, August 1990, pp. 22-24.

[9] *Massiah v. U.S.*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

[10] 49CrL 2031 (4-16-91).

[11] *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1983).

[12] 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

[13] 494 U.S. ____, 110 S.Ct. 1212 (1990).

[14] 494 U.S. ____, 110 S.Ct. 1257 (1990).

[15] *Supra* n. 12.

[16] 919 F.2d 1091, 1094 (6th Cir. 1990), *cert.* denied, 49 CrL 3017 (4-15-91).

[17] 110 S.Ct. 2412 (1990).

[18] One notable and surprising exception may be found in the April 27, 1991 issue of *Time* magazine, pp. 68-69.

[19] 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

[20] 490 U.S. ____, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

[21] 109 S.Ct. at 2211.

[22] 669 S.W.2d 519, 523 (Ky. 1984).

[23] 754 S.W.2d 534 (Ky. 1988).

[24] 766 S.W.2d 58 (Ky. 1989).

[25] 777 S.W.2d 900 (Ky. 1989).

[26] The Court has backed away, however, from strict reliance on *Booth* in a non-capital homicide case. *Campbell v. Commonwealth*, 788 S.W.2d 260 (Ky. 1990).

[27] 111 S.Ct. 1031 (1991).

[28] 111 S.Ct. 902 (1991).

[29] March 11, 1991, p. 24.

[30] 111 S.Ct. at 905.

[31] 111 S.Ct. at 904.

[32] 111 S.Ct. at 905.

[33] *Mississippi v. Turner*, 111 S.Ct. 1032 (March 2, 1991).

[34] Le Lys Rouge, Ch. 7 (1894). (Thanks to Vince Aprile who knew who said it.)

[35] *The Courier-Journal*, 5-1-91.

[36] *Sanborn v. Commonwealth*, 754 S.W.2d 534 (1988).

[37] *Id.* at 538.

[38] 586 A.2d 85 (1991).

[39] 586 A.2d at 199.

**OOPS!**

An Ohio prisoner serving consecutive sentences of up to 40 years in prison was denied a stay of execution by the U.S. Supreme Court in March, despite the fact that the prisoner was not under a sentence of death!

Martin Crago had appealed his sentence to the Court, asking that the Court review claims that Crago's trial and sentence were unfair. In an error which Court officials couldn't explain, the Justices reviewed the case as if it were a capital case, and ordered that an execution proceed.

From *Life Lines*, a publication of the National Chapter to Abolish the Death-Penalty, April/May/June 1991 issue.

## Victim's Character no issue in penalty

In consideration of the penalty in a capital case, should it matter whether the victim was a reprobate or a model citizen? Attorney General Dick Thornburgh says yes. We disagree.

The attorney general in a Tennessee case urged the U.S. Supreme Court to allow juries to take into account the character of the victim, and also to learn about the grief of the survivors.

While that position may seem consistent with the overdue emphasis on victims' rights, it ventures into the dangerous territory of personal distinctions. In effect, one victim would be regarded as having more fundamental worth than another, and while individuals are free to their own opinion on that point, it shouldn't enjoy the sanction of the court.

States that allow capital punishment have well developed systems for weighing mitigating and aggravating circumstances. Likewise, requirements for capital cases are spelled out precisely. It is the crime that dictates the punishment and the crime usually speaks for itself. Who or what the victim was, or whether his character was exemplary or shady, shouldn't matter. Nor should the number of mourners or the depth of their sorrow be a factor. Introduction of that issue is excessively inflammatory.

If the Supreme Court overrules lower court decisions barring such evidence, the penalty phases of capital trials in some instances would degenerate into conflicting testimony about the character of the dead victim, which has nothing to do with either the crime or the defendant.

The death penalty is too serious a business to allow extraneous evidence or appeals to emotion.

*THE PADUCAH SUN*, APRIL 28, 1991, Reprinted by permission.

# DEATH WITHOUT DELIBERATION

*State Supreme Court Appears Ready to Uphold any Capital Conviction no matter what trial errors occur*

*The following was a February 17, 1991 editorial from the San Francisco Examiner.*

The California Supreme Court has upheld more than 30 death penalty convictions and sentences in a row, despite obvious and eyebrow-raising errors in a number of them. It virtually doesn't matter how sloppy the trials are. No matter what happens, the court will call it "harmless error," and the verdict and sentence will be upheld. A death-penalty defendant in California has as much chance with the state Supreme Court as a civil rights worker in the 1960s had with a Mississippi justice of the peace. He can't win.

This is not a matter of being for or against the death penalty or of coddling criminals. Even those who support the death penalty agree that if the state is to take a life, it must do so with great care and with full observance of basic constitutional rights. In California, this requirement is being flagrantly ignored.

When the California voters removed Rose Bird, Joseph Grodin and Cruz Reynoso from the state Supreme Court in 1986, they sent a message that they wanted death penalty convictions upheld. The Malcolm Lucas court has taken that message to heart--in spades. As a result, the California Supreme Court now has one of the highest affirmance rates in capital cases in the nation, higher than Texas, Florida and Virginia, the death belt states. The Lucas court is so result-oriented and ideological that it has all but abandoned the vital task of making sure that the Constitution is followed and that the rule of law remains the law of the land.

Here are the startling facts of a few cases that the court has decided in recent years:

- In 1989, Watson Allison was convicted of murdering Leonard Wesley Polk during a robbery, and he was sentenced to die. In sentencing Allison, the judge referred to his long and violent criminal record as aggravating circumstances leading to the death penalty. Unfortunately, the judge got it wrong. Allison had no prior criminal record.

  Justice Stanley Mosk summed up the situation when he wrote in dissent: "The error was particularly egregious in this instance, for the judge obviously did not recollect the facts. Whether he merely failed to recall the evidence, or actually had some other case in mind, we shall never know because of his death. He emphasized the 'criminal record of the defendant,' and again stressed 'the long and distinguished record of the defendant in the criminal annals of the county.' To the contrary, there was no evidence whatever concerning any prior violent criminal conduct by this defendant. He has never served time in prison nor been convicted of a felony."

  Nonetheless, the Supreme Court found this "harmless error."

- Richard William Garrison was convicted of two murders and a robbery. In January 1981, he was sentenced to die in the gas chamber. Garrison's court-appointed lawyer, one Blendon Beardsley, who has since died, was an alcoholic who drank excessively throughout the trial. The court's own opinion conceded that "Beardsley drank in the morning, during court recesses and throughout the evening." The court bailiff reported "that he was in close contact with Beardsley throughout the trial, that Beardsley always smelled of alcohol (but) that he did not see Beardsley stagger or sleep in court."

  One day during jury selection, Beardsley was arrested for drunk driving on his way to the courthouse and was found to have a blood alcohol level of .27--three times the legal limit for driving.

  Yet the Supreme Court found that Garrison had received the effective assistance of counsel as required by the U.S. and California constitutions.

- Jeffrey Sheldon was convicted of first degree murder and kidnapping in 1989. During the penalty phase of the trial (California has separate guilt and penalty phases in capital cases), the jury was told about a previous "crime" for which he had been prosecuted--the murder of a policeman--and evidence about that "crime" was admitted. However, Sheldon had been acquitted of that charge, and the evidence was inadmissible as a matter of law.

  Nonetheless, the Supreme Court found this "harmless error."

- Charles Edward Whitt was convicted last year of one count of first degree murder, one count of robbery and one count of assault with a deadly weapon. The jury sentenced him to die. During the penalty phase, Whitt took the witness stand, and his lawyer asked him, "Why do you deserve to live?" The prosecutor objected to this question, and the judge sustained the objection. In so doing, the judge violated the United States Supreme Court's rule that capital defendants be allowed to introduce any relevant mitigating evidence. Whitt wanted to say something mitigating. What could be fairer than allowing him to look the jury in the eye and say, "Don't kill me because..."? In this case, the judge summarily refused to let him do that, a clear violation of the law.

  The state Supreme Court found this "harmless error."

There are many similar examples, all of which lead to the same conclusion: The state Supreme Court is ignoring serious errors in capital trials and rubber-stamping convictions without adequate review. "Harmless error" means that an error occurred, but the court believes that the same result would have been reached even if the error had not occurred. Can the court be so sure of what would have happened if Watson Allison's judge had not confused him with someone else, or if Richard Garrison's lawyer had not been drunk at his trial or if Jeffrey Sheldon's jury had not heard about a crime he did not commit or if Charles Whitt had been allowed to tell the jury why he should live?

The court is making up law to fit each case, without concern for an overall rationale. For example, if the prosecutor misstates the law to the jury, the court says it's OK because the judge got it right. If the judge misstates the law, the court says it's OK because the prosecutor got it right. If both the judge and the prosecutor misstate the law, the court says it's OK because the defense lawyer got it right.

The voters have stated overwhelmingly and repeatedly that they want the death penalty. Pandering to public opinion, the Supreme Court has abandoned its responsibility to make sure that the Constitution is enforced. Eventually, we are certain, many of these cases will be overturned by the federal courts. In the meantime, the court has forgotten that unless it observes the law, it will soon lose justice.

# PENALTIES PURSUANT TO 1991 DUI AMENDMENTS

| DUI. 189A.010 | FINE | JAIL/PRISON | PUBLIC SERVICE WORK | SUSPENSION PERIOD |
|---|---|---|---|---|
| 1ST OFFENSE | $200-$500 [A B] + 150.00 [F] | 48 hours to 30 days [A B] | 48 hours to 30 days [C] | 90 days subject to occupational license after 30 [G] |
| 2ND OFFENSE within 5 years | $350-$500 [D] +$150.00 [F] | 7 days-6 months [H D] | 10 days to 6 months [E] | 12 months [G] |
| 3RD OFFENSE within 5 years | $500-$1000 [D] +$150.00 [F] | 30 days to 12 months [D H] | 10 days to 12 months [E] | 24 months [G] |
| 4TH OR GREATER within 5 years | $1,000-$10,000 [I] | 1-5 years [J H] | Possible as a condition of probation or conditional discharge | 60 months [G] |
| **SUSPENDED OPERATOR'S LICENSE 189A.090** | | | | |
| 1ST OFFENSE within 5 years | 0-$250 | 0-90 days | As a condition of probation or conditional discharge | Twice original revocation period |
| 2ND OFFENSE within 5 years | 0-$500.00 | 0-12 months | As a condition of probation or conditional discharge | Twice original revocation period |
| 3RD OFFENSE OR GREATER | $1,000-$10,000 [I] | 1-5 years | As a condition of probation or conditional discharge | Twice original revocation period |
| **REFUSAL** | | | | |
| All are within 5 years | N/A | N/A | N/A | 1st-6 months<br>2nd - 18 months<br>3rd- 36 months<br>4th or Greater- 60 months |

**COMMENTS**

[A] Can be either or both.

[B] Must be at least one-cannot be probated, conditonally discharged, or subject to early release.

[C] May apply to judge for this option in lieu of either jail or fine.

[D] Both must be accessed.

[E] Penalty available to trier of fact as option in addition to fine and jail.

[F] Service fee designated as a fine pursuant to *Beane v. Commonwealth*, 736 S.W. 2d 317 (KY 1987).

[G] Assuming adult offender - juvenile offender is suspended until 18 or listed penalty whichever is greater.

[H] At least 48 hours must be consecutive to other sentences.

[I] Pursuant to KRS 534.030 in lieu of Imprisonment as a condition of probation or conditional discharge.

[J] Minimum of 120 days mandatory jail time.

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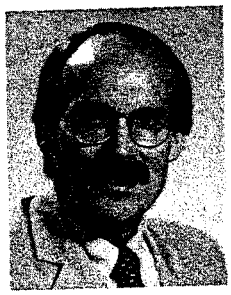
# PLAIN VIEW

*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.

### *California v. Hodari*

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court stated that a seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away," which happens "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."

In *United States v. Mendenhall*, 446 U.S. 544 (1980), the Court stated that a person was seized for Fourth Amendment purposes when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." This test was reaffirmed as late as *Michigan v. Chesternut*, 487 U. S. 567 (1988), just three short years ago.

It was in this context that young Hodari D. was standing with others on a street in Oakland, California, when to his chagrin, police officers appeared. Perhaps because of the rock cocaine in his possession, or perhaps because he had tired of confrontation with the police whenever he gathered on the streets of his city, he and his friends took off. After a chase, Hodari threw away his rock and was shortly thereafter tackled. The United States Supreme Court granted *certiorari* following a California decision that Hodari had been seized illegally when he saw the police running towards him. *California v. Hodari*, 49 Cr.L. 2050 (April 23, 1991).

The only question for the Court was "whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield." The seven member majority held in an opinion written by Justice Scalia that it does not.

Justice Scalia borrows liberally from common law notions of arrest in reaching his decision regarding when a seizure occurs. Rejecting the *Mendenhall* test as stated above, he instead writes that such an arrest requires either physical force, such as touching, or "submission to the assertion of authority." Thus, by fleeing, Hodari futilely avoided arrest and missed the protections of the Fourth Amendment. Even though Hodari clearly did not feel free to leave, under *Mendenhall* neither had he been seized for Fourth Amendment purposes. Thus, even though the police had neither probable cause nor a reasonable suspicion when they began to chase Hodari and his friends, that is without significance to the Fourth Amendment analysis precisely because there was no seizure.

The opinion gathered a surprising seven justice majority, demonstrating the extent to which Fourth Amendment claims will be planted in rocky soil henceforth in the Supreme Court. It further demonstrates a proclivity to abandon precedent, both hallowed and recent, in order to pander to perceived needs of the law enforcement community.

Only Justice Stevens and Marshall remain. The dissenters state the majority opinion has "significantly limited the protection provided to the ordinary citizen by the Fourth Amendment." They fear that the opinion "will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they may still have." The dissenters note the irony that the citizen himself by his submission to the show of authority, or on the other hand by his decision to flee, will himself decide at what point his Fourth Amendment rights come into effect.

## THE KENTUCKY COURT OF APPEALS

### *Coker and Pritchard v. Commonwealth*

The Kentucky Court of Appeals has written a significant Section Ten decision. It is entitled *Coker and Pritchard v. Commonwealth*, Ky. App., ___ S.W. 2d. ___(March 8, 1991), (to be published). In this decision, written by Judge Wilhoit and joined by Judges Stumbo and Lester, the Court puts some meat on the bones of

Section Ten. Here, the police executed a search warrant for 814 Glen Hollow Road. That search produced no evidence. However the police did find that Coker was moving to Royal Gardens Court. Later the officers found Coker at the new address and arrested him there.

Following the arrest, the police called the district judge at his home, desirous of searching Coker's new apartment. The judge advised the officer to simply alter the old search warrant by inserting the new address. That was done without the district judge signing the "new" warrant. The police executed the new warrant at the Royal Gardens Court apartment and found cocaine, marijuana, and drug paraphernalia. Coker's motion to suppress was denied in Circuit Court based upon the good faith exception to the warrant requirement, citing *United States v. Leon*, 468 U.S. 897 (1984). The Court did no analysis under Section Ten of the Kentucky Constitution.

The Court of Appeals reversed. Significantly, the Court based its reversal entirely upon Section Ten. Under Section Ten, both the affidavit and warrant were faulty for not mentioning the Royal Gardens Court address. "No affidavit was ever presented to the judge to support a warrant for the search of those premises. At best he received an unsworn oral statement. It has also been long recognized that an oral statement is insufficient to support the issuance of a search warrant."

The Court further rejected any good faith on the part of the police officers. Even if *Leon* applies under Section Ten, which the Court does not assume, "we are astonished that one would consider that the warrant was reasonably relied upon by the police."

Ultimately, the Court held that the search had been illegal, and that all evidence seized had to have been suppressed. While the Court acknowledged that there were societal costs to such suppression, the Court reminded all of us that "It is much better that a guilty individual should escape punishment than that a court of justice should put aside a vital fundamental principle of the law in order to secure his conviction", citing *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860, 866 (1920). This case represents a fine analysis, and a refreshing use of our state constitutional search and seizure provision.

### *Creech v. Commonwealth*

The Court decided another case on March 22, 1991, also to be published. In *Creech v. Commonwealth*, Ky. App., ___S.W. 2d___(March 22, 1991), the Court revisited the question of when the police may investigate the occupants of a car short of probable cause.

In this case, Creech and a male companion were in a car bent over facing each other at 2:45 a.m. in the corner of a dark parking lot in Covington. When the police pulled into the lot, Creech sought to leave, but instead was flagged down. Once Creech was stopped, the police found narcotics in plain view. The question, however, was whether the police could stop Creech in the first place under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

In a surprising opinion, the Court held that the stop was legal. "It would be reasonable to suspect, considering the totality of the circumstances, that Creech and his companion could have been involved with a stolen vehicle or certainly could have been engaging in some criminal activity at the time and place Kim observed them." Thus, the evidence which soon became readily apparent was admissible at the defendant's trial.

Unfortunately, the Court gives little guidance regarding their reasoning. What differentiates this case from the hundreds of similar cases which the police face every night? Is the Court saying that the police may make a *Terry* stop of every car in a parking lot at night? The Court simply does nothing to inform the police or the Bar about why this case is unique. If it is not unique, then the case is wrongly decided and should be reversed by the Supreme Court of Kentucky. If it is unique, then the Court should say so.

### *Irvine A. Smith v. Commonwealth*

The Court also rendered an interesting decision in *Irvine A. Smith v. Commonwealth* on March 29, 1991, not to be published. Here, Smith was stopped for speeding, and subsequently arrested for driving on a suspended license. A passenger compartment search revealed an empty gun pouch and spent shells. A request to search the trunk was countered with an obscenity laced expression of indifference. The search of the trunk then revealed a plastic garbage bag of marijuana. The trial court denied the motion to suppress.

The Court of Appeals, however, reversed. The Court had no problem with the initial search, saying that it was incident to Smith's arrest. It was the search of the trunk that was problematic. The Court rejected that a search incident to the arrest extended into the locked trunk. Further, the search could not be conducted as a probable cause search under *United States v. Ross*, 456 U.S. 798 (1982) and *Estep v. Commonwealth*, Ky., 663 S.W. 2d 213 (1983), because the existence of the gun pouch and spent shells simply gave rise to no belief that the car contained contraband. Thus, the search was illegal, and Smith's conditional plea was to be vacated.

## THE SIXTH CIRCUIT

### *United States of America v. Crotinger*

The Sixth Circuit considered two search and seizure issues in the case of *United States of America v. Crotinger*, 928 F. 2d. 203, (6th Cir. 1991). Here, the police pulled over a car going 66 in a 55 zone on Interstate 40. The police noticed white pills on the floor of the car as they asked for a license. When they returned, they could no longer see the pills, but they could smell marijuana. The owner's wife then consented to a search of the car, which resulted in two smoked marijuana cigarettes being found in an overnight bag. The mother lode, however, was found in a search of the trunk of the car, specifically 122 pounds of marijuana.

The Court held that a passenger's privacy rights had not been violated. First, the Court held that the stop was not pretextual since the driver was speeding. Further, the Court found this to be a classic *United States v. Ross*, 456 U.S. 798 (1982) probable cause car case. Under the facts, probable cause developed inexorably as the search occurred. The Court distinguished both Chadwick and Sanders because probable cause here was present as to the entire car and not just the containers in the car.

## THE SHORT VIEW

1. ***Dimeo v. Griffin***, 924 F.2d 664 (7th Cir. 1991). In a case of some interest in Kentucky, the Seventh Circuit has held that the circumstances of the racing industry do not justify special needs searches. Unlike *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the circumstances of the racing industry are not sufficiently substantial to justify allowing random urine testing and similar warrantless seizures of body samples.

2. ***People v. Wright***, Colo. Sup. Ct., 804 P.2d 866 (1991). The police may not search without a warrant the purse of a driver who has been in an automobile accident, despite the officer's professed need for information in order to complete his report. Accordingly, drugs found during a search of the purse had to be suppressed.

3. ***United States v. Hahn***, 922 F.2d 243 (5th Cir. 1991). The IRS cannot search a car without a warrant as an inventory without written guidelines for an inventory any more than a local police department can do so, according to the Fifth Circuit. Nor can the IRS "borrow" such inventory guidelines from a local police department. The Court relied specifically on the case of *Florida v. Wells*, 110 S. Ct. 1632 (1990), where the Court "clearly expressed its view that inventory searches must be regulated in order to limit police discretion and reduce the danger that inventory searches will become a disguise for warrantless evidentiary searches."

4. ***State v. Derifield***, Iowa Ct. App., 48 Cr. L. 1428 (1/29/91). Once the police search a car incident to a lawful arrest, they may not reenter the car to conduct a second search, according to the Iowa Court of Appeals.

5. ***Commonwealth v. Welch***, Pa. Super. Ct., 4569 A.2d 1387 (1991). The refusal to consent to a search may not be introduced against a defendant at trial. The Pennsylvania Court analogized their holding to the similar proscription against the use of the invocation of Fifth Amendment rights at trial. "The point of significance is that one should not be penalized for asserting a constitutional right....The integrity of a constitutional protection simply cannot be preserved if the invocation or assertion of the right can be used as evidence suggesting guilt."

6. ***People v. Hinton***, Calif. Ct. App. 2d Dist., 278 Cal. Rptr. 36 (2/6/91).(Not to be published) A passenger in a car containing a person against whom there is an outstanding arrest warrant may not be searched or detained merely because they are in the car with such a person.

7. ***Commonwealth v. Copenhefer***, Pa. Sup. Ct., 587 A.2d 1353 (March 18, 1991). This is truly a modern search and seizure case. The police obtained a warrant for a defendant's computer, having established probable cause that the computer contained information tying the defendant to a robbery/murder. The defendant, however, had deleted the desired information, which was then stored on the hard drive. The Court rejected the defendant's contention that the police needed to obtain another warrant for the hard drive, saying that "An attempt to destroy evidence is not equivalent to a legally protected expectation of privacy. Appellant's unsuccessful attempt to delete documents or files from his computer did not create a legally protected expectation of privacy which would have required a second warrant before the prosecution applied technology to elicit the content of files buried in the memory of the computer."

8. ***Wilner v. Thornburgh***, CA DC, 49 Cr.L. 1024 (3/29/91). In the turnabout is fair play category is this decision by the D.C. Circuit Court of Appeals. The Court holds that lawyers applying for jobs with the Justice Department may be forced to pee in a cup. Relying on *Skinner v. Railway Labor Executives Ass'n.*, 489 U.S. 602 (1989), the Court finds the special needs of the Justice Department to outweigh the diminished expectation of privacy of the lawyer applicant.

9. ***United States v. Taketa***, 923 F.2d 665 (9th Cir. 1991). Does a government employee have a right not to be videotaped? According to the 9th Circuit, the answer is yes. Here, two drug agents were suspected of illegal wiretapping. Video surveillance was set up of one of their offices. The 9th Circuit held that a warrant was required for the video surveillance due to the fact that the surveillance was directed at obtaining evidence of criminal conduct rather than mere work-related employee misconduct.

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## ENTRAPMENT DEFENSE GUIDELINES

The Institute for Law and Justice, in conjunction with the Bureau of Justice Assistance published a monograph, *Entrapment Defense in Narcotics Cases: Guidelines for Law Enforcement*, to provide guidelines designed to minimize the likelihood of a successful entrapment defense, particularly in drug cases. The monograph contains four chapters, each addressing a specific area of the entrapment defense.

Chapter 1 defines the entrapment concept and briefly reviews pertinent U.S.Supreme Court decisions. Chapter 2 addresses the alternative standards governing the entrapment defense, while the next chapter provides specific guidelines for dealing with each of the prevailing entrapment standards. The final chapter covers the need for supervisory oversight to avoid the entrapment defense successfully.

To request a copy of the monograph contact: Mike McCampbell, Institute for Law and Justice, 1018 Duke Street, Alexandria, Va. 22314 (703) 684-5300

## SIXTH CIRCUIT COURT HEARS ACLU CASES

The Sixth Circuit heard oral argument in two ACLU of Kentucky cases involving search and seizure.

In the first, *Jeffers v. Heavrin*, Tony Jeffers sued the Jefferson County Police Department and Churchill Downs for searches conducted of Kentucky Derby patrons. Jeffers was arrested for possession of his allergy medication (which police suspected might be Valium, even though the pills bore their proper markings) after police searched his prescription pill bottle, which was located in a potato chip can inside a grocery bag. Police were allegedly searching for alcohol, glass and weapons. After a three-day trial conducted for the ACLU by Ed Post, Al Quick and Chris Rivers, U.S. District Judge Ronald E. Meredith ruled that the searches were lawful and that Jeffers had consented to them by voluntarily entering Churchill Downs.

The Sixth Circuit found that the gate search was consenual, but reversed and remanded on the grounds that the police used the entry policy of a private entity to justify a search otherwise beyond the power of the police agency to conduct. Had Churchill Downs employed private security guards, they would have either granted or denied Jeffers entry.

Although voluntary consent is a substitute for probable cause to search, when it comes to arrest, the offficer must have independent probable cause. In the totality of the circumstances that did not exist here. The bottle did not contain a recognizable controlled substance.Jeffers offered a believeable explanation and even offered to call, or have the officer call, his doctor. Jeffers met no "profile." The can was used to segregate small items, so there was nothing unusual about the pill bottle being there. The pills themselves were identifiable by the *The Physician's Desk Reference* available to Officer Heavrin.

*Jeffers v. Heavrin et al.* 1991 WL 74189 (6th Cir. Ky.)

In the second case, *Williams v. Ellington*, a Graves County high school student challenged her strip search by school officials searching for drugs. David Armstrong and Janice Jacobs handled the case for the ACLU at trial, where U.S. District Judge Charles R. Simpson III held that the search was supported by "reasonable suspicion" and was thus lawful. No decision as yet.

# EVIDENCE LAW

## *Using Ky's Constitution to Challenge Established Evidence Practices*

***FOURTEEN 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.

If someone asked you to identify the legal authority that allows the Commonwealth to take a sample of your client's blood for DNA testing, what would your answer be? If you answered *Schmerber v. California* (384 U.S. 757 (1966), you would be wrong but your answer would be the answer of the majority. *Schmerber* does not declare Kentucky law nor does it authorize any state to force a defendant to submit to a blood test. It only says that under the circumstances of that case the "search" was a valid search incident to arrest because of the danger of the alcohol metabolizing in the defendant's system and the reasonableness of the limited intrusion to secure the sample. [384 U.S. at 768-772]. The court specifically limited its conclusion "only on the facts of the present record." The court noted that "the integrity of an individual's person is a cherished value of our society" and cautioned that the holding in the case "in no way indicates that it (the Constitution) permits more substantial intrusions or intrusions under other conditions." [384 U.S. at 772].

Relying on the last paragraph of *Schmerber*, you could argue that because your client's DNA is not going to evaporate or metabolize the 4th Amendment would prohibit taking a blood sample for that purpose. [*Winston vs. Lee*, 470 U.S. 753 (1985)]. But the problem is that for 25 years no one has paid any attention to the last paragraph of the majority opinion and consequently everybody thinks that *Schmerber* authorizes a blood test anytime a police officer or prosecutor says that she needs it. Winning a 4th Amendment claim would be a real accomplishment.

This situation is an unhappy result of Bill of Rights worship that defense lawyers have been guilty of for years. Defense lawyers have focused on the federal Bill of Rights for so long that our knowledge of state law has atrophied and now that federal cases are coming down against us we have to scramble to find out what the state law is and how we can use it to protect our clients from unfair treatment. The state law in many cases is favorable to our clients. The question is how lawyers with heavy caseloads can find the law that they need when they need it. In this article, we are going to examine the issue of whether the Commonwealth can force a criminal defendant to submit a blood sample for purposes of DNA testing. The issue is important for many reasons but chiefly because the issue involves all aspects of Kentucky law, statutes, rules, common law and constitutional law. By examining the law, we will be able to look at the important sources of information and legal authorities that will be useful in considering other evidence questions.

It is important not to limit your argument to the Kentucky Bill of Rights. There is a lot more to our argument under the state constitution than citation of some section of the Bill of Rights. Bare assertions that Section 10 prohibits compelled blood tests are not going to impress the court very much because comparison of the language of Section 10 with the language of the 4th Amendment shows that it is quite similar. Under these circumstances, the court can decide according to its own preferences. But the court's discretion in ruling will be limited if it knows that RCr 7.24 doesn't authorize compelled blood tests in criminal cases, that under common law a person's body cannot be subjected to non-consensual intrusion in the absence of a positive enactment of law, that Section 1(1) of the Constitution constitutionalizes this principle, and that Section 11 prohibits forced disclosure of any fact that might incriminate the defendant, testamentary or otherwise.

To obtain this information it is necessary to develop a method of approaching a case that goes beyond citing the state constitutional analogue of a federal right. To obtain this information we have to examine the structure of government under the state constitution, the history of law in Kentucky and elsewhere, the substance and interplay of Kentucky common and statutory law, and the text, structure, and meaning of the Bill of Rights of the Kentucky Constitution. The order in which the method is set out is significant and intentional. Each of the first three parts contributes to an accurate

understanding of the Bill of Rights. There really is no way to find out what the Bill of Rights means except by going through the legal history and development of the particular issue first. And it is important to make an accurate statement of the law when you first make a state constitutional argument. You will be facing an unreceptive audience. People are not used to dealing with the Kentucky Constitution, and, where blood tests are concerned, they think they know what the law is. Telling judges that they don't know the law is no easy task. The only way to do this effectively is to be as sure as you can of your grounds and ready to back up your assertions with definite proof. Construction of correct arguments is not that hard, as I hope we will see below.

## EXPLANATION OF THE PROBLEM

For purposes of this article assume that during their investigation of a robbery case in which the prosecuting witness received a serious knife wound the police found fresh blood at the scene that upon testing turned out to be a type different from that of the prosecuting witness. On the basis of a weak eyewitness identification by the prosecuting witness your client has been arrested and jailed on a criminal complaint. No other evidence implicating your client has been found so, citing *Schmerber* and *Newman v. Stinson*, Ky., 489 S.W.2d 826 (1972) along with the need for the test, the prosecutor has filed a motion to get a sample of your client's blood for DNA identification. How do you prevent this?

## INITIAL RESPONSE

The case is in the district court at this point because of the criminal complaint. Your client is charged with first degree robbery, a Class B felony. There is no need to get fancy or to worry about the Bill of Rights here. The winning response is lack of jurisdiction to grant relief on the motion.

The district court is a court of limited jurisdiction, "and shall exercise original jurisdiction as may be provided by the General Assembly." [Constitution, Section 113(6)]. The district court has jurisdiction to dispose of all juvenile matters and all misdemeanor cases, but it does not have jurisdiction to make a final deposition of any felony. [KRS 610.010(1); 24A.110(1), (2); 24A.130]. In felony cases it has jurisdiction concurrent with the circuit court "to examine any charge of a public offense denominated as a felony or capital offense . . . and to commit the defendant to jail or hold him to bail or other form of pretrial release." [KRS 24A.110(3)]. This is it as far as felony jurisdiction goes.

The Criminal Rules place similar limitations on the district court in felony cases. Under RCr 3.14(1), the only thing that a district court may do at the preliminary hearing on a felony charge is determine probable cause and hold the defendant over for the grand jury. There is no provision in the statutes for the district court to entertain motions in the nature of discovery, which is what a motion for a blood test is. Under the Constitution, the district court's jurisdiction is only what the General Assembly says it is. In the absence of specific authorization, the district court could not rule favorably on the motion for blood test even if it wanted to. The text of RCr 3.07 confirms this conclusion.

In that rule, the mode of proceeding is determined by the nature of the charge. In a felony case, a district judge does not have authority to try the offense charged and therefore the judge "shall proceed" in accordance with Chapter 3 of the Rules. A judge may proceed under Chapter 7 [discovery] of the rules only when she has "authority to try the offense charged." The district court is compelled to honor this limitation because the rules govern all proceedings in the Court of Justice. [RCr 1.02(1)]. The motion for the blood sample fails in the district court because the court is forbidden by the criminal rules, by Chapter 24A of the statutes, and by Section 111 of the Constitution to grant the relief requested. There is no need to resort to any other part of the constitution at this point.

## THE NEXT STAGE OF THE PROBLEM

Assume now that the Commonwealth has obtained a first degree robbery indictment by direct submission to the grand jury. The Commonwealth files the same motion in the circuit court and the circuit judge enters an order granting you discovery and granting the Commonwealth reciprocal discovery. The judge has set a pretrial date to hear your objection to the motion for blood test and the Commonwealth's claim that it is entitled to the blood sample.

## RESPONSE IN THE CIRCUIT COURT - RULES

The circuit court has jurisdiction of this charge, so a different approach is required. [Constitution, Section 112(5)]. It is easy to deal with the discovery argument because the text of Chapter 7 does not allow the discovery that the Commonwealth seeks. It is important to note first that discovery in criminal cases is a relatively recent innovation, becoming available only in 1962 when the Criminal Rules were adopted. [Ky. Acts, 1962, Ch. 234, p. 807]. RCr 7.24 in its present form was not adopted until 1968. Before 1962, the Criminal Code of 1854 made no provision whatever for discovery or inspection. [Carroll's Kentucky Codes, 1948 Rev., Ch. 4, Sections 150-153; *Evans v. Commonwealth*, Ky., 19 S.W.2d 1091, 1093-1094 (1929)]. Production of evidence was limited to depositions and subpoenas to appear at trial. At common law, there was no discovery at all. [6 Wigmore *Evidence*, Section 1845, Section 1860, Section 1859 (Chadbourne Rev., 1976); 2 LaFave and Israel, *Criminal Procedure*, Section 19.3 (1984)]. Because there was no discovery before the enactment of the criminal rules, discovery in Kentucky criminal cases is what the Supreme Court says it is in Chapter 7 and no more.

A circuit judge proceeding under RCr 7.24 is limited by what the rule allows. The circuit court has no authority on its own to go beyond the limits of the rule and the rule does not provide for compelled blood tests. It only allows for reciprocal inspections and for copying of the results of scientific tests or physical examinations "which the defendant intends to introduce as evidence," or which were prepared by "a witness who the defendant wishes to call at trial." [RCr 7.24(3)(A)(ii)]. In a recent addition, the rule provides that if a defendant intends to rely on a defense of mental disease or defect, a court may order him to submit to a "mental examination." [RCr 7.24(B)(ii). The defendant is granted confidentiality if he does participate, but he also can refuse to submit to the examination. [RCr 7.24(3)(B); 3(C)]. This right of refusal is analogous to the right of a civil litigant to refuse to submit to a physical examination for determining blood groups under CR 35.01. A party who refuses to submit to the tests may suffer procedural penalties and may lose his case but the court cannot coerce submission to the test by its contempt power. [CR 37.02(2)(d)]. The court cannot compel submission to an invasion of a litigant's body. The reasons for this result is found in the limits of the court's authority and in the common law.

## RESPONSE IN CIRCUIT COURT - JURISDICTION AND COMMON LAW

The Supreme Court under Section 116 of the Constitution is authorized to enact "rules of practice and procedure for the Court of Justice." By definition, rules of practice and procedure exist to provide an orderly framework for the exercise and application of the substantive law. Section 116 cannot be a basis for compelled blood tests in criminal cases. The Supreme Court has never and legally can never enact a court rule that would support a forced blood test. It would be an

abuse of the limited authority given to the Court under Section 116. Rather, only the General Assembly of Kentucky has the authority, if it exists, to compel a blood test.

Section 29 of the Constitution assigns the legislative power of government to the General Assembly. A major part of that power is the authority to declare public policy, that is, the authority to decide what the law of Kentucky should be. "It is elementary that the legislative branch has the prerogative of declaring public policy and that the mere wisdom of its choice in that respect is not subject to the judgment of a court." [*Fann v. McGuffey*, Ky., 534 S.W.2d 770, 779 (1975)]. The Supreme Court has recently recognized the limitation of its authority to deal with subjects of substantive law in *Mash v. Commonwealth*, Ky., 769 S.W.2d 42 (1989). There the Court noted that Section 29 of the Constitution "gives all legislative power to our General Assembly" and that Section 28 of the Constitution "prohibits all persons or collections of persons of one of the three departments from exercising any legislative power properly belonging to the other one." In *Mash*, the Court acknowledged that it had no authority to add to the statute governing arrest.

Review of the statutes show 11 instances in which the General Assembly has authorized non-consensual blood testing or forced medical treatment and testing. Three of the statutes are the "implied consent" statutes for DWI. In each such statute, the subject has the right to refuse the test, although he does so at the cost of his driving privilege. [KRS 189.520; 189A.100; 186.565]. Children must be immunized against diseases unless there is a religious objection and, unless there is a religious objection, each newborn child must be tested for PKU [KRS 214.034; 214.155].

There are four situations in which a blood test is required. A physician must get a blood sample from a pregnant woman at her first presentation in order to test her for syphilis. [KRS 214.160]. KRS 406.081 requires a putative father to submit to a blood test to determine paternity. KRS 215.540 requires a person previously diagnosed to have tuberculosis to submit to testing and hospitalization. And, a convicted prostitute "shall be required to undergo screening for human immunodeficiency virus infection." The person "shall submit to treatment and counselling as a condition of release from probation, community control or incarceration." [KRS 529.090]. This statute stands in contrast to KRS 214.181(5) which prohibits HIV testing without informed consent except in cases of emergency.

Both CR 35.01 and RCr 7 were enacted as statutes by the General Assembly in 1952 and 1962, well before the adoption of Section 116 of the Constitution. All these statutes indicate hesitation to force anyone to submit to any form of medical or physical testing or treatment. Five specifically provide that a person cannot be compelled to submit while two more allow for a religious exemption. A woman may avoid the syphilis test by not seeing a doctor. In any event, the statute does not authorize the doctor to coerce a sample. A person must submit to TB testing and treatment, but only after being diagnosed for that disease. A convicted prostitute must submit to testing and treatment, but only after conviction. The only pre-adjudication blood test that can be compelled under the statute law of Kentucky is the test of a putative father under KRS 406.081. But the purpose of this test is determination of paternity for purposes of child support. The only reasonable conclusion to be drawn is that the General Assembly has determined the public policy of Kentucky to be that no person, except in the interest of public health, support of children, or after adjudication of guilt of a crime, may be compelled to submit to any medical treatment or physical tests.

Of course, the prosecution can argue that where a specific statute has not supplanted the common law, the common law prevails. [*N. Ky. Port Auth. v. Cornett*, Ky., 700 S.W.2d 392 (1985)]. But the common law is clearly against such an argument for compelled testing. The subordinate courts of the Court of Justice are required to follow the precedents of the appellate courts. [SCR 1.040(5)]. The precedents are clear

> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." [*Tabor v. Scobee*, Ky., 254 S.W.2d 474, 475 (1952)].

The only exception to this rule occurs when there is an emergency that prevents the person from indicating his desires. This rule is not an innovation. In English common law, the most fundamental of the "absolute" rights enjoyed by the subject was the "right of personal security" which consisted of "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." [1 Blackstone, *Commentaries*, [1765], U. of Chicago Reprint, p. 125 (1979); Posner, *The Economics of Justice*, p. 15-18 (1983)]. This right is a natural right that pre-dated the development of government. And it was so deeply implanted in the common law that historically no court could order an act contrary to the rule without a specific statute authorizing the act. [*Smith v. Southern Bell Telephone Co.*, Ky., 104 S.W.2d 961, 964 (1937)]. The leading case on this point is *Union Pacific Railway v. Botsford*, 141 U.S. 250 (1891) which held that the federal courts could not order a physical examination of a defendant in a civil case in the absence of statutory authority. The principle relied on in that case was that

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." [141 U.S. at 251].

Nothing in Kentucky law clearly authorizes coerced blood testing in the absence of statute. The more reasonable view of the situation is that the person's common law right to personal security is so important that only an act of the General Assembly, declaring as a matter of public policy the necessity of invasion, is sufficient to justify coerced physical testing or treatment. As we will see in the constitutional argument, I believe Section 1(1) of the Constitution constitutionalizes this principle thus presenting another argument against *ad hoc* orders requiring blood test.

One other possible argument in support of the authority to order tests is based on the case of *Newman v. Stinson*, Ky., 489 S.W.2d 826 (1972). *Newman* is often cited in compelled blood test motions. That case ostensibly holds that there is no constitutional violation in coerced blood testing. But what is often overlooked in this case is that it involves an implied consent statute, KRS 186.565, which deems the person to have consented to the blood test by the act of operating a motor vehicle. Aside from the historical errors contained in this opinion, it is obvious that if a person has consented in advance to the tests, there can be no legitimate objection to the test.

It seems obvious to me that the circuit court does not have jurisdiction to ignore the common law of Kentucky and the clearly expressed wishes of the General Assembly of Kentucky and of the Supreme Court of Kentucky in regard to coerced physical testing. Maybe the Supreme Court has authority to change the common law. However, in light of *Fann v. McGuffey*, it seems unlikely. A right as important as a person's right to physical integrity and freedom from invasion cannot be disposed of by the *ad hoc* determinations of the circuit court judge. I believe that such a rule, if it is possible under the Constitution, can be enacted only by the General Assembly. Because that body has not acted, we must conclude that the circuit court does not have jurisdiction to order the test on its own authority.

## THIRD STAGE OF THE PROBLEM

Assume that while the prosecutor was reviewing her file she found an unexecuted but facially valid search warrant that was signed by a circuit judge and that authorizes the police to take your client to a hospital for the purpose of providing a blood sample for DNA testing. She has attached the warrant and affidavit to her memorandum, and now argues that because a judge has issued a search warrant and that the information with respect to the blood test is not stale the Commonwealth may rely on the warrant to get the blood test even if it does not prevail on other arguments.

## RESPONSE - KENTUCKY BILL OF RIGHTS

If the circuit court does not rule favorably on the jurisdictional and legal grounds already presented, recourse to the Bill of Rights is the next step. The most obviously apt sections for the problem in this stage are Sections 1, 2, 10 and 11. Other provisions may apply tangentially, but the sections just named deal with the substantial issues presented by this problem. Before examining the applicability of the provisions however it is important to consider what we are doing. There are some ground rules about constitutional litigation that should be laid out and I do so in the next few paragraphs.

The most important rule is found in Section 26 of the Bill of Rights. Section 26 says that all substantive provisions of the Bill (Sections 1-25) are "excepted out of the general powers of government" and are "inviolate." The general powers of government are the legislative, judicial and executive powers delegated and assigned to the three branches of government in Sections 27, 29, 69 and 109 of the Constitution. Section 26 declares unambiguously that the government cannot do away with any part of the Bill of Rights nor can it, without amendment to the Constitution, modify any sections. This language was copied almost word for word from the last section of the Bill of Rights of the Pennsylvania Constitution of 1790. However, the drafters of the Kentucky Constitution of 1792 added a second clause to underscore the absence of governmental authority to undermine the protections of the Bill of Rights. The second clause provides that "all laws contrary thereto, or contrary to this Constitution, shall be void." This innovation by the drafters of the Kentucky Constitution of 1792 has been retained in each of the three subsequent constitutions. It has been interpreted in a number of cases to mean just what it says, that any acts of any branch of the government contrary to the Bill of Rights are not just illegal or unconstitutional, but void, as beyond the authority of government to enact. [*e.g. Columbia Trust Co. v. Lincoln Institute*, 129 S.W. 113, 116 (1910)]. This provision is very useful when you can catch the government in a plain violation of the provisions of the Bill of Rights. But at the same time it understandably makes courts reluctant to find the violations in the first place because there is nothing to do in that situation except to say that the act or the law is a nullity. This is why courts prefer to decide cases on non-constitutional grounds if they can arrange to do it. Constitutional decisions engrave principles in stone. Few courts want to be pinned down in that way. So, when possible, it is a good idea to find some common law, statutory, or rule-based reason to cite along with the constitutional claim you are making in a case.

Section 26 also highlights the important difference between the functions of the Federal and the Kentucky Constitutions. It is basic Con Law I theory that the federal constitution grants certain limited powers to a federal government that may not exercise any powers in excess of those granted. Section 26, on the other hand, expresses what might be called the "agency" theory of government. It begins with a sentence about "the high powers which we have delegated." The high powers referred to are the legislative, executive and judicial powers assigned in Sections 29, 69 and 109 of the Constitution. There are no limitations in the text of those sections. Therefore, the grant is one that gives the government the power to do any act that the particular branch believes is necessary or desirable. [*e.g., Holsclaw v. Stephens*, Ky., 507 S.W.2d 462 (1973)]. But just as a principal can withhold from the agent the authority to do certain acts, the people of Kentucky who established the Constitution [Preamble], withheld from the agents of government the right to do certain acts, *i.e.*, the right to infringe on any of the limitations found in the Bill of Rights or the Constitution. Thus, when approaching a problem of constitutional law, you should assume that the General Assembly or the Court of Justice have the authority to do what they have done unless there is a specific prohibition found in the Bill of Rights or the Constitution. The rule for the executive branch is somewhat different as we will see in the last section of this article.

Assuming that you find a rule that infringes on but does not obliterate a right found in the Bill of Rights, does the "void" language of the last clause of Section 26 mean that the court is bound to declare the act or law unconstitutional and therefore void? The answer is "not always." Although the Bill of Rights appears to be written as a list of absolutes, courts generally have found two reasons not to treat them that way. The first is the theory that a person may forfeit the right, by commission of a crime or some other act. [1 Blackstone *Commentaries*, p. 54; 140]. The other is that a person may not exercise his rights where such acts will affect the health, safety or welfare of others. [Posner, *The Economics of Justice*, p. 15; 19; *Chapman v. Commonwealth*, Ky., 172 S.W.2d 228, 229 (1943)]. But the key corollary to this second principle is that the government may not prohibit an individual "any liberty the exercise of which will not directly injury society." [*Commonwealth v. Campbell*, Ky., 117 S.W. 383, 385 (1909)]. This brings us to the first sections of the Bill of Rights pertinent to this issue.

## INHERENT AND INALIENABLE RIGHTS

Section 1(1) of the Constitution is part of the "Pleiades" amendment presented to the 1890 constitutional convention. It is perhaps the one real innovation in the Bill of Rights presented at that convention. C.T. Allen, the drafter of Section 1 [1 Debates of 1890, 435], designed the section to be the repository of the inherent and inalienable rights of every human person. [1 Debates, 494]. He noted that most of the rights had been scattered throughout the previous constitutions but that he and the drafting committee had gathered them together to emphasize the purpose of the Bill of Rights. By moving the Bill of Rights to the first place in the Constitution, the drafters intended to "magnify" the individual. The Bill of Rights had been the last Article of each of the previous three Constitutions. To emphasize the importance of individual rights, the Bill was placed first and the "inherent and inalienable rights" of persons were placed at the head of the Bill [1 Debates, 494].

The language of Section 1(1) was new to the Constitution. It was inspired by the language of the Declaration of Independence and was copied from the Massachusetts Declaration of Rights of 1780. [1 Debates, 435; 779-780]. The first sentence of Section 1 proclaims that all men by nature are free and equal and that all have certain "inherent and inalienable rights," that is, rights that are not surrendered upon the formation of a government. The first such right is the right of ". . . enjoying and defending their lives and liberties." The liberties referred to in this sentence are, I believe, the natural rights of personal liberty, which include the right of personal security. There is no opinion of the Kentucky courts saying so directly, but there is a good deal of evidence that this is so. In *Commonwealth v. Campbell*, the former Court of

Appeals in construing another part of Section 1 relied on that portion of Blackstone's *Commentaries* that described the absolute rights of men. [117 S.W. at 385]. In another case, *Smith v. Southern Bell Telephone Co.*, Ky., 104 S.W.2d 961, 964 (1937), the court discussed the rights protected by the 14th Amendment of the U.S. Constitution. The court was of the opinion that the rights protected there "are those natural rights, which include the right of personal liberty, the right of personal security, and the right to acquire and enjoy property." While this is a construction of the life, liberty and property clause of the 14th Amendment, it seems reasonable that these same rights are part of the liberties enjoyed by all regardless of the existence of government. Without discussing any particular constitutional sections, the court in *Chapman v. Commonwealth*, Ky., 172 S.W.2d 228, 231 (1943) pointed out that the right to live in peace and quiet "is one of the inalienable rights guaranteed to him by the Constitution that no man or set of men can abridge or deny." That same court noted that so long as a person's enjoyment of his rights does not interfere with the legal rights of others, he must be protected in his rights. "Within such protected rights are freedom from personal assault; freedom from molestation, or intimidation in pursuing lawful engagements and freedom from personal assaults or destruction of property." When Section 1(1) is read in conjunction with Section 2 which denies government "absolute and arbitrary power over the lives, liberty and property of free men" it seems clear to me that the basic right of personal security, which existed first at common law, and which has been described from the time of Blackstone to the present as one of the "absolute" rights of all persons, must be protected as one of the basic liberties that a person does not give up upon formation of a government. Freedom of the person is a basic liberty along with the right to vote, freedom of speech, freedom of conscience, freedom of thought, freedom from arbitrary arrest and seizure, and the right to hold personal property. [Rawls, *A Theory of Justice*, p. 61 (1971)]. The right of a person to be left alone physically is a basic liberty and therefore is one included in Section 1. From this point of view, the common and statutory law concerning coerced medical testing or treatment makes sense.

The right not to be subjected to such violation of one's person is so important that it is only when the exercise of the right of personal security "will directly injure society" [*Campbell*, 117 S.W.2d at 385] that the state can intervene and compel testing or treatment. In each of the statutes listed earlier in this article, the violation of the individual's right to personal security is premised on the General Assembly's determination that society or other individuals will be harmed in the absence of treatment or testing. The common law rule against unconsented to treatment also is understandable. The individual will not harm others by refusing treatment so there is no basis for compelling it. Rather, in the absence of an emergency, where treatment may be needed simply to preserve life until the individual can make an informed choice, a doctor faces a lawsuit for battery if he acts without consent.

Neither the Supreme Court nor the General Assembly have decided that a coerced blood test is proper in a criminal case. Nor, under the analysis presented here, may they do so legitimately. We are told by RCr 9.56(1) that a criminal charge either by complaint or indictment is not evidence of wrong doing. Rather, a person charged with a crime is presumed innocent. Thus, there can be no question of forfeiture simply by being accused of a crime. The question is whether under these circumstances a person's insistence on maintaining this liberty will "directly injure society." I think not. A person with TB may infect others. A mother with syphilis may infect her baby at the time of delivery. But a person who refuses to provide a blood sample to the Commonwealth only makes it more difficult for the Commonwealth to convict. If there is any injury to society because of the failure to cooperate it is only an indirect one and certainly not of the magnitude of the injuries dealt with in the statutes already enacted. Section 2 denies the state arbitrary power over the lives, liberty and property of its citizens. The fact that it would be helpful to the state to be able to compel blood testing is not a sufficient reason to compel testing in light of these constitutional barriers. Section 1(1) reserves to each individual the right of enjoying life and liberty. Where enjoyment of this right of personal security does not directly injure others, the state has no authority to infringe upon it and therefore has no authority under the Constitution to enact any rule or statute that would require submission to a blood test under the circumstances presented here.

## SECTION 11 - THE RIGHT NOT TO "GIVE EVIDENCE" AGAINST YOURSELF

The obvious difference between Section 11 of Kentucky's Bill of Rights and the 5th Amendment is that Section 11 says that no person shall be compelled to give evidence against himself while the 5th Amendment says that the person shall not be a witness against himself. Readers who have watched "Rumpole of the Bailey" on PBS may have noticed that in England the phrase "give evidence" often is used where Americans would say testify. But it would be a mistake to assume as the former Court of Appeals did in *Newman v. Stinson* that the difference in language is meaningless. The history of the provision shows a distinction.

Kentucky's Section 11 is a close copy of Section 9 of the Bill of Rights of the Pennsylvania Constitution of 1790. The Pennsylvania provision was patterned closely on Section 8 of the Virginia Declaration of Rights of 1776. Madison, the author of the 5th Amendment, had been on the drafting committee of the 1776 Declaration with George Mason. [1 Schwartz, *The Bill of Rights: A Documentary History*, p. 231 (1971)]. Thus, when Madison drafted the federal language in 1789, he knew of Mason's formula for the right. Of more importance for us, however, is the question of whether the draftsmen of Kentucky's first Bill of Rights knew about Madison's formula and consciously rejected it.

We know that Madison was asked by no fewer than 14 Kentuckians to draft the first Constitution of Kentucky, but he said that he could not because of other duties. He recommended that Kentuckians consult a recently published volume of state constitutions as a source for constitutional language. [Coward, *Kentucky in the New Republic*, p. 11 (1979)]. Virginia ratified the Federal Bill of Rights on December 15, 1791, about three and a half months before the opening of the Danville Convention. Each of Kentucky's 8 counties could send 2 delegates to the Virginia House of Delegates, but I can't say at this point whether any of those delegates served in the Kentucky constitutional convention or whether the members of the constitutional convention were aware of the language of the federal Bill of Rights. What is obvious is that the drafters chose to copy the 1790 Pennsylvania Bill of Rights almost word for word and section for section. Comparison of these two documents showed 4 instances where the language differs and 2 instances where Kentucky rejected sections of the Pennsylvania Bill. However, the 1792 provision, which was unnumbered in the 1792 Constitution, is a word for word copy of Section 9 of the Pennsylvania Constitution.

The 1890 convention modernized the language of Section 11 and moved the prohibition against giving evidence against one's self to a position before the listing of the public trial rights granted in prosecutions by indictment or information. By so doing, it appears that the drafters wished to make clear that the right not to give evidence against one's self applied to all criminal prosecutions, not just those prosecuted by indictment

or information. The text and its modification do not tell much about the reach of the right not to be compelled to give evidence against one's self.

In the Debates of 1890, the drafters acknowledged the adoption in 1886 of the statute (now KRS 421.225) which for the first time allowed a criminal defendant, if he asked, to testify as a witness at his trial. At the convention, the Committee on the Preamble and Bill of Rights reported a new formula for the protection which provided that at trial the defendant "shall not be compelled to testify against himself." [1 Debates, p. 310]. This proposal was defeated. Another amendment proposed to add a provision that "if he introduces himself as a witness, he may be questioned on all matters about which he testifies." This also was defeated. [1 Debates, 953]. The best statement about the meaning was made by Delegate Bronston, who, in discussing the "old" Bill of Rights said that the protection did not mean only that a man could not be compelled to testify against himself, but that "he cannot be compelled to disclose any fact which would tend to criminate himself, on anybody else's trial or anywhere else." [1 Debates, 954]. To, "disclose any fact" does not necessarily mean to testify at a legal proceeding. Disclosure after all means to expose to view or to make known or public. But one man's understanding of Section 11 voiced at the 1890 convention is not conclusive proof of the extent of Section 11's protection. It is necessary therefore to examine the history of the right.

It is obvious that because the defendant could not testify at trial, the original drafters of the phrase did not need a constitutional provision to protect the defendant from compelled testimony at trial. Two English cases show that the right extended beyond testimony at trial. In *R. v. Worsenham* (1701) and *R. v. Mead* (1704), requests for production of books made in criminal cases were refused, the first on the ground that the production required the party to "shew the defendant's evidence" and the second on the ground that it would be "to compel the defendant to produce evidence against himself in a criminal case." [McNair, *The Early Development of the Privilege Against Self-Incrimination*, 10 Oxford J.Leg.Stud., 66, 83 (1990)]. Therefore, at the beginning of the 18th Century, a rule prohibiting compulsory production of a party's evidence and "become associated with a general right to silence." [McNair, p. 83]. But evidence of such an extension of the rule in America is left to vague statements that the state formulation of the right must have meant something different from the 5th Amendment statement. Leonard Levy, a well-known constitutional historian, states the problem well when he states that history does not clearly uphold the *Schmerber* distinction between testimonial and non-testimonial compulsion. He notes that most forms of "non-testimonial compulsion" like blood tests are of recent origin. However, he notes that "the common law decisions and the wording of the first state Bill of Rights explicitly protected against compelling anyone to furnish evidence against himself, not just testimony." [Levy, Encyclopedia of the American Constitution, p. 1575 (1988)]. However, a good deal more historical research on the American practice concerning the right is necessary before a firm conclusion can be reached.

At this point, the best that can be said is that the difference in language between the federal and state provision, the prohibition against defendant testimony at the time of adoption, the existence of some cases extending the right to the production of record books, and Bronston's comments about forced "disclosure" at the 1890 convention indicate that the phrase "give evidence" means more than just testimony. The rule for construing constitutional privileges designed for the security of persons and property is that such provisions should be construed liberally. [*Commonwealth v. O'Harrah*, Ky., 262 S.W.2d 385, 389 (1953)]. In plain terms, this means that if a decision has to be made on a doubtful proposition, the court should err on the side of security and liberty for the individual. This rule should apply to Section 11, and therefore coerced blood tests should be prohibited under the "give evidence" clause of that section.

## SECTION 10 - UNREASONABLE SEARCH AND SEIZURE

Section 10, like the federal 4th Amendment, is written in 2 parts. Comparison of the 2 parts shows them to be similar, but Section 10 was copied from the 1790 Pennsylvania Bill of Rights. The only changes since adoption of Section 10 in 1792 have been changes of syntax. There is not a lot of historical information on this section, but because of a well developed body of case law and the relative clarity of its language, it is possible to understand and apply the section without too much danger of misunderstanding.

The section begins with a plain declarative sentence that the "people shall be secure in their persons, houses, papers and possessions from unreasonable search and seizure." The next clause forbids issuance of warrants "to search any place, or seize any person on thing," without adequate description and without proof of probable cause given under oath or affirmation. The second clause is important to our problem here because it plainly forbids the issuance of a search warrant to search a person.

Section 10 cannot be considered as an authorization for the police or the prosecutor to conduct a search anytime they feel it is "reasonable." Under the agency theory of the Constitution discussed above, Section 10 is a prohibition or limit on the general power of the government to exercise authority. The Supreme Court and the General Assembly under Sections 109 and 29 may authorize and regulate searches and seizures within the bounds set by Section 10. Neither the police nor the prosecutor has the inherent power to search. [*Brown v. Barkley*, Ky., 628 S.W.2d 616, 623 (1982); *Commonwealth v. Wetzel*, Ky., 2 S.W. 123, 125 (1886)]. Their powers are what the General Assembly and the Supreme Court "choose to give them."

The authority to arrest on a warrant comes from RCr 2.04 *et seq.* and RCr 6.52 et seq., as well as KRS 431.005. As noted in *Mash v. Commonwealth*, Ky., 769 S.W.2d 42, 44 (1989), the power to arrest without a warrant is only what the General Assembly has allowed in KRS 431.005. Searches by warrant are authorized by RCr 13.10, which specifically refers to the limits set by Section 10. The power to search without a warrant is defined in the decisions of the appellate courts that specifically describe the circumstances under which warrantless searches can occur.

The rule in Kentucky is that any search or seizure not authorized by warrant is unreasonable. [*Brent v. Commonwealth*, Ky., 240 S.W. 45 (1922); *Commonwealth v. Johnson*, Ky., 777 S.W.2d 876, 880 (1989)]. Section 10 authorizes 2 types of warrants, the first to search any place, the second to seize any person or anything. The plain language of Section 10 does not authorize warrants to search persons. Court decisions authorize searches of the person, but only in "exigent" circumstances. Exigent circumstances are "emergency-like" circumstances that demand immediate action to prevent escape of a suspect or loss or destruction of evidence. [Black's Law Dictionary, "exigent circumstances," p. 574 (1990)]. Obviously, a suspect's DNA is not going to change or disappear so this exception cannot be used to justify a coerced blood sample. The only justification that conceivably could apply is the "search incident to arrest" exception. A search incident to a lawful arrest is one made after an arrest and is a long standing exception to the Section 10 warrant requirement. [*Commonwealth v. Phillips*, Ky., 5 S.W.2d 887, 888 (1928)]. The justification for the search incident is that the person is in the control of the state after

a determination of probable cause to believe that he has committed a crime. But it is important to note that the cases have only allowed a search of the defendant's person for "articles" or things. [*Phillips*, at 888-889]. The reason for this limitation no doubt is that the drafters of Section 10 and the members of the 1890 Convention no more thought of the possibility of blood tests as a method of crime detection or evidence than they thought a man could go to the moon. It simply was not foreseen. But the Constitution must be applied as it is written. The warrant requirement and the unreasonable search and seizure requirement of Section 10 must not be seen as separate considerations. The "unreasonable search" clause, as we have seen in the beginning of this section, does not authorize inventive ways to get around the warrant clause. Where emergency conditions are shown, the police are allowed to act to protect themselves, to detain suspects and to prevent loss or destruction of evidence. No more is necessary and no more has been authorized by any decision of the Kentucky Courts. A valid arrest does not justify violation of a defendant's right of personal security. An arrest does not amount to a forfeiture of the right. It would be bizarre in the extreme for the law to provide (1) that no warrant may authorize a blood test, (2) that once the defendant is lodged in jail RCr 3.02 prohibits any blood test, and (3) that the rules of discovery do not permit a blood test, but still hold that a police officer is allowed, in the short period of time between arrest and presentation to a judge or to a jailer, to force the accused to submit to a blood test. It is clear that none of the exceptions to Section 10 permit such a test.

## CONCLUSION

The conventional wisdom is that the Commonwealth wins blood test motions. However, in this article we have seen that this commonly held assumption rests on a weak foundation. The problem presented here shows the necessity of covering every base when attacking an established evidence practice. Each part of the argument supports the others, and the combination of all parts shows that the practice is not justified, either under the law or the Constitution. Although it is difficult to find out much about the original intent of the drafters of the Kentucky Constitution, it is possible by examining the history and development of the court system and of various procedural practices to make good inferences as to what was considered proper.

At a minimum there must be a positive enactment of law by the General Assembly authorizing blood tests for the purpose of DNA identification for such tests to be lawful. Invasion of the right of personal security is one so grave that only the General Assembly, which is charged with declaring the public policy of Kentucky, should make the decision. Even so, a defendant's refusal to cooperate in gathering evidence against himself is not the type of direct injury to society that justifies the enactment of other statutes that we have looked at in this article.

As to the applicability of Section 11, I think it is clear that a good deal more historical research is necessary. Many sources hint that Section 11 covers a broader range than the 5th Amendment, but nobody has found conclusive evidence that this is so. This is a question that lawyers in Kentucky could undertake to answer.

Finally, I think it is clear that Section 10 has little to do with the question of blood tests for developing evidence of guilt. It is only through the search incident to arrest exception that the Commonwealth could hope to justify a blood test. But in light of the almost universal prohibitions against such tests in other stages of a criminal prosecution, the search incident must be limited to the outside of a person.

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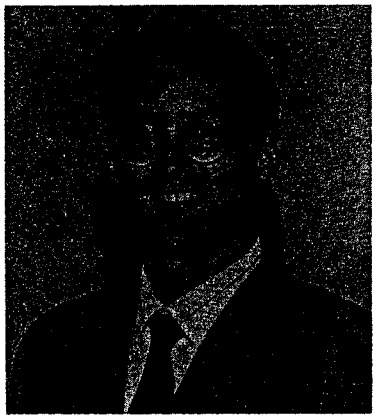
# STAFF CHANGES



**JIM CHAMBLISS**, formerly an Assistant Public Advocate with the Morehead office since 5/16/90 resigned on 5/10/91 to join the Garfield County Attorney's Office, 109 8th Street, Suite 300, Glenwood Springs, Colorado 81601 (303) 945-7943

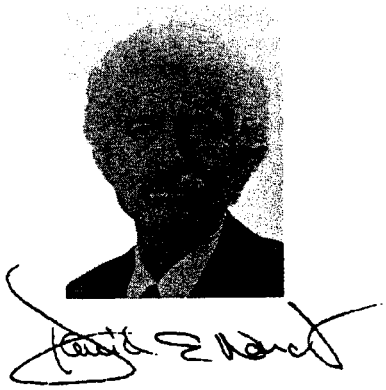
**BARBARA SUTHERLAND** joined the Department's Administrative Division on April 16, 1991 as DPA Law Librarian. She is a 1977 graduate of the University of Kentucky School of Law and received her Master of Library Science at Texas University in 1990.

### RESIGNATIONS

**SHELLY COPE** formerly a paralegal with the Eddyville Post-Conviction Office, resigned on 4/15/91 to become an assistant to Judge David Buckingham, Marshall County.

# ALTERNATE SENTENCING

*Restorative Justice at Work*



## NATIONAL CONFERENCE ON SENTENCING ADVOCACY

On April 19 and 20, 1991, Kentucky Sentencing Specialists attended the Practicing Law Institute's National Conference on Sentencing Advocacy. The conference agenda addressed the many different sentencing issues which judges face every day: how to effectively sentence the drug offender, the learning disabled offender, a battered woman, a disadvantaged offender all while having to deal with mandatory minimum sentences, public opinion and the need to punish appropriately.

***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.***

## *BURDEN OF JUSTICE*

To sentence an offender to a punishment which is appropriate to him and the public is a burden of the criminal justice system. How one state, Alabama, has dealt with this burden is the subject of a film shown at the conference titled "Burden of Justice." Alabama, a state with demographics similar to Kentucky, is facing the same prison overcrowding problem. Alabama, like Kentucky, is also a state with limited resources and a prison budget which could bankrupt the state.

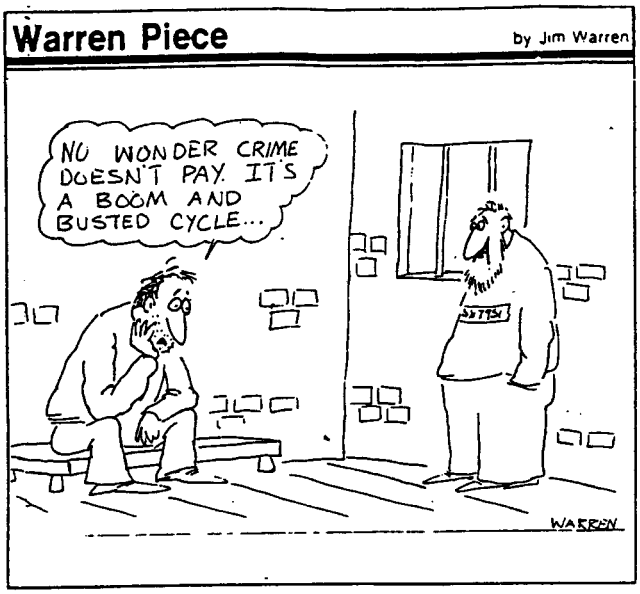
The film "Burden of Justice" takes a close look at alternative sentencing as one way to punish non-violent criminals without sending them to prison. Alternative sentencing is also one of the options being explored by the Kentucky Legislative Task Force on Sentencing and Sentencing Practices (HB123) chaired by Representative Bill Lear, 79th District.

The film "Burden of Justice," funded by the Edna McConnell Clark Foundation, with David Ellis, Emmy award winning Ellis Productions, tracks the cases of two young men in the criminal justice system who are diverted from prison with an alternative sentence.

With permission this film along with it's shortened version is available on loan for your viewing. This is an opportunity to learn how an alternative sentence can help reduce the prison overcrowding crisis in Kentucky while effectively and fairly punishing offenders.

To borrow a copy of the film, contact Barbara Sutherland, Librarian, Department of Public Advocacy, Perimeter Park West, 1264 Louisville Road, Frankfort, Kentucky 40601. Phone (502) 564-8006.

If you have any questions contact David Norat at the above address or phone.

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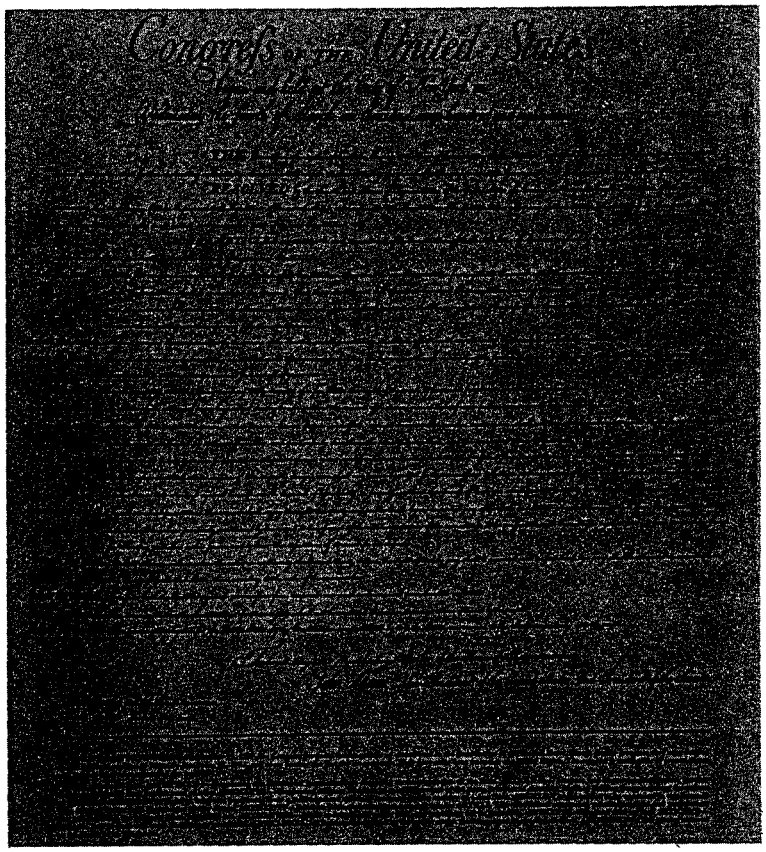
This regular *Advocate* column features information about sentencing alternatives to prison.

# No document has more meaning to the American Way of Life than does Our *Bill of Rights.*



**Q. Who protects and advances the individual liberties guaranteed by our Bill of Rights?**

**A. Kentucky Public Defenders which represent more than 70,000 fellow Kentucky citizens charged with committing a crime but too poor to hire a lawyer.**

**Department of Public Advocacy**
**1264 Louisville Road**
**Frankfort, KY 40601**
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# THE PENAL CODE'S DISINTEGRATION

JAY LAMBERT

## 1976'S PROMISE

The advent of the Kentucky Penal Code in 1976 supposedly heralded the arrival of a new, enlightened approach to the dispensation of justice in the Commonwealth. This new framework constituted a long overdue response to the bewildering patchwork of prior statutes and procedures in place up to that time. A uniform system of classification and sentencing administered by judges vested with wide discretion regarding both the appropriateness and length of incarceration provided for consistent and rational sentencing.

## DIMINUTION OF THE PROMISE

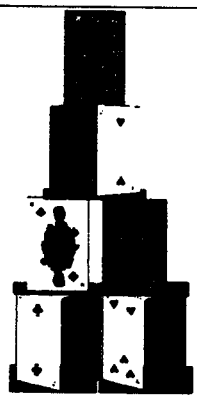
The tantalizing promise held out by the adoption of the Code fifteen years ago, however, has been substantially diminished by a combination of factors. The legislature habitually panders to the whims of special interest groups to whom the terms "probation," "parole," and "discretion" form an *Unholy Trinity* perpetuated by a judiciary perceived as liberal devils in black robes. The kind of special legislation fostered by such intense and unrelenting political pressure then nuzzles against a judiciary consistently less vigilant in maintaining its own independence.

## CODE DOOMED TO DEATH

The confluence of these factors results in a legislative feeding frenzy with our clients as the main course which in turn provides a statutory scheme that produces as many injustices as it once purported to cure and ultimately dooms the entire structure to death by a thousand cuts and the occasional hatchet blow (*i.e.*, Truth-In-Sentencing). The disintegration of the Penal Code's unified approach to criminal law in the Commonwealth originates in substantial part from an increasingly vocal electorate's fear of crime accompanied by the realization of various legislators that they lose few, if any, votes by supporting virtually any piece of legislation associated with a "get tough on crime" policy.

## FEEDING FRENZY OF TIS

The so called "Truth-In-Sentencing" Statute (KRS 532.055) provides the premiere example of how the interplay between these factors produces the kind of special legislation that undermines the unified approach envisioned with the adoption of the Code. Truth-In-Sentencing grew out of one of the most highly publicized crimes in the history of the Commonwealth. The kidnapping, robbery, sodomizing and murdering of two white teenagers in an execution style shooting by two black defendants in Jefferson County resulted in understandable public outrage and almost daily media coverage. The failure of the prosecution to obtain a death verdict against one of the co-defendants and the subsequent attempts by various interested parties to assign blame in the face of unprecedented publicity planted the seed for the legislation.



**IS KENTUCKY'S PENAL CODE BECOMING A HOUSE OF CARDS?**

The possibility of blaming jurors or the court for an unpopular sentence was not a realistic option. Acknowledging the existence of a viable defense or, conversely, conceding any shortcoming in the prosecution was not only unpalatable but, in light of the subsequent decision of the prosecutor to seek election to the Commonwealth Attorney's Office, politically impractical. Another option, blaming "the system" for what the prosecution and public generally viewed as a debacle, however, shifted the focus of the debate away from whether the jury rendered an appropriate sentence on the facts of the particular case. The emphasis quickly centered on methods to prevent repetition of such a perceived miscarriage of justice with a defendant's criminal history and parole eligibility becoming the primary scapegoats for what supporters of "reform" portrayed as a system run amok.

Had the controversy erupted at any other time, it may well have dissipated after a few months. Unfortunately, it coincided with the legislative session. Faced with an array of victim's rights advocates, press conferences, grieving parents, law enforcement officials smelling blood and an enraged citizenry all fueled by a press firmly locked into hyperdrive, the legislature jumped into the previously mentioned feeding frenzy with reckless abandon. The result was the now infamous Truth-In-Sentencing Statute.

## POLICY BY PANIC

Although the extent of the damage inflicted on the criminal justice system of the Commonwealth by this ill conceived piece of legislation may not manifest itself fully for years, the process by which it became law provides immediate lessons in how the Penal Code can disintegrate in the face of piecemeal legislation.

First, it illustrates the immense damage that one piece of special legislation can inflict on the unified system set forth in the Code when the motivation rests in expediency and does not allow for calm reflection from all quarters. This single statute severely undermined the concept of a punishment appropriate to the facts of a case instead of a defendant's past or his likelihood of parole. The sound exercise of judicial discretion in the structuring of concurrent or consecutive sentences is similarly impacted. In the real world, few judges often ignore a jury's

"recommendation" of consecutive sentences.

Maintaining the kind of unified approach to classification and sentencing found in the Code presupposes the realization that altering one aspect of the system inevitably reverberates throughout the entire structure. Such legislation, hastily produced in response to virtual panic by the public and not given due consideration by the legislature, ignores that reality.

The second lesson provided by the method of adoption of this legislation rests with the manner in which the media will inevitably portray competing interests to the public. The story behind destruction of the unified approach of the Code by such legislation and the consequent, albeit relatively gradual, erosion of the ability of accused citizens to defend themselves inevitably pales in comparison to the contrary position widely circulated by the media and symbolized by grieving families and videotapes of bloody crime scenes.

Piecemeal disintegration of the code, judges hampered by a lack of discretion, and sentences based on factors other than the facts of a case do not fit into neat ten second sound bites. A failure by the press to incorporate deep, studied reflection into their reports instead of going for the cheap shot not only allows but implicitly encourages the kind of knee-jerk reactions by the legislature typified by many of these statutes and increases the likelihood that such a procedure will become the norm.

Doubters of this hypothesis would do well to revisit this issue the first time a seriously mentally retarded person perpetrates an especially well publicized and heinous murder. The severity of the inevitable legislative and media assaults on the recently enacted prohibition against executing the retarded (KRS 532.140) will illustrate only too well the inherent problems associated with enacting legislation precipitated by fear and one-sided media coverage.

## JUDICIAL DEPENDENCE

Given the degree of encroachment on matters traditionally within the discretion of trial courts coupled with often sloppy draftsmanship of the statutes, one would expect intense scrutiny by appellate courts. Such attention has not, however, been the case.

On issues such as Truth-In-Sentencing, prohibitions on probation and the mandatory nature of running certain sentences consecutively, appellate courts have consistently refused to exercise the independence of the judiciary recognized in section 109 of the Kentucky Constitution which states:

> The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court, and a trial court of limited jurisdiction known as the District Court. The Court shall constitute a unified judicial system for operation and administration. The impeachment powers of the general assembly shall remain inviolate.

Section 116 more specifically states:

> The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction and rules of practice and procedure in the Court of Justice.

The Kentucky judiciary is, in theory, completely independent of the legislature. In practice, the judiciary's deferential treatment of statutes that do violence to the notion of comprehensiveness tempered by the sound exercise of discretion underlying the Code allows the legislature to run roughshod over the courts.

The legislature, not the judiciary, now decrees the manner in which the courts conduct jury trials including, but not limited to, the admissibility of previously prohibited evidence. (KRS 532.055). The legislature, not the judiciary, now mandates the instances in which the court may not consider probation for a multitude of offenses centering around the involvement of firearms and most sexual offenses. (KRS 533.060 and KRS 532.045). The legislature, not the judiciary, now establishes the consecutive assessment of sentences. (KRS 532.110 and 533.060).

These statutes, whether examined singly or in combination, severely restrict the ability of a court to exercise its discretion in a given case in assessing the constitutionality of a procedure, the admissibility of evidence or the appropriateness of a sentence.

## COURT'S HOLLOW PROMISE

*Commonwealth v. Reneer*, Ky., 734 S.W.2d 794 (1987) best typifies the judicial reaction toward this threat to an independent judiciary. The challenging of the entire Truth-In-Sentencing scheme in *Reneer* resulted in the court upholding the statute while recognizing that the inherent encroachment on the prerogatives of the judiciary was clearly unconstitutional. Although the statute was upheld on grounds of "comity," Justice Leibson, in his dissenting opinion, recognized the broad impact of the decision when he noted:

> It takes no visionary to foretell that the new sentencing procedure will (1) produce sentences that are, in many cases, unduly harsh and abusive, (2) fatally overload an already overcrowded prison system, and (3) exacerbate the problem of disparate sentencing. The impending calamity to our sentencing system (it will be no less) is not just likely, it is inevitable. It will take years of effort to correct the mischief we have done this day, if indeed correction will ever be possible. The Majority opines that we 'reserve the right to correct in the future' any 'abuses or injustices,' but correction will come too little and too late for those who suffer in the meantime.
> *Id.* at 799.

Partial alleviation of the damage to the sentencing structure and the Penal Code in general was still possible had the appellate courts subsequently followed through on the promise of the Supreme Court to correct injustices on a case by case basis. Unfortunately, when opportunities to reign in some of the negative consequences of the statute present themselves, the courts generally fail to seize the opportunity.

Even an incomplete listing of the decisions establishes the point. *Logan v. Commonwealth*, Ky.App., 785 S.W.2d 497 (1989) allows the use of a "prior" conviction during a penalty phase even if the conviction occurred after the crime for which the defendant is currently being tried. *Hill v. Commonwealth*, Ky.App., 779 S.W.2d 230 (1989) allows the Commonwealth to prove a prior misdemeanor conviction for sentencing purposes even in the absence of a valid judgment. *Commonwealth v. Hubbard*, Ky., 777 S.W.2d 882 (1989) endorses the right of the trial judge subsequent to a hung jury to impose a sentence beyond the statutory minimum. *Commonwealth v. Bass*, Ky., 777 S.W.2d 233 (1989) precludes the use by the defendant of the plea bargain agreement of a co-defendant for mitigation during the sentencing phase. *Melson v. Commonwealth*, Ky., 772 S.W.2d 631 (1989) allows the use of a prior conviction for sentencing purposes even while being litigated by way of collateral attack. *Lemon v. Commonwealth*, Ky.App., 760 S.W.2d 94 (1988) endorses the combining of the persistent felony offender and penalty phases of a trial. *Ballard v. Commonwealth*, Ky., 743 S.W.2d 21 (1988) applies the statute to crimes committed before its effective date. Although there are occasional exceptions [*See Boone v. Commonwealth*, Ky., 780 S.W.2d 615 (1989) recognizing a defendant's right to introduce parole eligibility in mitigation], the general trend of the appellate courts points unerringly to a construction of the statute in a manner contrary to the interests of the defendant.

When the appellate courts allow the introduction of convictions which occurred after the crime currently being tried, and retroactive application of the statute, the Court's promise in *Reneer, supra,* to prevent injustices on a case by case basis rings hollow.

During the years subsequent to the adoption of the code, the judiciary has consistently allowed the legislature to dictate to them how to conduct trials, what evidence to admit, whether to consider probation and whether to run sentences consecutively. The battle for judicial independence and adherence to the underlying principals of the Penal Code has been underway for the last fifteen years. The judiciary is loosing the battle while, at best, firing only an occasional stray shot.

### LEGISLATURE AND COURT CREATE DARK FUTURE

As long as the legislature continues to allow itself to be simultaneously intimidated and propelled by special interest groups driven by fear and bent on revenge without any thought to the widespread effects of special legislation on the overall policy and philosophy of the Code, we will witness the continued destruction of our client's rights.

When this effect combines with a judiciary which, despite promises to the contrary, contents itself with letting its own independence wither on the vine, there may well be darker days ahead.

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## CORRECTION

In the last issue of *the Advocate* on the chart on page 47 it should read: There were a total of 66 violations alleged in the **39** complaints, *not 309 complaints.*

# PRESENTENCE INTERVIEWS: AN UPDATE

The importance of an attorney's presence at the presentencing hearing was detailed in *Your Client Needs You at Presentence Interviews*!, April, 1991 *Advocate* (Vol. 13, No. 3) at 63. We update that article.

A recent case from the U.S. Court of Appeals, Sixth Circuit illustrates the extreme importance of accompanying one's client to their presentence interview. In *United States v. Davis*, 919 F.2d 1181 (6th Cir. 1990), the defendant made incriminating statements during his presentence interview which lengthened his potential sentence by more than three years. The court held that these statements were not made in violation of the defendant's rights against self-incrimination. *Id.* at 1186.

After the defendant pled guilty to conspiracy to distribute cocaine, he was asked to participate in a presentence interview. The defendant had been informed by the sentencing court of both his fifth amendment privilege against self-incrimination and his "right to have counsel represent [him] at all stages of any criminal proceeding." *Id.* at 1184. The defendant's attorney was invited to attend the interview, but declined. *Id.*

The Sixth Circuit noted that had the attorney questioned the defendant's ability to give reliable answers to the probation officer's questions, the attorney would probably have chosen to attend the interview. The court stated further:

We are troubled, nonetheless, by the lawyer's decision not to attend. If this had been a civil case, one wonders whether the lawyer would have let his client be deposed without counsel being present.

The defendant was thus interviewed without the benefit of counsel, and made statements with respect to the quantity of cocaine involved. He stated that the amount of cocaine was higher than that which the government could have proven at trial. Pursuant to the Federal Sentencing Guidelines, the probation officer's findings changed the guideline range from 121-151 months to 188-235 months. *Id.* at 1184-85.

The court found that the defendant's statements were wholly voluntary and reliable despite defendant's psychiatric disorder. *Id.* at 1186.

On appeal, defense counsel argued that the defendant made these statements falsely in an attempt to *mitigate* his sentence by showing an acceptance of responsibility. Instead, the absence of counsel at the presentence interview resulted in a substantial *increase* in the defendant's sentence.

This is only one example of the terrible potential effects of allowing one's client to attend the presentence interview without the protection and advice of counsel. The most tragic aspect of this case is how easily this increased sentence could have been avoided.

**HAP HOULIHAN**
DPA Law Clerk
Frankfort

# Legislative Highlights

LISA DAVIS

On Friday, January 11, 1991, the Governor of this Commonwealth issued a Proclamation, convening the Kentucky General Assembly in Extraordinary Session to begin on Monday, January 14, 1991 at 12:00 noon (EST). Fortunately, only two of the subjects specifically set out to be considered during this Session will have an impact on the Department of Public Advocacy.

**1991 Extraordinary Session Statistics**

| | Senate | House | Total |
|---|---|---|---|
| Bills Introduced | 13 | 22 | 35 |
| Resolutions Introduced | 85 | 141 | 226 |
| Bills Passed | 4 | 8 | 12 |
| Resolutions Passed | - | - | *214 |
| Became Law | 4 | 8 | 12 |
| Concurrent Resolutions (that became law) | | | 6 |

*Includes seven Concurrent Resolutions that passed both Houses.

Legislation was enacted imposing tougher sanctions on and revoking privileges for motorists who drive while under the influence of alcoholic beverages. (House Bill 11) The amendment of KRS 439.3401 to add capital offenses to those offenses requiring certain offenders to serve at least 50% of their sentences prior to being eligible for parole was enacted through House Bill 7. This is in response to the recently decided Kentucky Supreme Court case of *Offutt v. Commonwealth*, 799 S.W.2d 815 (1990).

House Bill 7, relating to capital sentencing procedures, has an Emergency clause attached and was effective February 15, 1991 upon Governor Wilkinson's signature. The Attorney General's Office has not yet issued an effective date for House Bill 11, relating to driving under the influence. The following is a brief description of House Bills 7 and 11 as they relate to this office.

### HOUSE BILL 7: Parole for Violent Offenders

This bill amends KRS 439.3401 relating to parole for violent offenders. Upon passage of this legislation, capital offenders, sentenced to a term of years, are considered violent offenders and are required to serve 50% of their sentence before becoming eligible for parole. A violent offender convicted of a capital offense who receives a life sentence will be required to serve twelve years of his/her sentence before becoming eligible for parole.

One can look upon this as being legislation that might enable a criminal defense attorney to argue for the jury to sentence a client accused of a capital offense to a term of years instead of death. If the attorney points out that the defendant, if sentenced to 200 years, will not be eligible for parole for 100 years, thus keeping him imprisoned for the rest of his life, the juror who might not necessarily think he deserves to die but wants to be sure that he is never released, could possibly be persuaded to sentence him to a term of years instead of death.

Mike Williams, Chief of the Department's Capital Trial Unit, points out that "Subsection (3) would still permit incarceration for an offender who has committed an offense **less than death**. If he has committed a rape or sodomy in the first degree, and if given 100 years, he would not be eligible for parole for 50; however, the same individual who kills his victim and receives a life sentence would be eligible for parole in 12 years."

In *Offutt v. Commonwealth*, the Kentucky Supreme Court tried to clarify this inconsistency problem thus prompting this legislation. However, as can be seen, from the death penalty defense attorney's viewpoint this was not entirely accomplished by this Act.

### HOUSE BILL 11: DUI

This bill creates and amends various sections of KRS Chapter 189A relating to driving under the influence. With the passage of this legislation came many revisions in Kentucky's current DUI statutes. There were changes made in court procedures and functions, as well as in the penalty areas of the law.

Illegal *per se* was a major stumbling stone in the passage of this legislation. The original bill, as introduced, encompassed not only illegal per se but also administrative *per se*. The administrative *per se* part of the bill was removed before the final bill was enacted. Illegal *per se* presumes a person to be driving under the influence if their BAC (blood alcohol content) is 0.10 or above. If his/her BAC is 0.05 but less than 0.10 then the offender is not necessarily *presumed* to be driving under the influence, but the BAC can be used in conjunction with other evidence (*i.e.* field sobriety tests) to prove guilt.

First through third offense fines and imprisonment requirements remain unchanged but fourth offense, under the new law, is a Class D Felony. As is presently law, second and third offense prison terms cannot be probated, and if convicted of fourth offense DUI, the minimum term of imprisonment is 120 days. Current law does not allow the use of prior DUI convictions in other states to count as prior offenses in Kentucky. Once this law takes effect, prior offenses include all convictions in this or any other state within a five year period. The five year period is calculated from the dates on which the offenses occurred for which the judgments of conviction were entered.

Driver's license suspension periods increased to 90 days for first offense, 12 months for second offense, 24 months for third offense, and 60 months for fourth

offense. Under this legislation, pretrial suspension of the license of a person charged with DUI is required. At arraignment, the court will suspend the license of a person whose BAC is 0.10 or above, a person who is under the age of 21, or a person who has prior convictions for DUI. The license is also suspended for refusing to take the chemical test (*i.e.* breathalyzer or blood test). Any prior refusals will also result in pretrial suspension.

A person whose license has been suspended pretrial can make a motion for judicial review of such suspension. Once this motion is made, the court has 30 days to conduct a hearing on the matter. At this hearing the court must determine that the accused was arrested for DUI, that the arresting officer had reasonable grounds to believe that the person was in physical control of the vehicle, that the officer had probable cause to believe the person was DUI, or that the accused is under 21 years of age.

Pretrial suspension of the license requires immediate surrender of the license to the Circuit Court Clerk. If the defendant does not have a license in his possession, and it has not already been suspended for other reasons, he is to remain in custody until the license is produced. If the license is lost, the Sheriff must transport the defendant to the office of the County Court Clerk so that he may be issued a duplicate license, then returned so that he can surrender the license to the Circuit Court Clerk. The Clerk is to notify the Transportation Cabinet of the suspension.

The court must order the return of a revoked license upon the expiration of the suspension time or in cases where an acquittal results and refusing the chemical test (RCT) is not involved. All pretrial license suspension time is credited towards the final suspension time resulting from a conviction.

Persons refusing the chemical test (RCT) currently are required to come before a hearing officer for the Transportation Cabinet. A determination is then made as to whether the refusal is valid. This procedure has been transferred to the court. The suspension times for RCT first offense is six months, second offense 18 months, third offense 36 months, and fourth offense 60 months.

A defendant may petition the court to order prior convictions invalid and not to be used for enhancement purposes. The court should abide by the standards set out in *Boykin v. Alabama*, 395 U.S. 238 (1969) when determining validity of prior convictions.

The prosecution is prohibited from amending DUI charges in cases where the defendant's BAC is 0.10 or above unless there is scientific evidence which shows that the test results are invalid. In these such cases the prosecution must state, on the record, the reasons for amending the charges.

The court clerk is required to report to the Administrative Office of the Court (AOC) within five days of the end of each quarter all DUI cases which have not resulted in a final ruling within 90 days of the commission of the offense. The AOC will then forward the list to the Attorney General and the Chief Justice. The AG can then either appoint a special prosecutor to aid in the prosecution of the remaining cases or the Chief Justice will dispose of the case in an appropriate manner.

With this legislation comes the invention of a new creature coined the "hardship license". The district court upon application of the defendant has the sole jurisdiction over these licenses. The county attorney will review the applications and can object to its issuance. There is, of course, a fee of up to $200 attached to this permit.

A hardship license can be issued to a first time offender after a **HARD** 30-day license suspension for purposes set out by this legislation. A hardship license can be issued in order for the defendant to continue employment, attend school, receive needed medical treatment or attend court ordered counseling or treatment. Before granting such licenses, the defendant must provide the court with proof of valid insurance and provide sworn, written statements from the defendant's employer, teacher, doctor, or the director of the facility that is providing treatment or counselling as to the need for the permit. Persons are under oath and are subject to the penalties of perjury when making these sworn written statements. These permits cannot be issued is there was a refusal to submit to the chemical test (RCT).

The Transportation Cabinet will issue the hardship license, upon order of the court, setting forth times, places, purposes, etc. that the person is allowed to drive. The defendant must have the permit in his possession at all times during which he is operating, or authorized to operate, a motor vehicle. Transportation will also issue a decal to be placed in the rear window of the vehicle to be operated by the defendant. Failure to display the decal is a Class B misdemeanor. Any violations of these stipulations will result in immediate suspension for the original time period imposed by the court plus six months.

In addition to any other penalties for a violation of this statute the court is required to order the defendant to participate in counselling and / or treatment. The Cabinet for Human Resources will regulate the treatment facilities and the facilities will report to the court.

An assessment of the defendant's alcohol or substance abuse problems must be performed at the start of the program. Upon written report to the court by the program administrator that the defendant has completed the program, based upon the assessment, the defendant may be released from the program prior to the expiration of the 90 day period.

Once the court orders a defendant to enroll in the program the enrollment must be accomplished within ten days of the entry of judgment of conviction. Once enrolled, the program administrator must transmit to the court a certificate of enrollment, within five working days.

If the court does not receive notice of enrollment within 20 days of conviction, the court will hold a show cause hearing. If the defendant enrolls but drops out or does not complete the program, the program administrator will transmit this information to the court and the court will again hold a show cause hearing. Upon receipt of notice that the defendant has failed to complete or attend the program the court will reinstate any of the original penalties which had been withheld pending completion of the program.

The program administrator is required to notify the court of the defendant's completion of the program. Failure to complete the program or pay the amount specified by the court for the program will constitute contempt. In this case the court will reinstitute all penalties which were previously imposed but suspended or delayed pending completion of the program.

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### FIRST DEGREE ESCAPE

The Michie official edition of the KY Revised Statutes contains a typographical error in KRS 520.020 (2) on page 377 of the 1990 replacement for Volume 17. The penalty for escape in the first degree should be a Class C felony, *not* a Class A felony as shown. See 1974 Kentucky Acts, Ch.406, Section 170. Michie will be correcting this error in the next issue of its KRS Advance Service.

# Americans Behind Bars:

*A Comparison of International Rates of Incarceration*

## OVERVIEW

In 1979, a criminal justice report was released which has been often cited for its striking conclusions. That report, "International Rates of Imprisonment," issued by the National Council on Crime and Delinquency (NCCD), documented that the United States' rate of incarceration was third in the industrialized world — behind only South Africa and the Soviet Union.[1] Despite a considerable amount of attention to the report in the criminal justice community, there was little policymaker response to its findings.

This report provides a new look at some of the issues raised in the NCCD report. We do this for two reasons. First, the NCCD report, useful as it was, was hampered by the unavailability of complete data in some areas. Most significantly, the prison population for the Soviet Union was estimated to be one million at the time, by all measures just a rough approximation. Due to the greater openness in the Soviet Union, we now have far more accurate figures on the number of its prisoners. In this report, we also extend the analysis of the number of prisoners in South Africa beyond what most sources have generally described.

The second reason for this updated analysis of international rates of incarceration is that much has changed in the world since 1981. Of particular interest here is that the criminal justice policies of these three nations have taken very different directions, with significant consequences for rates of imprisonment.

After examining overall rates of incarceration, we then look at a subset of the population in the United States and South Africa — Black males. As we noted in our earlier report, "Young Black Men and the Criminal Justice System: A Growing National Problem," nearly one in four Black men in the age group 20-29 is under the control of the criminal justice system — in prison or jail, on probation or parole.[2] In order to understand the situation of Black males more fully, we developed this international comparison to provide another context for examining this issue. As will be seen, the results in both parts of this report indicate the serious nature of criminal justice problems in the United States.

## MAJOR FINDINGS: RATES OF INCARCERATION

Comparing international rates of incarceration is problematic. Crime rates, and rates of violent crime in particular, vary greatly from one country to another. Criminal justice systems are also unique to each country, and methods of punishment and control vary from one society to another. In most areas of the United States, for instance, we maintain a system of jails, for persons awaiting trial and serving short sentences, and a prison system which is generally used for offenders serving sentences of a year or more. In most other nations, there is only a single prison system, both for convicted and unconvicted persons. Most societies make use of mental institutions to some extent for persons convicted of crimes, although these persons may or may not be counted as "prisoners" in official prison counts. And, in apartheid South Africa, restrictions on civil liberties and personal freedom for the country's Black population are ever present, whether in prison or not.

Bearing this caution in mind, though, we think it useful to analyze these international data. Although the crime rates and criminal justice policies creating each country's prison population are different, the comparison can help to place in perspective our nation's approach to issues of crime and punishment. While the three nations under study have vastly different political and economic systems, this report demonstrates that the extent of criminal justice control in a society cannot necessarily be predicted by the degree to which that society is dedicated to democracy and human rights.

Our analysis examines the number of incarcerated adults in each country, both those awaiting trial and sentenced offenders, and then divides this figure by the country's population to obtain an overall rate of incarceration. For the United States, we have used the combined figures for prison and jail populations (excluding the small number of juveniles held in jails and a small "overlap" in the prison and jail counts; see *Methodology)* to obtain an overall number of inmates. The number of prisoners in the Soviet Union is taken from recent published reports, which are consistent with other observations over the past several years.[3]

Previous reports documenting the number of prisoners in South Africa have been consistent, but have only included the number of persons held in South Africa proper.[4] This figure excludes the number of prisoners held in the four "independent" homelands of South Africa — Bophuthatswana, Ciskei, Transkei, and Venda. These homelands, though, are recognized by no nation outside South Africa, and have been clearly shown to be appendages of the South African government. Therefore, an accurate portrayal of the incarcerated population in South Africa needs to include this population. Although information on prison systems in the homelands is difficult to obtain, we have used the available information to project an estimate of these figures.

The major findings of our study, as seen in Tables 1-3, are as follows:

The United States now has the world's highest known rate of incarceration, with 426 prisoners per 100,000 population. South Africa is second in the world with a rate of 333 per 100,000, and the Soviet Union third with 268 per 100,000 population. (Table 1).

Black males in the United states are incarcerated at a rate four times that of Black males in South Africa, 3,109 per 100,000, compared to 729 per 100,000. (Table 2).

The total cost of incarcerating the more than one million Americans in prisons and jails is now $16 billion a year. The cost of incarcerating the estimated 454,724 Black male inmates is almost $7 billion a year.[5]

Although this study only examines three countries in detail, it is clear from other reports that no other nation for which incarceration rates are known even approaches these levels. Rates of incarceration for western Europe are generally in the range of 35-120 per 100,000, and for most countries in Asia, in the range of 21-140 per 100,000.[6] (Table 3).

## THE UNITED STATES AS NUMBER ONE: CAUSES AND CONSEQUENCES

Again recognizing that international comparisons are difficult, we can discern general trends of the past decade in these three nations which have placed the United States in the unenviable position of world leadership in incarceration.

The South African prison population has remained the most stable of these three countries over the past decade, rising only about 11% during this period, from an average daily population of 100,677 in 1979-80 to 111,557 in 1988-89 (excluding the four homelands).[7] We do not have sufficient information available to determine the causes of this relatively modest increase.

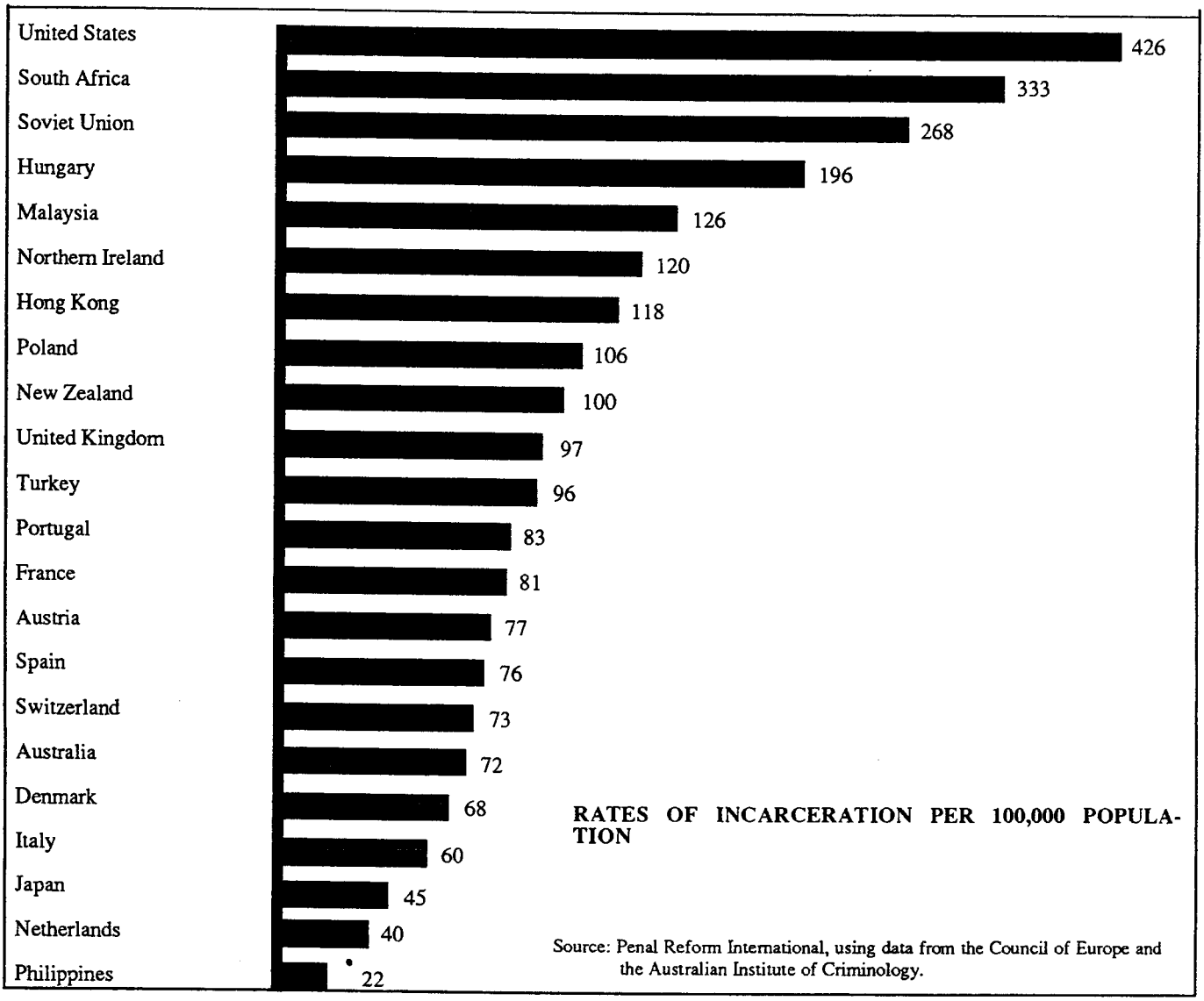
**Table 1**
**International Rates of Incarceration**

| Nation | Population | Inmate Population | Incarceration Rate per 100,000 |
|---|---|---|---|
| US | 248,251,000 | 1,057,875 | 426 |
| S. Africa | 35,978,284 | 119,692 | 333 |
| S.Union | 287,015,000 | 769,000 | 268 |

**Table 2**
**Black Males Rate of Incarceration**

| Nation | Black Male Population | BlackMale Inmates | Incarceration Rate per 100,000 |
|---|---|---|---|
| US | 14,625,000 | 454,724 | 3,109 |
| S.Africa | 15,050,642 | 109,739 | 729 |

**Table 3**
**Incarceration Rates for the US, S. Africa, and the Soviet Union in comparison to Europe and Asia**




Source: Penal Reform International, using data from the Council of Europe and the Australian Institute of Criminology.

In the Soviet Union, the prison population has declined dramatically during the past decade. Estimates of the prison population ten years ago range from one million in the NCCD report to 1.6 million.[8] The drop in the incarcerated population is generally considered to be a result of the changing political climate in the Soviet Union, leading to the release of many political prisoners, and amnesties for many minor offenders.[9] (Similar trends have been examined in other parts of Eastern Europe, with one report describing a 50% decline in Poland's prison population in three years.)[10]

In sharp contrast, the incarcerated population in the United States has more than doubled in the past decade, rising from just over 500,000 in 1980 to more than one million today. On top of this dramatic increase, the rate of increase for African-American males has been even greater than for the population as a whole.

Why has the incarcerated population of the United States risen so dramatically, and is now the highest in the world? Following, we explore two possible causes — crime rates and criminal justice policies.

### Crime Rates

International comparisons of crime rates are problematic due to variations in reporting methods and the definition of offenses. Nevertheless, it is clear that in comparison to western Europe, for example, American rates of crime for many offenses are substantially higher. American murder rates are at least seven times as high as for most Europeans. There are six times as many robberies and three times as many rapes as in West Germany (prior to reunification).[11] Alfred Blumstein has demonstrated that much of the disparity in international incarceration rates may be explained by higher crime rates for serious offenses.[12] While a full analysis of this relationship is beyond the scope of this study, it appears that at least some of the disparity in incarceration among nations can be explained by crime rates, particularly for assaultive offenses likely to lead to imprisonment. If this is the case, then its implications are extremely disturbing, for it implies that the wealthiest society in the world has failed to provide a relatively safe society; instead, it has an appallingly high level of crime.

### Criminal Justice Policies

While there is little question that the United States has a high rate of crime, there is much evidence that the increase in the number of people behind bars in recent years is a consequence of harsher criminal justice policies of the past decade, rather than a direct consequence of rising crime. Many criminal justice observers now believe that prison populations are very much a function of policy choices.

Looking at the Soviet Union, for example, we have seen how a decision by a reform government to release many political prisoners has resulted in virtually halving the incarcerated population. Although few American prisoners could be considered "political," thousands are in prison due to policy choices — as a result of mandatory minimum sentences, restrictive parole policies, sentencing guidelines, and other policies. While we could debate the wisdom of these policies, the point is that, to a certain extent, the size of the prison population is a reflection of conscious political choices.

The growth of prison populations in the past decade, for example, shows that incarceration rates do not rise or fall directly with crime rates. Although the crime rate has dropped by 3.5% since 1980, the prison population has doubled in that period. Breaking down these figures further, we see first that crime dropped by 15% from 1980 to 1984, while the number of prisoners increased by 41%; then, from 1984-1989 crime rates climbed by 14%, while the number of prisoners rose by 52%.[13] Any cause and effect relationship is difficult to discern.

During this same period, we have seen a number of criminal justice policy changes which have resulted in a more punitive system overall. Mandatory sentencing laws requiring incarceration for certain offenses are now in place in 46 states. At the federal level, the combined impact of the new sentencing guidelines and harsher drug laws is expected to result in a 119% increase in the federal prison population from 1987 to 1997.[14]

There is also a greater proportion of offenders being sentenced to prison than ten years ago. In 1980, there were 196 offenders sentenced to prison for every 1,000 arrests for serious crimes. That figure increased by 54% to 301 per 1,000 by 1987.[15]

In this report, we do not attempt to analyze the relative weight that should be given to crime rates or criminal justice policies in causing such a high rate of incarceration. Other researchers have conducted analyses of these issues, and further work needs to be done. It is our assumption here that both factors play a role: that the United States does have a substantially higher rate of serious crime than many nations, and that criminal justice policies have contributed to the increase in incarceration in the past decade.

## AFRICAN-AMERICAN MALES: AN ENDANGERED SPECIES?

The equally shocking conclusion of this report is that African-American males in the U.S. are locked up at a rate four times greater than their counterparts in South Africa. We and others have attempted to analyze the reasons why Black males have higher rates of crime for certain offenses, and why there are a vastly disproportionate number of Black males behind bars. The reasons are complex, but include factors relating to the root causes of crime as well as the response of the criminal justice system. African-American males, who are disproportionately low-income, face a variety of problems, including: the social and economic decline of our inner cities and diminished opportunities for young people; the continuing failure of our schools, health care systems, and other institutional supports to prepare young Black males to occupy legitimate roles in society; continuing poverty and a distribution of wealth which has resulted in even greater disparity between the rich and the poor over the past twenty years.

The comparison with South Africa should not be misconstrued to indicate support for the South African apartheid system or its criminal justice policies, or to imply that the criminal justice system in the United States should emulate the South African system. Despite changes in the South African political climate in recent years, the system of apartheid remains strong and freedom remains an elusive goal for the Black population. We make the comparison with South Africa only to provide a point of reference for the cumulative effect of American policies regarding Black males.

### The War on Drugs

Particular note needs to be made regarding the "war on drugs," probably the largest single factor behind the rise in prison populations during the past decade. While drug arrests and prosecutions have increased each year since 1980, the number of African-Americans arrested for drug offenses has increased at an even more rapid rate than has the arrest rate for the population as a whole. From 1984 to 1988, the Black community's percentage of all drug arrests nationally increased from 30% to 38%.[16] In Michigan, drug arrests overall have doubled since 1985, while drug arrests of Blacks have tripled.[17] With a "war on drugs" primarily waged through the criminal justice system and disproportionately targeting inner-city drug

users, the end result is an increasing number of prisoners and an ever larger share of Black male inmates.

## IMPLICATIONS FOR PUBLIC POLICY

Ten years ago, state and national policymakers were faced with these circumstances:

- With a combined prison and jail population of 500,000, the United States stood third in the world in its rate of incarceration, behind two highly repressive governments. The country had already experienced a significant increase in its incarcerated population since 1973, with the number of prisoners rising by well over 50% from 1973 to 1980. Promising alternatives to incarceration — programs of community corrections, restitution to victims, community service, victim-offender mediation programs and many others — had been developed and were being implemented in many states. Further, there was little optimism in the corrections community that the high rate of recidivism of released prisoners would substantially diminish.

- Communities were in a state of decline, particularly our urban areas. The steady decline of our manufacturing base had eliminated many relatively stable and high-wage employment opportunities, replaced in many cases by low-wage service jobs. Schools in many urban areas experienced dropout rates of 40 percent or more, waiting lists for low-income housing were years long, and over 30 million Americans were without health insurance.

The choice for policymakers in responding to our high national crime rate, therefore, was very stark. The first option was to continue to build new prisons and jails at a cost of $50,000 a cell or more, and to spend $20,000 a year to house each prisoner. The second option was to spend these same tax dollars on prevention policies and services — programs designed to generate employment and to provide quality education, health care, and housing, along with alternatives to incarceration rather than new prison cells.

The choice was not described as clearly as this, of course, but those were essentially the two options faced by policymakers. Overwhelmingly, the punitive policies of the first option were the ones selected at both a national and local level. In the area of criminal justice, one would be hard pressed to determine whether Democrats or Republicans were more zealous in their pursuit of repressive criminal justice measures. The conservative Republican governor of California and the liberal Democratic governor of New York both proudly boasted of their accomplishments in adding tens of thousands of new prison cells to their state systems.

Unfortunately, the decision-making process in criminal justice is particularly prone to the influence of political rhetoric. It is no accident that, for several sessions now, a major crime bill has been adopted by Congress every two years prior to the November election. As the "Willie Horton" issue showed too well in the last presidential campaign, public policy on issues of crime and justice is far too often driven by the atypical, sensational "crime of the month," rather than by a rational examination of options.

Had the punitive policies of the past decade resulted in dramatically reduced crime rates, one could argue that their great expense was partially justified by the results. But as the 1990s begin, we are faced with the same problems as in 1980, only greater in degree — overcrowded prisons, high rates of crime, a major national drug problem, and the public lack of confidence in the criminal justice system. In many respects, it is not surprising that harsher criminal justice policies have had little impact on crime. Criminologists have long contended that if the criminal justice system can have an effect on crime, it is much more likely to result from increasing the certainty of arrest, and not the severity of punishment.

If we continue to pursue the policies of the 1980s in the 1990s, we can expect that Black males may truly become the "endangered species" that many have predicted. No segment of society, however, remains free from the cost of the punitive policies of the 1980s. The nation's record rate of incarceration continues to increase at an unprecedented scale. The National Council on Crime and Delinquency projects that our prison population alone, exclusive of jail inmates, will rise by 68% from 703,000 in 1989 to 1,133,000 in 1994.[18]

We now have the opportunity, and the obligation, to review our policy options in regard to crime and punishment, and to examine carefully the impact of the lessons of the past decade. In the section following, we suggest a new direction for responding to crime and achieving justice.

## RECOMMENDATIONS FOR PUBLIC POLICY

**1. Establish a national commission to examine the high rate of incarceration of Americans, and African-American males in particular.**

Congress should establish a national commission on crime, composed of a broad spectrum of representatives, to conduct a comprehensive examination of crime rates and incarceration rates. The commission should be directed to develop a set of recommendations to reduce the rates of crime and incarceration. Those recommendations should include programs and policies within the criminal justice system, as well as preventive measures for the family, community, and workplace.

**2. General Accounting Office study of the social and economic factors related to crime.**

Crime has many causes, some individually-based, others related to social and economic conditions and opportunities. The General Accounting Office should review research in this area to determine the relative influence of a range of social and economic factors on crime. These factors should include unemployment, welfare benefits, school dropout rates, pre-school programs, and access to health care and housing. A greater understanding of the root causes of crime will provide policymakers and the public with information that can guide budget and program priority decisions.

**3. Justice Department funding of pilot programs to reduce the high rate of incarceration of African-American males.**

While criminal justice agencies are relatively limited in the impact they can have on crime, they can develop and implement policies to alter the number of offenders and type of control under which they are placed. The Justice Department should encourage the development of programs and sanctions designed specifically to reduce the disproportionate incarceration rate of African-American males. In the area of juvenile justice, the Department is currently providing funding for "programs designed to reduce the proportion of juveniles detained or confined ... who are members of ethnic and minority groups where such proportion exceeds the proportion such groups represent in the general population."[19] Programs for African-American males could include diversion from prosecution, intensive probation, alternative sentencing, and parole release planning, among others. Priority should be placed on programs which have the potential to be replicated in other jurisdictions.

### 4. Redirect the "war on drugs" to define drug abuse as a public health problem and not a criminal justice problem.

In the past decade, drug abuse has taken a great toll in human lives and potential among all sectors of our society. The direction of the "war on drugs," though, has served to increase dramatically the number of Americans in prison and, in particular, the number of non-white, low-income males. There is little evidence to show that the law enforcement approach to the drug problem has had a substantial impact on drug abuse or drug-related crime. While waiting lists for treatment programs remain at six months or more in many communities, the number of drug arrests and prosecutions continues to rise as 70% of federal anti-drug funding is directed toward law enforcement. Defining drug abuse as a public health problem would require a shift in funding and program priorities to a system focused on education, prevention, and treatment rather than incarceration.

### 5. Redirect the focus of law enforcement to address community needs and to prevent crime.

Police forces are inherently limited in their ability to control crime since they can generally only respond to crime once it has occurred. Of 34 million serious crimes committed each year, 31 million never result in arrest.[20] Even if we assume that a good number of offenders had committed multiple crimes which were not detected, we can still recognize the limited impact that law enforcement can have. Efforts are being made in some police departments to refocus law enforcement priorities. In New York, St. Louis, and other cities, community-oriented policing is being implemented. This approach emphasizes improving police-community relations and a proactive approach to policing in order to address problems before they escalate and to be able to respond to crime more effectively. The police chief in New Haven, Connecticut has adopted a policy of discontinuing mass drug arrests and now uses his officers to go door-to-door in certain communities to encourage drug abusers to enter city-sponsored treatment programs.

### 6. Reduce the recidivism rate of prisoners by providing effective services.

The most recent Justice Department study of recidivism shows that 62% of state prisoners are rearrested within three years of release from prison. With prisons seriously overcrowded and state budgets constrained across the country, inmates in most prison systems have fewer opportunities to gain an education or marketable skills than they did a decade ago. Further, more than half of all prisoners with a drug history are not enrolled in drug treatment programs.[21] For those offenders who are sentenced to prison, it is in society's interest to attempt to reduce recidivism by providing a broad range of counseling, educational and vocational services appropriate to prisoners' needs.

### 7. Repeal mandatory sentencing laws.

Mandatory sentencing laws for drug crimes and other offenses have exacerbated prison overcrowding, while denying the possibility of judicial discretion in appropriate cases. In Michigan, for example, a 50-year old grandmother with no criminal record is serving life without parole — the same penalty as for first degree murder — for the offense of possession of more than 650 grams of cocaine. In the federal system, mandatory sentences thwart the purposes of a sentencing guidelines system designed to introduce a rational basis for sentencing. In calling for the repeal of mandatory sentences, the Federal Courts Study Committee charged that they "create penalties so distorted as to hamper federal criminal adjudication."[22] In jurisdictions without mandatory sentencing, judges are not hindered from sentencing drug offenders to incarceration when they feel it appropriate, but can also use their discretion to sentence offenders to non-incarcerative sanctions. Mandatory sentences should be repealed because they do not permit judges to exercise that discretion in the interest of justice.

### 8. Expand the use of alternatives to incarceration.

Incarceration is the most expensive sanction in the criminal justice system and brings very limited results in terms of public safety or rehabilitation of offenders. A range of alternatives to incarceration now exist which have the potential to reduce the number of offenders sentenced to prison. A study by the RAND Corporation examined the eligibility criteria of alternative sentencing, or intermediate sanctions, programs and then made projections on the number of "prison-bound" offenders who could qualify for such programs. Even if those offenders convicted of murder or rape, or with a prior prison term were excluded, 33% of potential inmates still qualified for the alternative programs.[23]

Diverting appropriate offenders from the prison system can result in substantial cost savings as well. A study in Delaware calculated the following annual costs of various sanctions:

| | |
|---|---|
| Prison | $ 17,761 |
| Work Release | 11,556 |
| House Arrest | 3,332 |
| Intensive Supervision | 2,292 |
| Regular Probation | 569 |

The study further found that for every drug offender sentenced to prison, three offenders could be treated in an inpatient treatment program and sixteen in an outpatient program.[24]

### 9. Engage in a national dialogue on issues of crime and punishment.

For more than two decades, inspired by politicized rhetoric, our national response to crime has been to demand harsher and harsher punishment, and to equate punishment with incarceration. This approach has taken a great toll in human lives, at a huge cost to taxpayers. In spite of the record number of prisoners resulting from these policies, we are still left with high rates of crime and an epidemic of drug abuse.

The American public is more open to engaging in a broad discussion of crime and punishment issues than is commonly believed by policymakers.[25] Day-to-day experience with alternative sentencing programs and comprehensive public opinion surveys demonstrate that Americans understand and support more frequent use of non-incarcerating sanctions and programs that address rehabilitation and the causes of crime.[26] It is time now for America's civic, business and political leaders to invite the American people to engage in a rational and constructive discussion of crime, punishment, and justice issues.

## CONCLUSION

"If you can't do the time, don't do the crime."

— Prisoner saying

More and more Americans, and African-American males in particular, are "doing the time." Unfortunately, this hasn't led them or others to stop "doing the crime." Incarceration rates set new records each day, while crime rates remain intolerably high. Clearly, large-scale imprisonment provides no panacea for crime.

As we have discussed, two possible areas of explanation for our high rate of incarceration are crime rates and criminal justice policies. It is important to determine the relative influence of these factors in contributing to an incarcerated population of more than a million Americans, and to develop programs and policies which can offer constructive solutions.

This report suggests that we need to engage in a public dialogue regarding the factors which have led the United States to be a world leader in incarceration. This dialogue needs to be very inclusive, ranging from criminal justice officials to prisoners, from members of Congress to neighborhood organizations. If we value the human potential of all members of our society, and if we truly wish to reduce crime, we will need to consider seriously whether we can afford to continue our current ineffective social and criminal justice policies.

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## METHODOLOGY

### Population Data

For data on total national populations, we have used the following sources:

UNITED STATES - Census Bureau estimate for July 1, 1989.

SOVIET UNION - *World Almanac* estimate, 1989

SOUTH AFRICA - Population figures for South Africa are inconsistent, particularly regarding the non-white population. For both South Africa and the homelands, we have relied on estimates made by the Institute of Race Relations, generally considered to be among the most objective organizations in South Africa. These figures are lower than some other estimates. At the high end, for example, is a CIA estimate of a total population of 39,549,941. Using this figure, the overall rate of incarceration in South Africa would be 303 per 100,000, compared to the estimate of 333 per 100,000 we have calculated in the report. The Black male rate would be 669 per 100,000, compared to the report's figure of 729.

Overall population figures and prison population data in the report are not always provided for the same year. For example, the South African population figure is as of June 1988, while the prison data are from June 1989. Since the prison population has not fluctuated dramatically, there is no reason to believe that this inconsistency introduces any substantial margin of error into the overall calculations.

### Prisoner Data

Statistics on the number of prisoners have been obtained from the following sources:

UNITED STATES - The total number of inmates in the nation's prisons as of December 31, 1989, and jails as of June 30, 1989, excluding 2,250 juveniles being held in jails. A small percentage of prisoners under the jurisdiction of state prison systems are held in local jails. Estimates of this number vary in publications of the Bureau of Justice Statistics, due to variations in reporting methods. For this report, we have subtracted 39,115 inmates from the total combined prison and jail population (3.6% of all inmates) to account for this overlap. (See *Jail Inmates 1989*, Bureau of Justice Statistics, June 1990.) Since this is the higher of the two figures reported for this category, this provides a conservative estimate of the overall number of incarcerated persons.

To determine the number of incarcerated Black males, we have used the figure of 43% of the jail population (*Jail Inmates 1989*), as well as the most recent estimate of 43% of the prison population (*Correctional Populations in the United States, 1987*, Bureau of Justice Statistics, December 1989). From this total also, we have deducted the number of juveniles as well as the 3.6% overlap between jail and prison inmates.

SOVIET UNION - The most recent published figure of 769,000 prisoners is taken from *Newsweek*, (Fred Coleman, "Reforming a University of Soviet Crime," September 10, 1990). This figure is consistent with reports documenting the decreasing number of inmates in recent years. (See, for example, the estimate of 800,000 prisoners in 1989 in Peterson.) It is somewhat unclear whether these figures include incarcerated juveniles, and whether there are political prisoners who are still incarcerated under the jurisdiction of a separate agency.

SOUTH AFRICA - The number of prisoners, along with a breakdown by race and sex, is taken from the annual report of the South African Prisons Service, with figures as of June 1989. The South African categories of Blacks and Coloreds are combined as Black for our analysis. To estimate the additional number of prisoners in the four homelands, we begin with a report of the Institute of Race Relations documenting that there were 2,677 prisoners in Bophuthatswana in 1987. Since we were not able to obtain any other incarceration statistics for the homelands, we have used the incarceration rate for Bophuthatswana to project an estimated prison population for the other three homelands. Although there are a very small number of whites living in the homelands, we have assumed for these purposes that all prisoners, as well as the overall population in the homelands, are Black. We have also assumed that the percentage of the Black prison population in South Africa that is male — 96.1% — is the same for the homelands. Due to the need to estimate prison populations in the homelands, we have also calculated the Black male rate of incarceration excluding the homelands. That figure, 851 per 100,000, is higher than the figure used in the report, but does not change the overall rankings or analysis.

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[2] Marc Mauer, "Young Black Men and the Criminal Justice System: A Growing National Problem," The Sentencing Project, February 1990.

[3] Many studies of international rates of incarceration look at sentenced prisoners only, and not those inmates awaiting trial or incarcerated in a local jail. We include both jail and prison inmates in this study because we have no breakdown on the pretrial vs. sentenced population in the Soviet Union.

[4] See, for example, *Compendium of Social Statistics and Indicators 1988*, United Nations, 1991, and Doleschal and Newton, "International Rates of Imprisonment."

[5] Overall costs of incarceration are taken from *Justice Expenditure and Employment, 1988*, Bureau of Justice Statistics, July 1990. To calculate the cost of Black male incarceration, we have used 43% of the total figure, representing the Black male proportion of the overall institutional population.

[6] See Newsletter of Penal Reform International, No. 1, February 1990 and No. 2, April 1990, London. It is possible, of course, that rates of incarceration in some Third World countries may be higher, but there are few published reports discussing this. One source examines 1974 incarceration rates for 48 countries, including many in Asia, Africa, and South America, and finds all well below the rate for the United States. See Calvert R. Dodge, *A World Without Prisons*, Lexington Books, 1979, p. 258.

[7] Here, we use the *average daily population* in South Africa because of the availability of data, while we have used a *single day count* in calculating the rate of incarceration, in order to be consistent with the method used for the United States and the Soviet Union. We also exclude the four homelands in this section because we have no data available to measure the fluctuation of the prison population there over time.

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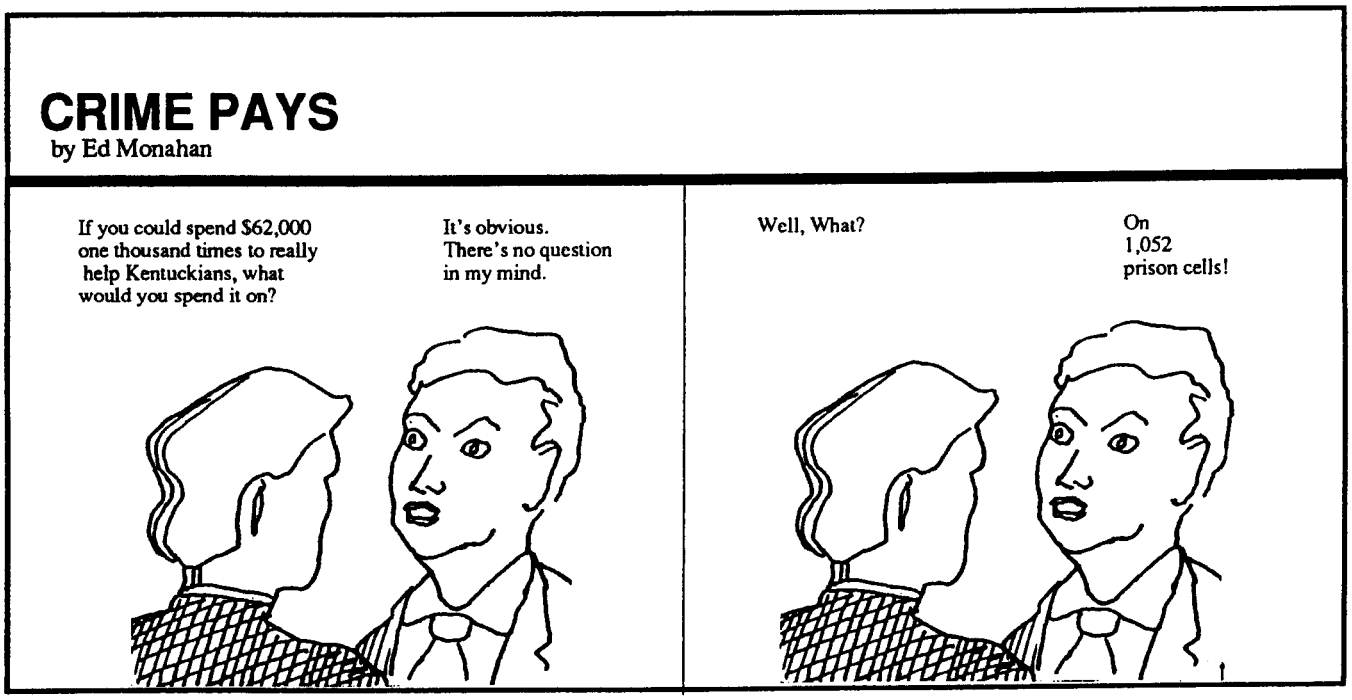

# Young Black Men and the Criminal Justice System

The Sentencing Project's February 1990 report on "Young Black Men and the Criminal Justice System" shocked the nation. The report showed that, on any day, 1 in 4 black males aged 20 to 29 is in prison or jail or on probation or parole. The 609,690 young black males under the control of the criminal justice system on one day far exceeded the 436,000 black males of all ages enrolled in higher education on the same day.

The report was featured in more than 700 newspapers and magazines, and attracted radio and television coverage including the network evening news, the "Geraldo" show, and National Public Radio's "All Things Considered." More significantly, the report has led to a broad range of efforts to reduce the disproportionate impact of the criminal justice system on African-American males.

The American Bar Association's Committee on Minorities in the Criminal Justice System is developing a report on policies and programs which can reduce the criminal justice system's disproportionate impact on minorities.

National organizations, including the National Association of Pretrial Services Agencies and the American Society of Criminology, held annual meeting sessions on strategies to respond to this problem. State agencies and criminal justice reform groups in Connecticut, Michigan, New York, and Virginia have convened public discussions.

The Suffolk County (Long Island), New York Department of Probation convened a working group by county criminal justice officials and community organizations to develop a mentoring program. The program will serve both as a preventive measure for black youth and as a diversion program for young offenders in the criminal justice system.

A prison warden in Missouri, who realized that state furlough screening criteria result in far more white offenders qualifying for furloughs than blacks, is attempting to analyze the reasons for this disparity, and to see if any bias exists in the screening device.

State and national policymakers have looked carefully at these problems. Not surprisingly, African-American officials have taken the lead.

The Congressional Black Caucus sponsored sessions at its annual legislative conference to analyze racial disparities in the criminal justice system, and to examine links between educational failures and entry into the criminal justice system.

The New York State Black and Puerto Rican Legislative Caucus initiated forums to solicit community suggestions for responding to the large-scale incarceration of black males. The first forum in Harlem attracted 700 people, and was broadcast live on radio.

Professionals and organizations not primarily involved in criminal justice have also responded. The *Boston Globe* reported that "campus discussions of black male enrollment have been stimulated by a report released by The Sentencing Project." Educators concerned with school dropouts and declining enrollment in higher education have been discussing a variety of approaches to design curricula and structure schools to meet the needs of black youth more effectively. Other groups, such as "100 Black Men" in Memphis, have begun mentoring programs to provide positive role models for young people in their community.

Criminal justice professionals should be pleased with the widespread interest the report has revived in problems which have long been acute in the criminal justice system. The nature of this interest offers some important lessons.

First, although the reasons for racial disproportion in the system are complex, this has not prevented criminal justice officials from facing these issues. Too often, we hear that the criminal justice system is the "end of the line," the institution which steps in when all else has failed. While there is truth in this, recent actions of criminal justice personnel indicate that many want to try to address these problems.

Second, there has been increased recognition that criminal justice problems cannot be solved in isolation from the larger community. Whether developing mentoring programs or working with the religious community, criminal justice personnel have a potentially deep source of support for working with offenders.

Reaction to the report challenges the myth that the public is uniformly "tough on crime," and has no sympathy for examining the underlying causes of our high national crime rates. Editorials across the country, both conservative and liberal, echoed similar themes. As the Charleston, South Carolina *Post / Courier* stated, "If the report does nothing else, its horrifying statistics should ignite a national debate on a subject that has become too critical to ignore any longer."

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# Announcing NLADA's Civil Training Calendar

## Mark Your Calendar NOW!

### Litigation Directors Conference
New Orleans, Louisiana
June 9-12, 1991

**Who should attend?** Litigation directors, senior attorneys, and other attorneys with leadership responsibilities in areas of program management or substantive legal work.

**What's the plan?** The agenda will include sessions on management techniques, legal issues and strategies, computer applications, impact of emerging issues on the client community, and more.

**How much will it cost?**
$225 registration fee (meals and lodging NOT included)
Hotel rates are $71/night

### Experienced Managers Conference
cost, location & date (in early 1992)
to be announced

**Who should attend?** Those with at least 5 years experience as a program director, litigation director, managing attorney or administrator.

**What's the plan?** Sessions will address substantive, delivery, management and leadership issues

### Substantive Law Conference
Berkeley, California
August 3-6, 1991

**Who should attend?** Litigators and advocates.

**What's the plan?** Concurrent 2 1/2 day intensive training sessions on a variety of issues and topics will be presented by staff of the national back up centers and field programs.

**How much will it cost?**
$225 registration fee only
$375 registration, meals and lodging

### NLADA 69th Annual Conference
Portland, Oregon
October 28-November 2, 1991

**Who should attend?** Program managers, litigators, administrators, paralegals, trainers, computer specialists, PAI coordinators, board members, and clients.

**What's the plan?** Sessions will be designed to follow up on the agendas presented at the Litigation Directors and Substantive Law Conferences in addition to a variety of sessions focused on substantive law, management, training techniques, client issues, computer applications, and PAI delivery.

**How much will it cost?**
$225 registration fee only

NLADA has contracted with United and Delta to provide discount airfares to these events to help reduce your costs.

An announcement of each event (including a description of the program, transportation information and a registration form) will be mailed about 2 months prior to the event - watch for it!

# A New Study on the Decision-Making of Capital Jurors

Since the United States Supreme Court decisions in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976), *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976), *Proffit v. Florida*, 428 U.S. 242, 96 S.Ct. 2960 (1976), *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978 (1976) and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001 (1976) numerous researchers have attempted to demonstrate that a guided discretion system has failed to reduce or eliminate the arbitrary and discriminatory nature of capital sentencing decisions.

The approach typically employed is to focus on the **outcomes** of capital cases as evidence that discrimination still exists in capital sentencing. For example, Baldus, Woodworth, and Pulaski (1990), in their landmark study that was presented to the Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756 (1987), found that convicted murderers whose victims were white were 4.3 times more likely to receive a sentence of death than those whose victims were black. The Court's primary criticism of the Baldus study was that it failed to prove that the jurors who served in Warren McCleskey's case intended to discriminate against the defendant.

The effects of death qualification on sentencing decisions is another avenue that researchers have pursued. Many of the results of this study were presented to the high court in *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758 (1986). In this case, a primary criticism was that actual jurors had not participated in much of the research.

The current study attempts to address a previously neglected area of inquiry. In particular, the question that guides this research is: How do capital jurors actually arrive at their decisions of guilt and/or punishment? Thus, the focus of this research is the **process**, not the outcome, of juror decision-making in capital cases.

## I. THREE MODELS OF JUROR DECISION-MAKING: ALGEBRAIC, STORY, MATCHING

There are three social psychological models of decision-making that may explain how jurors arrive at their decisions of guilt and/or punishment.

The first, known as the algebraic model, proposes that people listen to all the (legally relevant) evidence presented, assign each piece of evidence a ranking of importance, and arrive at a decision by combining each piece of evidence and its associated importance ranking (Anderson, 1981; Einhorn and Hogarth, 1985).

Alternatively, jurors may arrive at decisions of guilt and/or punishment by creating a "story" of the crime or criminal, based on the evidence presented at trial (Bennett and Feldman, 1981; Pennington and Hastie, 1986; 1988). The story is then compared to the available verdict categories, with jurors choosing the category that best fits the story.

Finally, a matching model suggests that jurors arrive at their decisions by comparing the evidence presented at the trial with their own preexisting mental story of a related occurrence (Smith and Medin, 1981). The more similar the crime and the defendant in the case the juror is deciding are to this story, the more likely the juror's decision will correspond with the outcome of the mental story.

In sum, the goal of the current study is to determine which of the above models of decision-making most accurately describes the **process** through which capital jurors arrive at decisions of guilt and/or punishment. By interviewing people with previous capital jury experience about the decision-making strategies they utilized, we will be able to ascertain whether actual practices correspond with legalistic assumptions about the interpretation of evidence.

## II. METHODOLOGY OF THE PROJECT

At the time of this writing, seven states (California, Florida, Indiana, Kentucky, New Jersey, South Carolina, Texas and Virginia) form the core of this project, and five states (Illinois, Louisiana, Missouri, North Carolina and Tennessee) may be added on a smaller scale. Each state is represented by a university professor of either law or a social science. The project, **Models of Juror-Decision Making in Capital Cases**, is funded by the National Science Foundation.

Thirty capital cases, fifteen where the jury voted for death and fifteen where the jury voted for a sentence of less than death, will be studied in each state. For each case, four of the jurors will be interviewed. Therefore, a total of 120 interviews with previous jurors will be conducted in each participating state.

The interviews will be conducted by advanced graduate students. Each interview is expected to take approximately two and a half hours to complete. The interview itself consists of questions pertaining to the eight general areas of the case: the trial; the respondent's sentencing decision; sentencing guidelines; the judge, prosecutor and defense attorney; jury selection and composition; death penalty attitudes; and personal background information.

Each of the states involved in the project is at a slightly different phase of data collection. However, it is anticipated that the majority of the interviews in Kentucky will be completed by the end of this coming summer. If all goes according to schedule, the preliminary findings should be available by the middle of November, 1991. In fact, the preliminary findings are scheduled to be presented at the annual meeting of the American Society of Criminology next November.

Each investigator is committed to analyzing his/her state data for publication. Also, many collaborative, cross-state publications are planned.

Although only a handful of interviews have been conducted thus far, the majority of which were in Kentucky, the project already has been very well received by the academic community. For example, an entire session at the upcoming joint meeting of the Law and Society Association and the Research Committee on the Sociology of Law of the International Sociological Association, to be held in The Netherlands this summer, has been devoted to studies re-

lated to the project.

## III. GENERAL OBJECTIVES OF THE STUDY

A unique characteristic of this project is that previous capital jurors will be interviewed to find out the process through which decisions of guilt and/or punishment are made. In particular, the project attempts to determine how jurors actually evaluate all the evidence presented in capital trials.

The primary purpose of this study is to assess which theoretical model most accurately describes the decision-making practices of capital jurors. The effects of different statutory sentencing guidelines on actual decision-making practices will also be studied.

In an attempt to gain a better understanding of the decision-making of capital jurors, the respondents will be asked about the information that served as the basis of their decisions. For example: What evidence presented by the prosecution (defense) was most important to the jurors' decisions of guilt and/or punishment? Which witness was most important to the juror in arriving at his/her decision of guilt and/or punishment?

In addition, jurors' perceptions of the trial proceedings and actors will be studied. In particular, does the manner in which attorneys structure their cases influence the decision-making model employed by the jurors? To answer this question, of course, requires talking to both the prosecutor and defense attorneys involved in the case.

Finally, the design of the project allows for a comparison between cases that did and did not result in a verdict of death. Were there any differences in the decision-making practices of jurors who served on both types of cases? It is possible that the **process** of juror decision making differs when the resultant sentence is death as compared to other punishments.

## IV. POSTSCRIPT

I am responsible for supervising the Kentucky component of this project. If you are interested in learning more about the project or perhaps offering your input, please do not hesitate to contact me.

There are two areas of the project for which I would especially welcome your involvement. First, I want to know of all capital cases in Kentucky since January, 1988. If you worked on a capital case during that time, I would appreciate it if you would let me know so I could insure that the case is included in my inventory.

Second, I would appreciate the opportunity to discuss with you your impressions of the case. In return for your assistance, I look forward to hearing from, and perhaps working with, many of you in the near future.

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*Marla Sandys received her doctorate in social psychology from The University of Kentucky in May, 1990. Both her master's and doctoral theses were on attitudes toward capital punishment. Marla currently is an assistant professor in the Dept. of Criminal Justice at Indiana University.*

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## LOUISVILLE BAR FOUNDATION AWARDS OVER $48,000 IN GRANTS. $5,000 AWARDED TO DPA.

The Louisville Bar Foundation awarded over $48,000 in grants for the 1991-92 fiscal year, at its May 14 board of directors meeting. The following projects were selected for funding:

**The Louisville Bar Association Judicial Evaluation**--$11,500. Administered annually by the LBA, alternating each year between evaluations of the Jefferson Circuit and the U.S. District Courts for the Western District of Kentucky one year, and evaluations of the Jefferson District Courts the next. The purpose of the evaluation is to strengthen the judiciary of Jefferson County and to offer constructive criticism to sitting judges.

**Kentucky Department of Public Advocacy**--$5,000. The statewide public defender program, is planning to conduct a comprehensive, independent evaluation of the system. The premise underlying this evaluation is to assess the current quality and methodology for delivery of services and to provide a blueprint for any changes necessary in the current system to insure that high quality representation is provided to poor citizens accused of crimes.

**Downtown Lecture Series**--$1,387.50. A joint venture of the Louisville Bar Association and the Louisville Presbyterian Theological Seminary. Each year, the groups plan a four-part series exploring various ethical issues inherent in day-to-day living. Discussion leaders are selected from such disciplines as the media, law, politics, medicine and theology. The grant will cover the expenses of the series, which is free and open to the public.

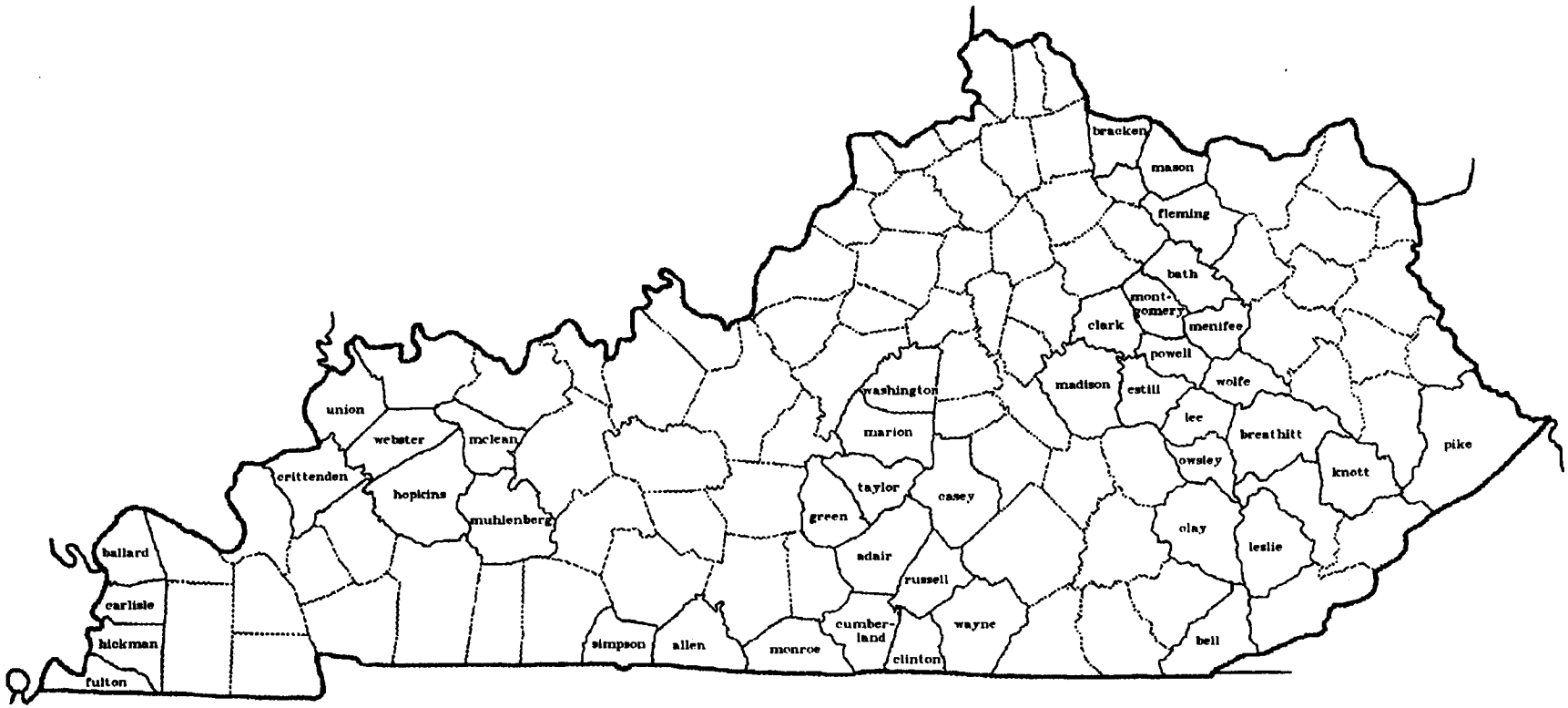
**Legal Aid Society Homelessness Prevention Program**--$20,000. Represents families and individuals who are at high risk of becoming homeless, and those who have already become homeless. The LBF grant goes toward paying the salary of an attorney who concentrates on housing issues by providing counsel, representation and advocacy.

**University of Louisville School of Law Public Service Program**--$7,217.50. The University of Louisville School of Law recently became one of the first five schools in the country to adopt a public service requirement for students entering law school. Plans are under way to develop and implement the program. The grant money will go toward hiring a part-time director who will work with public and private non-profit agencies, as well as the bench and bar, in developing placements and establishing the administrative structure for this program.

**Judicial Ethics Seminar with Michael Josephson**--$3,500. The Louisville Bar Foundation and the Kentucky Bar Foundation are jointly sponsoring this seminar on judicial ethics featuring nationally-renowned ethics expert Michael Josephson. He will speak in Louisville this June, and address the topic of the new ABA Model Code of Judicial Conduct. In addition, Mr. Josephson will hold two other ethics seminars for attorneys.

The Louisville Bar Foundation, the charitable arm of the Louisville Bar Association, was established in 1983 to provide financial support for projects and organizations whose missions include: Delivering legal services to the poor and indigent;Improving of the judiciary by periodic evaluation and other means; andProviding law-related public education. Grant applications numbered over 30 this year, up significantly from last year. Total dollars requested was in excess of $117,000. According to LBF President Daniel T. Goyette, "The board was gratified by the response to our call for applications this year. The grants committee had a number of deserving and innovative programs to consider. The LBF board is very enthusiastic about the programs ultimately selected."

# Selecting Jurors by Jury Commissioners




**The 43 Counties that use Jury Commissioners are named.**

# Test Your Knowledge About Drugs

1. Can American customs officers order you to disrobe and allow your body to be invasively inspected as you arrive from an international flight - without any evidence or even probable cause to believe you are smuggling drugs?

A. Yes
B. No

2. What is the largest cash crop in the state of Tennessee?

A. tobacco
B. marijuana
C. hay
D. rye

3. American employers can now legally demand that you take a drug test by urinating on command before a witness as a condition of keeping your job, even though they have no evidence you are a drug user.

A. True
B. False

4. According to the U.S. government, approximately how many times more people died in this country from using alcohol and tobacco than from using all illegal drugs combined?

A. 2
B. 10
C. 100
D. 1,000

5. According to the U.S. government, the total number of children who died from all forms of illegal drug overdoses in 1988 was

A. 10,000
B. 5,000
C. 50,000
D. 88

6. The chief administrative law judge of the Drug Enforcement Administration stated in a 1988 legal decision that "marijuana is far safer than many foods we commonly consume," that it "is one of the safest therapeutically active substances known to mankind," and that it ought to be made available as a medicine to Americans suffering from cancer and multiple sclerosis.

A. True
B. False

7. If you, your parents, or other loved ones are dying from cancer, will American drug officials allow your doctor to prescribe marijuana to curb chemotherapy nausea or to prescribe heroin to ease pain and anxiety?

A. Yes
B. No

8. If measured in cubic feet, the nation's annual demand for cocaine could fit into

A. an oil tanker
B. a cargo plane
C. Iowa

9. In 1989, Washington, D.C., (population 622,000, where all drugs are totally

## PRESIDENT BUSH TO WAGE WAR ON THE BILL OF RIGHTS

Comparing the nation's prosecutors to the soldiers who fought against Iraq, President Bush introduced his draconian new crime bill (the Comprehensive Crime Control Act of 1991) on March 12. In reality, this bill is a death-dealing scud missile aimed at the Bill of Rights. We patriots must shoot it down.

### DEATH FOR DRUG DEALERS

The President's bill expands the death penalty in ways reminiscent of some of the most repressive governments on earth. Iran, for instance, has been criticized by Human Rights groups for executing drug dealers under a law enacted last year. The President's bill also permits the execution of street-level drug dealers.

### THE GREAT WRIT IN A BODY BAG

The bill virtually eliminates the ability of death row inmates to petition the federal courts to review the constitutionality of their trials. Traditionally, death penalty states have not allocated sufficient financial resources for the defense of poor capital defendants. Further, politicized state court judges are often unwilling to order retrials in capital cases no matter how unfair the trial, lest they be branded as soft on crime.

While not a genuine remedy for these chronic problems, federal court review of state convictions, through habeas corpus proceedings, has provided a measure of justice. Over the past decade, almost one third of those sentenced to death in state courts have had their sentences or convictions overturned by federal courts.

The administration's bill would eviscerate the great writ of habeas corpus by destroying the ability of federal courts to grant relief to prisoners whose state trials were unconstitutional. In effect, the bill would allow the execution of prisoners even if their trials were infested with constitutional errors.

### POLICE MISCONDUCT/RACE DISCRIMINATION

In the aftermath of the videotaped assault by 25 white Los Angeles police officers of a black motorist, one would hope that any new crime legislation would seek to curb police misconduct and remedy race discrimination in the criminal justice system. The Administration's bill, though, actually rewards police misconduct by providing that evidence obtained through unlawful police searches can be used in a criminal prosecution.

The bill contains a provision which purports to guard against race discrimination in death penalty cases. However, this provision forbids the invalidation of racially-motivated death sentences by the only evidence publicly available -- statistical analysis which shows that blacks are disproportionately sentenced to death.

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illegal) had 262 drug trade homicides while Amsterdam (population 670,000, where many drugs are decriminalized) had 11.

A. True
B. False

10. Is it legal for the police to obtain a warrant to search every nook and cranny of your home on the basis of a tip sent in by your neighbor in an unsigned, anonymous letter?

A. not in America
B. only on Sunday
C. yes

11. AIDS, the disease of this century and perhaps the plague of the next, is spread more by sex than by intravenous drug use.

A. True
B. False

12. The rate of AIDS among the intravenous drug users in Liverpool, England, (where health authorities are encouraged to provide clean needles to addicts) is believed to be 0.1% while the comparable rate among the addicts in New York City (where clean needles are illegal) is believed to be 50%.

A. True
B. False

13. Since 1986, the U.S. Customs Service has spent more than $100 million to test, build, and deploy seven radar balloons on the U.S./Mexican border. How many smugglers have been caught in this effort?

A. more than 5000
B. about 2500
C. 942
D. less than 50

14. Last year, the Massachusetts National Guard

A. patrolled the Atlantic Ocean looking for drug smugglers.
B. attended a Grateful Dead concert to try to identify suspicious-looking people.
C. was sent to Peru to eradicate coca plants.
D. discovered a marijuana field the size of the city of Boston.

15. In 1989, sailing for a combined 2347 ship days costing $33.2 million, the U.S. Navy and Coast Guard

A. seized 879 ships and arrested 2,368 drug smugglers.
B. seized 637 ships and arrested 1,472 drug smugglers.
C. seized 348 ships and arrested 857 drug smugglers.
D. seized seven ships and arrested 40 smugglers.

16. Which statement is false?

A. Enough urine is tested each year to fill Lake Michigan.
B. Two ounces of a particular diet soda held under the arm for one hour will be accepted as a valid urine sample 98% of the time.
C. Adding a brand of eye drops to a urine sample camouflages any trace of marijuana in a drug test.
D. Cocaine users can avoid detection by simply adding bleach to urine.

17. According to the Bush Administration, the typical cocaine user is white, male, a high school graduate, employed full-time, and living in the suburbs.

A. True
B. False

18. The Dutch have a far lower *per capita* consumption of drugs than the United States. Who wrote: "The fundamental difference in Dutch drug policy is its demand-oriented approach to the problem as opposed to the supply-oriented approach favored by the United States and many other countries."

A. Reverend Jesse Jackson
B. The Bush Administration's State Department
C. Vice President Dan Quayle
D. Roseanne Barr

19. Instead of expending the time and effort to catch and prosecute marijuana users, "we should concentrate on prosecuting the rapists and burglars who are a menace to society." Who made this statement advocating the decriminalization of marijuana?

A. Reverend Jesse Jackson
B. The Bush Administration's State Department
C. Vice President Dan Quayle
D. Roseanne Barr

20. For every $1 we spend on treating hard-core drug users, the U.S. taxpayer is saved $3 in reduced crime and other social costs.

A. True
B. False

21. Every day, 56,000 hard-core addicts seek treatment, but are turned away for lack of staff or space.

A. True
B. False

22. Coca is the primary ingredient in cocaine. The biggest legal importer of coca in the United States is

A. The Federal government
B. the makers of nicotine chewing gun
C. Coca-Cola
D. RJR Tobacco

23. The Bush Administration claims that the U.S. has 862,000 regular cocaine users. How was that number determined?

A. It's the total number of *High Times* magazine subscribers
B. A survey of hospital emergency rooms
C. The government interviewed 8,621 people, of whom 65 admitted using cocaine weekly. The number was then extrapolated to account for the total U.S. population
D. A Gallup poll of white, suburban males completed in May 1990

24. Last year, international drug smugglers placed a $30,000 bounty on the head of "Barco." Who is "Barco?"

A. The Secret Service code name for the Attorney General.
B. The director of the Bolivian government police
C. A U.S. Border Patrol drug-sniffing dog.
D. A mid-level bureaucrat in the Customs Service.

25. A recent National Institute of Drug Abuse (NIDA) federal study found:

A. A typical Grateful Dead fan is a white male living in the suburbs.
B. You can blow bigger bubbles with nicotine chewing gum than with regular chewing gum.
C. People who have chocolate cravings and ice cream binges are more likely to become drug addicts.
D. Catepillars that eat coca plants have constant runny noses and also seem to have trouble sleeping.
E. A typical member of Plato and the Guardians (a legendary '60s rock and roll band) is a white male living in the suburbs.

26. The inhalant used most by students in Texas is a typewriter correction fluid.

A. True
B. False

27. In the U.S. last year, the total number of overdose deaths caused by aspirin was virtually the same as the overdose deaths from

A. tobacco
B. heroin
C. alcohol
D. typewriter correction fluid

## ANSWERS

1. a 2. b 3. a 4. c 5. d 6. a 7. b 8. b 9. a 10. c 11. b 12. a 13. d 14. c 15. d 16. a 17. a 18. b 19. c 20. a 21. a 22. c 23. c 24. c 25. c 26. a 27. b

Congressman Pete Stark's Drug Test to Congress, Reprinted by permission.

# *The Advocate* Magazine
# The Kentucky Department of Public Advocacy
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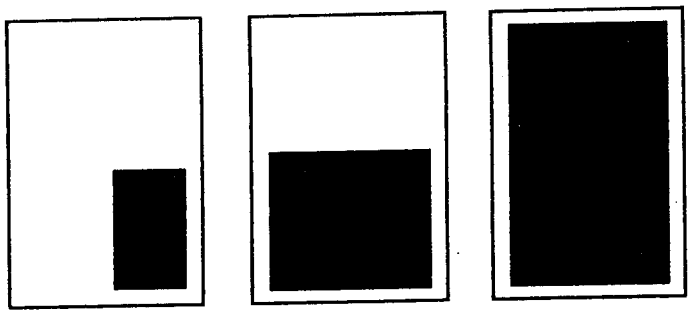

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For further information contact: Cris Brown, Managing Editor, *The Advocate*, Department of Public Advocacy, 1264 Louisville Road, Frankfort, KY 40601, (502) 564-8006, FAX # (502) 564-3949.

# Defendants with Mental Retardation Need Interveners who Understand Them

When policemen arrest persons with retardation, confusing things can happen. Officers recite something to them about "waving at my rights," as a Texan with retardation recalled. Then, with the click of handcuffs, they are taken away from everything that had been safe and familiar to them. They are placed in rooms where investigators work them to exhaustion, trying to "get something out of them." Because persons with retardation want so much to be accepted by others, they often try hard to give the investigators what they want — even though it will be used against them later. No matter whether they are guilty or innocent, they open themselves up to investigators in ways Ted Bundy, Jean Harris and Claus Von Bulow would have never even thought of doing.

Friends and helpers can be concerned, but when they encounter the imposing facade of the criminal justice system and its magical language, they feel intimidated and back off. They are somehow led to feel they're not needed anymore. Nothing may be further from the truth, says Dolores Norley. This Florida mother of a son with retardation, professor of communication, a lawyer and a police trainer, believes that "the best interveners will always be people who have actually worked with persons having retardation."

Norley, since the early 1950's, has taught at police academies, logged many hours riding in patrol cars (especially in Chicago), voluntarily visited numerous prisoners with retardation in their cells, written training manuals for officers, attorneys and judges, and helped to develop laws that protect persons with retardation.

The following are selected excerpts from her speeches and papers.

*The criminal justice system is a confusing place.* That's partly true because the system itself doesn't know what it is about:

> It is torn between rehabilitating, punishing and deterring people. One court can act like John Wayne, another like Mother Theresa — for the same crime. One judge can have the spite of a vigilante, another the wisdom and intellect of Justice Brandeis.
>
> It's not always rational. Tom Wicker, a former editor of the *New York Times*, held himself responsible for the deaths of many prisoners in the Attica prison uprising. In *A Time To Die*, he describes how prisoners asked him to represent them in the mediation sessions. And so, he went to the meetings and openly discussed critical situations with the authorities. Later, after many of the prisoners were killed, he blamed himself for assuming the system was rational. It was not.
>
> Sentencing practices can be arbitrary, discriminatory and generally unprincipled — often governed by the subjectivity of the judge and influenced by the current vacillating public feeling about any one given offense.
>
> It is far easier to get into the system than to get out. Chalk this fact up to all the egos and territories that get involved.
>
> Some system members, nevertheless, are educable. More often than not, they are eager to do right, to learn about the people they are dealing with, and to be inventive in their jobs when they have the right guidance and persuasion.

*When persons with retardation enter the system it is not just a crisis, it is usually a disaster.* In all of my years in this field, I have never seen one of these persons improved by imprisonment.

*Excepting those arrested for murder, rape and child abuse, the system usually would like to spit out people having retardation,* but it doesn't know how. The police, attorneys and judges have set things they must do — even if the person with retardation doesn't fit the usual criminal mold. That's professionalism.

*Psychiatrist are dear to the heart of the courts.* The courts were long ago intimidated into accepting them as the authority for practically everything. We as never before need educational and psychological evaluators who have lived with and understand persons with retardation.

*Finding a person incompetent to stand trial may not always be a good thing.* It could lead to a lifetime of incarceration in an institution and thereby deny him or her a chance to be proven innocent.

*The biggest hurdle is the diffidence of those who regularly work with people having retardation.* It is easy to blame the system for being insensitive. Then we become intimidated by them and don't try to advocate. Court liaison work is exactly like any other form of advocacy. The rules are identical: Do your homework. Know the problem better than they do. Know some of the solutions. Realize that some folks inside of the system are frustrated and they will welcome you and your expertise.

*The first step is educating the police and the courts.* I do everything I can to organize programs for training the police, lawyers and judges — even getting them to carry wallet cards that list helpful hints and the local disability agencies on call to them. In my experience, officers who can recognize and delineate disabilities become ambassadors and have been amazingly helpful in avoiding inappropriate arrests. Community level judges, if approached, will often welcome conferences with local people on possibilities for special programming.

*Those who work with persons having retardation need educating, too.* An example: A teenager with retardation went to his teacher at school to ask if a recent activity (fondling the genitalia of a young boy) was okay. The teacher sent him to the counselor. The counselor called the police. The young man was given 30 years in the penitentiary (even though rapists in Florida only average five years). The judge did it because he had suddenly become horrified by the current mushrooming of sex act cases.

When other prisoners saw the young man as a potential sex object, he requested protective custody. That amounted to being in absolute isolation — no radio, no reading material (he can't read anyway), no exercise, no meals outside his cell. At the time, he was 18 and flabby. When we tried to get him into a sex offender program he was refused because "he has less than normal intelligence."

When I visited, the guards put handcuffs on him and two armed guards stood outside his cell door. Handcuffs are rough when you are wiping away tears.

Whether he is a case of true pedophilia or a case of situational sex play, we may never know. Soon he may either go mad with the isolation, or become so desperate he will be willing to go on the compound and accept the protection of a "lover."

*We must train more of us in the field to be assertive interveners.* Judges will change. Prosecutors and public defenders will go on to cushy jobs in big firms. Only the advocates will remain constant. We must get the parole boards with facts about retardation as well.

Almost always, I work as an intervener with no status. But I am always welcomed. It works because the courts are desperately looking for any help they can get.

Recently, I went into a court and introduced myself as a person with no status — except for 33 years of experience in the field of retardation. The judge said, "Thank God! Do you have a card? I have a few other cases I want to talk to you about."

*Early diversion is crucial.* Persons with retardation need to be helped out of the criminal justice system and placed into alternative arrangements as early as possible. We need to pay heavy attention to first appearances, preliminary hearings and arraignments. Sentencing hearings are important, too. If we can offer alternative programs, many courts will jump at the chance to try them.

*But we need the alternatives.* The sad fact: Nine out of the ten times it is the lack of alternatives — not the nastiness of the court — which sends our people to miserable incarceration where they are the prime victims of others there. We must create alternative programs.

Item: Norley has developed succinct, easy-to-understand guidelines for criminal justice personnel in Florida. For a free copy, send a SASE (Self-addressed-and-stamped envelope) to: Dolores Norley, 529 North Sans Souci Ave., DeLand, FL 32720.

**ROBERT PERSKE**
159 Hollow Tree Ridge Road
Darien, Connecticut 06820
(203) 655-4135

*"Robert Perske is an author and journalist with a special interest in what happens to persons with mental retardation and similar disabilities after the criminal justice system gets them."*

## COURT TO DECIDE IF EARL WASHINGTON TRIED TOO HARD TO PLEASE COPS

A man with mental retardation may have followed the "leading" of investigators so well he was sentenced to death for a crime he probably did not commit. Defense attorneys Eric M. Freedman and Robert T. Hall came before the 4th Circuit Court of Appeals [in *Washingon v. Virginia*] and stated that 30-year-old Earl Washington Jr. did not rape and murder Rebecca Lynn Williams in Culpeper, Virginia on June 4, 1982. Freedman, arguing the case before a three-judge panel, said the conviction was based solely on a confession with details supplied by the police.

Judge J. Harvie Wilkinson III asked if Washington's role was "purely a passive role . . . or did he actually supply concrete details about the perpetration of this crime?" "It was purely passive," said Freedman. "Are you saying he had words put in his mouth?" asked Wilkinson. "That's what I'm saying, Judge," said Freedman. But he added that he didn't believe police were trying to "railroad" Washington. He said they simply may have believed Washington was holding out on them.

Rebecca Williams had been raped, stabbed and found lying in the doorway of her apartment. She died two hours later at a local hospital. According to the police, a witness reported seeing a man near the Williams apartment on the morning of the murder. He was described as "a black male with a beard," dressed in a white sleeveless t-shirt and faded blue jeans. He had "extra large muscles in the chest, arms and upper back areas." Based on the eye-witness account, a composite picture was published in the July 3, 1982 *Culpeper Star Exponent* and the police focused on a local suspect who fit the description.

Washington was not implicated in the case until almost a year later. On May 21, 1982, he was arrested in Warrenton, 20 miles northeast of Culpeper, for breaking and entering a home and for assaulting his brother-in-law. His arrest came in the morning after he had been up all night. He had been drunk. And yet, according to the defense, "Washington, mentally retarded with an IQ of 69 and sleepless the night before his arrest, was interrogated at great length that day and the next."

Although the initial charges were dropped, Washington "waived his *Miranda* Rights" and "confessed" to a number of other crimes, including the rape of a Warrenton woman. After initial investigations, all officials concurred later that he couldn't have done any of these local crimes. According to an officer's notes taken late in the first day of interrogation, "Earl still seemed nervous as though there was still something else being kept from us." After some probing, the officer spoke bluntly: "At this time I asked Earl, 'Earl, did you kill that girl in Culpeper?'" Earl "shook his head yes and started crying." Later the officer said, "Earl, I mean the woman you stabbed in Culpeper?" Washington said yes. (He made no mention of rape. Even the officer didn't know at the time that she had been raped.) During the later interrogations--with Culpeper police taking part--Washington usually proved to be wrong any time he volunteered facts:

He said Rebecca Williams was black. The officers corrected him. She was white.
He said she was "kind of short." She was 5'8".
He said he kicked in the door. The door wasn't damaged.
When asked how many times he stabbed her, he wasn't sure, perhaps one to three times. She was stabbed 38 times.
He said nobody else was around. And yet, police arriving shortly after the event found a baby in a playpen just inside the door. And standing beside the playpen was the victim's three-year-old daughter.
While his confession was being typed, officers drove Washington to apartment complexes throughout Culpeper. When they arrived at the crime scene, Washington failed to point it out. They drove away, then returned later. Again Washington failed to point to the apartment where the crime had taken place. They drove away and returned a third time. This time, an officer said "Earl, isn't that the place?" He said yes.

...

[In his affidavit, defense expert, Dr. John N. Follensbee,] stated that Washington did not understand his *Miranda* Rights. "Mr. Washington not only did not understand the point of the police advising him of his rights, he did not understand the concept of rights--a concept which requires very little capacity for abstraction." He also said that the stress caused by a sleepless night and long interrogations "would have induced a condition of absolute compliance and utter reliance on the interviewer for appreciation of results."

"Earl Washington is mentally retarded and can't tell you the colors of the flag, or what a thermometer does," said Freedman "but he has been sentenced to death . . . He's simply innocent... retardation doesn't only mean you don't know things. It also means you try and conceal [retardation]."

Follensbee, in his affidavit, showed how Washington compensated for such a concealment: "This man is easily led. Out of his need to please and his relative incapacity to determine the socially and personally appropriate behavior, he relies on cues given by others and a reflexive affability. These are his only apparent adaptive skills. It was my impression that if on the evening of his execution the electric chair were to fail to function, he would agree to assist in its repair."

There has been no decision in the case to date.

From newsletter published by Robert Perske. Reprinted by permission.

# Involuntary Civil Commitment Materials

To promote improved representation for persons with mental illnesses subjected to involuntary civil commitment, the American Bar Association's Commission on the Mentally Disabled has developed a training package for lawyers and judges. This package has four components: a manual; guidelines for involuntary civil commitment systems; a video; and a two-day workshop.

## INVOLUNTARY CIVIL COMMITMENT: A MANUAL FOR LAWYERS AND JUDGES

The comprehensive manual introduces an approach that encourages lawyers and judges to become involved before the commitment hearing, using pre-hearing screening, negotiation and diversion into less restrictive alternatives to reduce the number of full court hearings. The manual is divided into five parts.

**Introduction** - a concise overview of civil commitment practices and an orientation to the manual.

**Respondent's Counsel** - the manual's largest section with a step-by-step guide for attorneys with clients facing commitment, discusses: the role of respondent's counsel - the best interest v. advocacy models; procedural and due process issues; pre-hearing preparations, including interviewing the client and other parties (with a sample interview format) and preparing the client and witnesses; hearing issues, including notice, scheduling, location of the hearing, the client's attendance, the effects of medication; the conduct of the hearing, including motions, documents, direct and cross-examination, expert witnesses and the closing argument; and post-hearing responsibilities, including appeals and other procedural and administrative options for relief.

**State's Attorney** - addresses the civil commitment process from the point of view of the attorney who represents the interests of the state or the petitioner. Building on the respondent's counsel section, this discussion identifies areas where the state's attorney's considerations differ significantly from those of the respondent's counsel. Topics include the party(ies) being represented; political factors; special pre-hearing activities; and post-hearing issues such as appeals and periodic review hearings.

**The Judge** - comprehensively examines the judge's role and responsibilities from the point of view of a judge who handled hundreds of civil commitment hearings. Topics include administrative issues such as calendars, courtroom decorum and confidentiality; judicial perspectives on conduct of the hearing(s); and disposition determinations, including treatment alternatives.

**Appendices** - provide two useful tools: a general involuntary civil commitment interview and strategy form; and 40 pages of charts of selected statutory provisions in the nation's 51 jurisdictions.

The manual, which is 136 pages typeset in an 8 1/2" x 11" bound format with cover, is available for $30. Orders of 10 or more are $20 per copy.

## COMMITMENT TO ADVOCACY

This 10-minute VHS-format videotape introduces the kind of advocacy the Commission endorses and highlights some of the manual's major points. Commentary from leading experts - a judge, a law professor, a practicing attorney and members of the mental health community - underscores the importance of the advocacy role for respondents.

## The National Center for State Courts' Guidelines for Involuntary Civil Commitment

These 50 practical guidelines provide suggestions for improving a jurisdiction's involuntary civil commitment process without extensive statutory reform. The result of a multi-year project that investigated a number of states' civil commitment practices, the guidelines follow the typical involuntary civil commitment process, from the petition or first contact, through the hearing and into the disposition of the case. They address the following areas: the foundations of involuntary civil commitment; the organization and administration of pre-hearing screening; detention and custody of persons by law enforcement officers; mental health examination, treatment and disposition before court hearings; legal representation; court hearings; judicial determinations and case dispositions; and post-hearing matters. The Guidelines provide the basic framework for the advocacy approach to representation.

## CIVIL COMMITMENT TRAINING WORKSHOP

To teach the advocacy approach to civil commitment representation using the manual, the guidelines and the video, the Commission has developed a two-day workshop using a detailed hypothetical case to take participants through the civil commitment process. Through small group activities, participants follow the case from the pre-hearing phase through the hearing, where strategies for using witnesses are discussed and participants role-play some direct and cross-examinations. The hypothetical case is followed through its conclusion in the court and into counsel's post-hearing responsibilities. Two panel discussions address the specific practices in the jurisdiction.

To facilitate conduct of this workshop across the country, the Commission has developed an instructor's manual to enable local trainers to use these materials to conduct the workshop by themselves. The Commission also has experienced trainers who will present and help organize the workshop with Commission staff support on a request basis.

## FOR MORE INFORMATION

For more information about the package's components and the various packages designed to meet the needs of professionals in a range of situations, please contact the Commission at 1800 M Street, N.W., Washington, DC 20036, (202) 331-2240.

# 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:**

I have two clients who have been convicted of Murder, one whose offense was committed prior to Februray 15, 1991, and one whose offense was committed after Februray 15, 1991. Both clients received a one hundred (100) year sentence. In light of the recent revision of KRS 439.3401 by adoption of House Bill 7, what will be the differentiation between my clients parole eligibility?

**TO READER:**

House Bill 7 was adopted by the General Assembly and became effective February 15, 1991. Therefore, for the Capital Offense of Murder committed after July 15, 1986 and prior to February 15, 1991, your client would serve twelve (12) years before parole review minus jail time credit, pursuant to the opinion of the Supreme Court of Kentucky, *Offutt v. Commonwealth*. For the Capital Offense of Murder committed after February 15, 1991 your client's parole eligibility would be calculated by taking fifty percent (50%) of the sentence imposed minus any jail time credit.

**TO CORRECTIONS:**

My client was convicted of Murder in 1989 and sentenced to fifty (50) years in prison. The Corrections Cabinet has calculated his parole eligibility date by requiring him to serve fifty percent (50%) of his sentence, or twenty-five (25) years. When will my client's parole eligibility date be recalculated pursuant to the opinion of the Supreme Court of Kentucky, *Juan Offutt v. Commonwealth.*

**TO READER:**

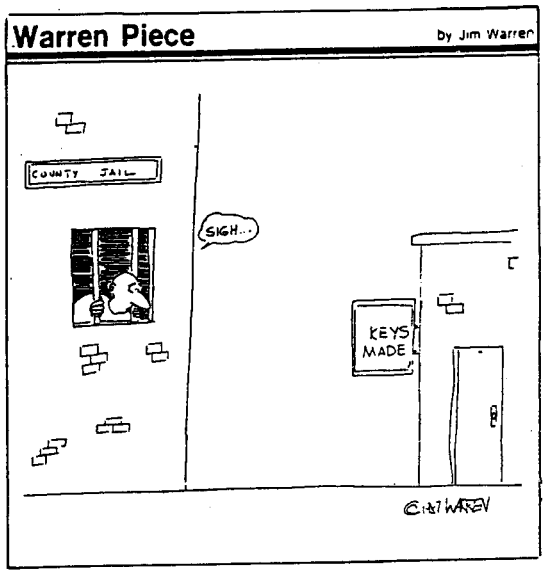
The Corrections Cabinet is in the process of re-calculating parole eligibility dates of those individuals who were convicted of Capital Offenses and sentenced to a term of years. These individuals parole eligibility dates will be re-calculated pursuant to the *Offutt* Decision by requiring twelve (12) years to serve for parole eligibility instead of fifty percent of the sentence imposed.

**TO CORRECTIONS:**

In order to prepare for an upcoming court date it is necessary that I have a certified copy of some documents which are in my client's institutional file. What do I need to do?

**TO READER:**

You may request certified copies of documents in an inmates' file from the Offender Records Office. In order to meet the many requests that the Offender Records Office receives concerning certified copies of documents from Commonwealth Attorneys, defense attorneys and other criminal justice agencies in a timely fashion, please indicate the date of the hearing, the name of the client and client's institutional number, if known.

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# BOOK REVIEW

*The Geometry of Violence and Democracy*
by Harold E. Pepinsky
Indiana University Press
Bloomington, Indiana
1991
$24.95


## THE VIOLENCE OF CRIME AND PUNISHMENT

Harold Pepinsky's book, *The Geometry of Violence and Democracy*, describes how Pepinsky, a criminologist, came to see crime and punishment as synonymous forms of violence which rise and fall together as systems of power are concentrated and dissipated. According to Pepinsky, the distinctions between crime and punishment are a figment of political partisanship -- a matter of who defines the situation. Pepinsky believes that it is morally and epistemologically unacceptable for a criminologist to accept these distinctions.

## VIOLENCE IS UNRESPONSIVENESS

Pepinsky believes that responsiveness is the antithesis of violence. Thus, violence is unresponsiveness. Violence arises when people or institutions are unresponsive to the needs of those affected by a particular action. Pepinsky asserts that the punishment our society metes out for criminal behavior is unresponsive both to the pain of the victim and to the criminal behavior of the accused. Therefore, the punishment itself becomes yet another form of violence.

Pepinsky's book, published this year, contains six chapters in addition to an introduction and conclusion. It is an incredibly dense literary work. He applies his theory of violence as unresponsiveness to nations in unrest, to a criminal defendant's sense of justice, to the need for citizen involvement in policing our communities and to parents' relationships with their children.

## RESPONSIVENESS DISARMS VIOLENCE

Pepinsky defines responsiveness as doing things with people rather than to or for people. If we want to dissipate or disarm violence, we must do so by being responsive.

Pepinsky recognizes that he does not always live by this credo. He writes of acting in violent defense of himself and his friends by marching relentlessly through courts or grievance committees to force others to relinquish power. In support of these exceptions to his general belief that violence must be met with responsiveness, Pepinsky turns to Mahatma Gandhi. Gandhi, Pepinsky asserts, recognized the principle that violent resistance is sometimes less evil than letting greater violence go unabated. Pepinsky accepts the principle that violent defense is justified where one succeeds in minimizing the force necessary to make peace.

## PASS IT ON

Why does violence beget violence and why is crime only a form of violence given definition as "crime" by those in power? Pepinsky anecdotally recalls the childhood game of "pass it on." In this game one child punches the child next to him and says "pass it on."

Law-and-order politics plays the same game. Rather than respond to disorder by trying to restructure situations to help everyone be more responsive and compassionate, those with some measure of power, tend to descend into violence by passing disorder onto persons weaker than themselves and less able to "pass it back." The result is relatively powerless, poor, angry, young men who "pass it on" to their even less powerful wives and young children.

## RESPONSIVENESS IS DEMOCRACY

In Pepinsky's theoretical framework, responsiveness is democracy. *Violence can be relieved only by giving people the sense that they influence the events that shape their destiny even if they cannot absolutely determine those events.* By virtue of such realizations we give workers a voice in the workplace and citizens voice in a commonwealth. In like manner, victim and offender together are better qualified to decide how to respond to crimes than judges.

Therein lies the radical application of Pepinsky's theory to our work as defenders of those who stand criminally accused.

Pepinsky sees that the greatest challenge of resisting violence lies in creating democracy to take its place. In one noteworthy line he states, "Democracy begins when the warrior begins to show mercy." Pepinsky is not afraid of words like mercy. In his view, becoming democratic means investing in friendship, rather than investing in wealth and power. One is less likely to hurt someone with whom one has had a compassionate relationship. Thus, more democracy means less violence.

This book is food for so much thought. It must be reread, analyzed and applied to uncover its full value. I conclude my own inadequate discussion of his work with Pepinsky's own reflections. *"I have so little hope about punishing ourselves out of crime. I am so cynical about the motives of politicians who declare war on crimes...I came to criminology believing that crime was a behavior, and trying to find it and define it. I now understand that crime is at root a relationship among human spirits."*

Reading Pepinsky's work may help us, as public defenders, recognize the deeper more systemic consequences of our work. *Are we creating a democratic justice system or furthering systemic violence?* Pepinsky's words encourage me to do the former, to choose responsiveness over violence.

**BECKY DiLORETO**
Assistant Public Advocate
Appellate Branch
Frankfort

# Book Review

## *Critique of The Geometry of Violence and Democracy*

**BILL CURTIS**

Pepinsky, in his book, *The Geometry of Violence and Democracy*, (Indiana University Press, Bloomington, 1991, $24.95) makes the claim that he is developing a new theory of crime and violence which might possibly supersede the Durkheimian perspective. [1] The difficulty with this claim is determining what is meant by the term Durkheimian perspective. Readers will not discover the answer this mystery in Pepinsky's latest book. Pepinsky's book is somewhat confusing because it contains some internal inconsistencies, his theory is not new, and his ideas are remarkably similar to those of Durkheim.

Emile Durkheim (1858-1917) was a French sociologist and philosopher. Nearly all of his works, considered to be classics in social theory, were written in French and later translated into English. Volumes have been written by numerous authors attempting to make sense out of Durkheim's theoretical constructs and propositions. Taken together, Durkheims's works make up a grand theory which attempts to explain and predict social change, social organization, and social control. He is generally credited as being the father of an entire school of sociological thought called structural-functionalism.

The first inconsistency which should be noted is Pepinsky's claim that his theory constitutes a new approach to the study of crime and violence. The implication is that he is breaking new ground with his concepts of responsiveness, accountability, compassion, and democracy as the antithesis of crime and violence. Pepinsky contradicts himself when he admits in chapter three that all of these concepts are basic principles of Christianity. [2] The New Testament was written nearly two thousand years ago.

Early in his book Pepinsky argues that his theory could constitute a departure from Durkheim's proposition that crime is normal. Durkheim did say that a certain amount of crime exists in every society and that a certain amount of crime is normal. But, he also said that crime is abnormal or pathological when its rate is unusually high. For Durkheim, an unusually high rate of crime is an indicator of social pathology or social disorganization. In other words, very high rates of crime constitute crime waves. (Durkheim did not use the term crime wave, instead he talked about upsetting the equilibrium of society.) [3] Near the end of chapter two Pepinsky agrees with Durkheim in concluding that "crime is normal because all of us commit so much of it." [4]

On the phenomena of crime waves and their causes the two theorists are basically in agreement. As mentioned above, a crime wave occurs when the rate of crime or specific type of crime reaches alarming levels. Pepinsky suggests that crime waves result from a combination of factors, such as wars, population explosions, birth cohorts moving into adult status, and change in type of leadership.

For Durkheim crime waves were related to his idea that communities are circled with several kinds of boundaries or barriers which make them resistent to change. Communities occupy a certain geographical space or territory. Communities are able to accommodate a certain level of population density. Each community has its own commonly accepted rules, values, beliefs, sentiments and laws. In other words, Durkhiem argued that members of a community occupy a certain cultural and social space. Crime waves result when a community's boundaries experience expansion. This is usually a crisis situation for a community.

For example, a nation's territorial boundaries could expand as a result of war. The population boundaries would expand as a result of a significant net

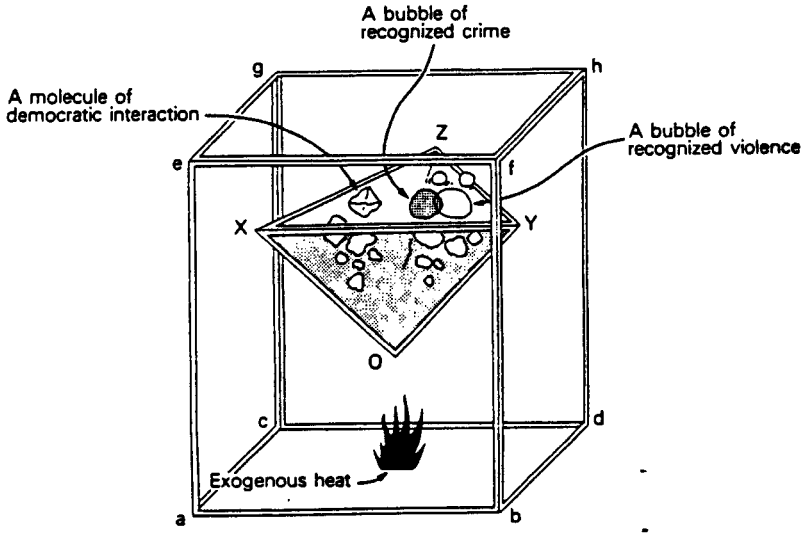


**Diagram 4: The Schlegel Vat of Violence**

OXYZ = the Schlegel vat of violence = any social system
X = intensity of violence
Y = prevalence of violence
Z = duration of violence
O = bottom of glass structure
abcdefgh = social interaction exogenous to the social system plus formal social control initiatives on the social system

population increase. Durkheim also discussed the problems caused by birth cohorts maturing to adulthood and its members moving in to take over positions of institutional authority. Boundary expansion means that different populations will mingle. Beliefs, values, sentiments, and laws will no longer be commonly agreed upon. Cultures will be in conflict and crime waves will result.[5]

Pepinsky and Durkheim are in agreement on the issue of white collar crime. Pepinsky points out that persons of status and wealth who commit crimes are far more dangerous than one who commits murder. For example, the dumping of toxic waste near subdivisions, selling TOW missiles to Iran and Iraq, and illegal shipment of military weapons to rebels in Nicaragua are far more serious offenses than those committed by the ordinary murderer who is usually without private means to defend himself/herself in court. In an era when few people recognized the fact, Durkheim wrote about the disastrous consequences of white collar crime. He argued that economic crises often brought about by economic fraud, such as bankruptcy or a stock market crash have far more serious consequences for society than does a single act of murder.[6] A present day example would be the nationwide Savings and Loan scandal.

Pepinsky's and Durkheim's views on punishment are not seriously divergent. They both argue that the criminal justice system has one type of justice (lenient) for people of status and wealth and another type for people of low status and without means (harsh and repressive). Nothing in Durkheim indicates that he was in favor of penal sanctions or systematic repression as the proper response to crime. He consistently maintained that only institutional change could attack the causes of social pathology.

Both theorists stress the fact that punishment meted out to members of the under class is usually not in proportion to the nature of the offense committed.[7] Pepinsky makes this point clear in his discussion of *State of Indiana v. William T. Breeden*, CR 87-75, Daviess Co., 1986-87. This case involved a man who stole a street sign honoring the President's deposed National Security Advisor, John Poindexter. Because he felt that naming a street after Mr. Poindexter was inappropriate, Mr. Breeden removed the sign. For theft of the sign, Mr. Breeden was charged with a felony, convicted, and sentenced to twelve months in jail with all but eight days suspended, eighty hours of community service, and one year probation. John Poindexter did not serve a single day in jail for his involvement in the Iran Contra scandal.

Another parallel between the work of Pepinsky and Durkheim concerns Pepinsky's concept that unresponsiveness leads to violence and the antithesis of violence is responsiveness. Durkheim expressed the idea of unresponsiveness leading to violence in his book, *Moral Education*.[8] In a discussion on colonialism, Durkheim pointed out that powerful, authoritarian governments of European nations frequently subjugated and dominated their defenseless, "primitive" colonies. Violence very often erupted between the powerful European nations and their colonies, a perfect example being the American Revolution. On the issue of responsiveness in *The Rules*,[9] Durkheim argued that as respect for individual dignity increases, crime and violence decreases.

In chapter five, Pepinsky presents his model of tetrahedronal interaction. See diagram 4. The diagram is an inverted tetrahedron floating in a vat of viscous fluid. The tetrahedron consists of two helixes touching end to end. The double helix is the basic molecule of life, the DNA molecule. For a discussion of how this model explains the incidence of crime and violence, readers are urged to read the book. Suffice it to say here that Pepinsky's tetrahedronal model is an analogy based on chemistry and physics.

Although somewhat ambiguous, Durkheim used similar kinds of analogies nearly one hundred years ago to explain some of his theories. In *Suicide*, he wrote about physio-chemical forces which could be measured like electric currents. He suggested that within each person there is a collective force with a certain amount of energy which leads to self-destruction.[10] In *The Rules*, Durkheim noted that the collective conscience must have only a moderate amount of energy in order to be flexible and open to social change.[11]

Without noting further similarities, it can be concluded that Pepinsky's theory of crime and violence is not new, nor is it radically different from the Durkheimian perspective. Careful reading of Durkheim will reveal that his theoretical framework covered a wide range of ideas on crime and violence. The value of Pepinsky's work is that he presents his theory in a far more explicit and cogent fashion than does Durkheim. The difficulty with Durkheims's work is that his concepts and propositions are highly abstract, somewhat implicit, and difficult to understand.

I highly recommend reading Pepinsky's book. It will definitely cause readers to reevaluate their own views on the causes of crime and violence.

**BILL CURTIS**
Chief ResearchAnalyst and Statistician
Administrative Division
Frankfort

## FOOTNOTES

[1] Harold E. Pepinsky. *The Geometry of Violence in Democracy*. Indiana University Press: Bloomington, Indiana, 1991, p.11.

[2] *Ibid.* p.32.

[3] Emile Durkheim. *The Rules of the Sociological Method*. The Free Press: New York, 1982, p.98. Translated by Steven Lukes. Originally published in 1895. For an excellent piece of historical research grounded in Durkheim's theoretical framework see, Kai T. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance*. John Wiley and Sons, Inc.: New York, 1966.

[4] Pepinsky, p.32.

[5] Emile Durkheim. *The Division of Labor in Society*. The Free Press: New York, 1984. p. 229-244. Translated by W.D. Hall. Originally published in 1893. Also see Erikson for a discussion of the crime waves in Massachusetts in the 17th century.

[6] *Ibid.* p.33.

[7] See Karl Menninger. *The Crime of Punishment*. The Viking Press: New York, 1968.

[8] Emile Durkheim. *Moral Education*. Trans. Everett K. Wilson and Herman Schnurer. New York: Free Press of Glencoe, 1961, p. 161. Originally published in 1925.

[9] Emile Durkheim. *The Rules of the Sociological Method*, p.100. For another interesting discussion of responsiveness, compassion, accountability, and democracy as the antithesis of crime and violence. See, George H. Mead. "The Psychology of Punitive Justice." *The American Journal of Sociology*, Vol. 23 (1917-1918), pp.577-602. Mead was an American social philosopher and social psychologist and a contemporary of Durkheim.

[10] Emile Durkheim. *Suicide*. Translated by John A. Spaulding and George Simpson. Glencoe, Ill.: Free Press, 1951, pp.229, 309-10. Originally published in 1897.

[11] Durkheim. *The Rules of the Sociological Method*. p. 101.

# JULY 1991

| SUN | MON | TUE | WED | THUR | FRI | SAT |
|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4<br>Independence Day | 5 | 6 |
| 7 | 8 | 9 | 10 | 11 | 12<br>KACDL DUI Seminar Louis& Frankfort | 13<br>1787:Northwest Ordinance<br>KACDL DUI Seminar Lex |
| 14 | 15<br>KACDL DUI Covington | 16 | 17 | 18 | 19 | 20 |
| 21 | 22 | 23 | 24 | 25 | 26<br>NY ratifies Constitution | 27 |
| 28 | 29 | 30 | 31 | | | |

July 14-27 National Defense College Trial Practice Institute, Macon, GA

# AUGUST 1991

| SUN | MON | TUE | WED | THUR | FRI | SAT |
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| 18 | 19 | 20 | 21 | 22 | 23 | 24 |
| 25 | 26 | 27 | 28 | 29 | 30 | 31 |

# FUTURE SEMINARS

**1991**

**KACDL DUI SEMINARS**
Louisville, Lexington, Frankfort, Covington
July 12, 13,&15 and other times and places in July
Contact:: Linda DeBord at (502) 244-3770

**AOC DISTRICT JUDGE'S JUDICIAL COLLEGE**
September 22-26, 1991
Lake Cumberland

**DPA DEATH PENALTY TRIAL PRACTICE INSTITUTE**
November 3-8, 1991
KY Leadership Center
Faubush, KY
Contact: Ed Monahan at (502) 564-8006

**NLADA ANNUAL CONFERENCE**
October 28-November2, 1991
Portland Oregon
Contact: Bill Bitely at (202) 452-0620

**KACDL ANNUAL CONFERENCE**
Covington
December 6-7, 19911
Contact: Linda DeBord at (502) 244-3770

**1992**

**AOC CIRCUIT JUDGE JUDICIAL COLLEGE**
January 12-16, 1992
Lexington

**DPA ANNUAL CONFERENCE**
May 31-June 2, 1992
Lake Cumberland State Park

**KBA ANNUAL CONVENTION**
June 3-6,1992
Lexington

**DPA TRIAL PRACTICE INSTITUTE**
October 11-16,1992
Kentucky Leadership Center
Faubush,KY

**STAFF ATTORNEY NEEDED AT INDIANA PUBLIC DEFENDER COUNCIL**

STAFF ATTORNEY sought by State support center for lawyers representing indigents in criminal cases. Attorney would write manuals, and provide occasional research consultation and technical assistance to trial lawyers. Knowledge of criminal and constitutional law required, as are strong research and writing skills. Applicants should have commitment to protection of individual rights and criminal defense. Criminal trial experience and experience with personal computers are a plus. Position is newly created. Starting salary is $30,000. Send resume and writing sample by June 21, 1991 to:

Larry A. Landis, Executive Director
ATTN: Staff Attorney Position
Indiana Public Defender Council
309 W. Washington St. Suite 401
Indianapolis, IN 46204-2725

**DEPARTMENT OF PUBLIC ADVOCACY**
Perimeter Park West
1264 Louisville Road
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