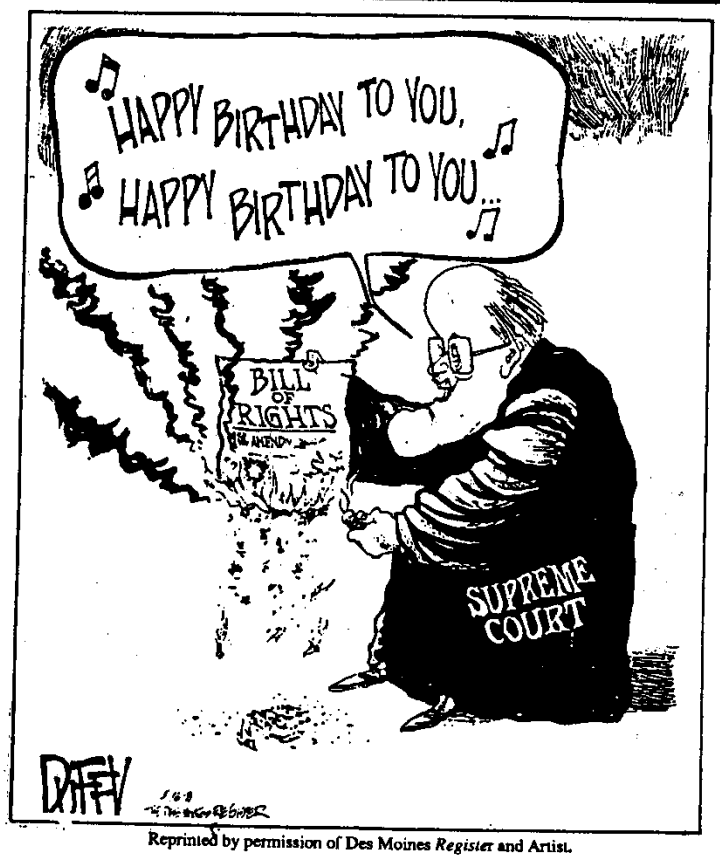
June, 1992 Volume 14, Number 4

THE ADVOCATE

The Kentucky Department of Public Advocacy's Journal of Criminal Justice Education and Research



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20th Anniversary

Department of Public Advocacy

1972-1992

Our Specialty is Criminal Defense Litigation

The Kentucky Department of Public Advocacy (DPA) is a state-wide public defender program that was established at the recommendation of Governor Wendell Ford by the 1972 Kentucky General Assembly. There are over 100 full-time public defenders in 16 offices across the state covering 40 counties. Another 250 attorneys do part-time public defender work in 80 of Kentucky's 120 counties. DPA is an independent agency located within the state's Protection and Regulation Cabinet for administrative purposes. A Public Advocacy Commission oversees the Department. Yearly, DPA represents in excess of 101,000 poor citizens accused of crimes for offenses ranging from DUI to capital murder. Day in and day out our attorneys and staff bring life to the individual liberties guaranteed by our United States and Kentucky Constitutions.

The Kentucky Department of Public Advocacy is Kentucky's statewide public defender program dedicated to providing high quality legal representation for Kentucky's citizens who are poor and accused of committing a crime.

Over 101,000 Kentucky citizens are served by the Department each year in an effort to insure *advocacy rooting out injustice*.

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

Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA.

The Advocate welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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FROM THE EDITOR:

We see ourselves as standing out in all of history as a people who cherish and protect freedom more than any other people. Our individual freedoms are insured through our *Bill of Rights* of our United States *Constitution* and subsequent constitutional amendments like the 14th amendment with its due process and equal protection rights, and through the *Bill of Rights* of our Kentucky *Constitution*. December 15, 1992 is the 201st Anniversary of the United States *Bill of Rights*. September 28, 1992 is the 101st Anniversary of the Kentucky *Constitution's Bill of Rights*.

SPECIAL RECOGNITION AND A LIBERTY RESOURCE

This very special issue of our magazine celebrates these defining values, reminds us of the historical reasons for the development of these precise individual protections, and brings together rich resources and thinking for current and future use by Kentucky's criminal justice system and by Kentucky's leaders and teachers. We know of no current Kentucky resource of this magnitude which brings together so much information on our liberties. In addition to our regular criminal justice readers, this issue of our magazine goes to every Kentucky school, over 1,000. Hopefully, it will be used for many years as a ready resource for our education system. Together, we need to work to remind ourselves and to remind the future beneficiaries and implementers of the origin and importance the guarantees of our fundamental freedoms.

WHEN IS LIBERTY MOST AT STAKE?

The *raw power of government vs. a person's liberty* takes on its most dramatic battle when the state, through a prosecutor, seeks to imprison or kill a fellow citizen for conduct claimed to be criminal. The extent to which that criminal process is fair is the extent to which we really value liberty in our society.

WHO *IMPLEMENTS* OUR RIGHTS?

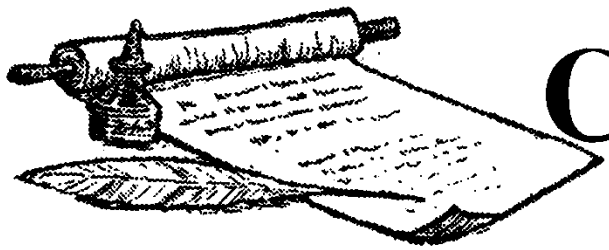
Rights on paper are meaningless. They must be put into effect by someone. A criminal defense attorney or a public defender stands representing a citizen-accused against the state's desire to seize the liberty or life of one of its own. Defenders are the persons who *implement* the *Bill of Rights*, perhaps more than any other person in our society, when they stand up and defend an individual against the power of government. Let's recognize this, appreciate it, and remind others of how much we appreciate those who are willing to stand up for the poor, the outcast, the marginalized, and even the guilty and defenseless. The degree to which the state can take liberty from one of the least of us is the degree to which *our* real liberty is at risk. As Martin Luther King has reminded us in his *Letter from the Birmingham Jail*, "Injustice anywhere is a threat to justice everywhere." Sometime this year pat a *Bill of Rights* patriot on the back and thank them for fostering our freedoms. The liberty we enjoy is a product of their efforts.

PRODUCED THROUGH MUCH GENEROSITY

This issue is published through the enormous generosity of two donors: 1) an individual who prefers to remain anonymous, and who was attracted to donating $7,500 because of the special nature of this issue and its distribution to Kentucky's schools; and 2) The Kentucky Bar Foundation which has given DPA a $2,800 grant. The Kentucky Bar Foundation is committed to improving the administration of Justice, educating the public about the legal system and enhancing the image of the profession. Its officers are: Carroll M. Redford, Jr., President; Robert W. Kellerman, President-Elect; William J. Kathman, Jr., Vice President; Thomas E. Turner, Secretary/Treasurer; Carol M. Palmore, Immediate Past President. The opinions expressed are those of the authors, and do not necessarily represent the views of The Bar Foundation or our anonymous donor. We are indebted to our donors for their immense generosity which will result in the education of many Kentuckians for the next generation on the essential nature of our liberty.

ED MONAHAN

FEATURES



CHAPTER 1

PREAMBLE

We, the people of the Commonwealth of Kentucky, grateful to the Almighty God for civil, political, and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution.

Kentucky Constitution, 1891

Kentucky Bill of Rights

September 28, 1891 as amended

Section 1: Inherent and inalienable rights

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties.

Second: The right of worshipping Almighty God according to the dictates of their consciences.

Third: The right of seeking and pursuing their safety and happiness.

Fourth: The right of freely communicating their thoughts and opinions.

Fifth: The right of acquiring and protecting property.

Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.

Seventh: The right to bear arms in defense of themselves and of the state, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

Section 2: Absolute power does not exist in a republic

Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

Section 3: Equality; exclusive privileges; amendment of charters

All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.

Section 4: Power inherent in the people; right to alter, reform or abolish government

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property. For the advancement of these ends, they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper.

Section 5: Freedom of conscience; church and state; education

No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

Section 6: Elections free and equal

All elections shall be free and equal.

Section 7: Trial by jury inviolate

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.

Section 8: Liberty of speech; freedom of the press

Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.

Section 9: Libel; truth justification; jury judges of law and facts

In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Section 10: Security from search and seizure; conditions of issuance of warrant

The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; 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.

Section 11: Rights of accused in criminal cases; change of venue

In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.

Section 12: Charge of crime; how preferred

No person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, or by leave of court for oppression or misdemeanor in office.

Section 13: Double jeopardy; property not to be taken for public use without compensation

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.

Section 14: Courts to be open and speedy trial guaranteed

All courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Section 15: Power to suspend laws

No power to suspend laws shall be exercised, unless by the General Assembly or its authority.

Section 16: Bail allowed; *habeas corpus*; suspension

All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.

Section 17: Excessive bail, fine or cruel punishment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted.

Section 18: Imprisonment for debt

The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law.

Section 19: *Ex post facto* law or law impairing contract forbidden; rules of construction for mineral deeds relating to coal extraction

(1) No *ex post facto* law, nor any law impairing the obligation of contracts, shall be enacted.

(2) In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to stipulate in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate for the purposes of coal extraction by only the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.

Section 20: Attainder; effect of

No person shall be attainted of treason or felony by the General Assembly, and no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the Commonwealth.

Section 21: Descent in case of suicide or casualty

The estates of such persons as shall destroy their own lives shall descend or vest as in cases of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.

Section 22: Standing army; civil power; quartering of soldiers

No standing army shall, in time of peace, be maintained without the consent of the General Assembly; and the military shall, in all cases and at all times, be in strict subordination to the civil power; nor shall any soldier, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, except in a manner prescribed by law.

Section 23: Title of nobility, or office for term of years

The General Assembly shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment of which shall be for a longer time than a term of years.

Section 24: Emigration free

Emigration from the state shall not be prohibited.

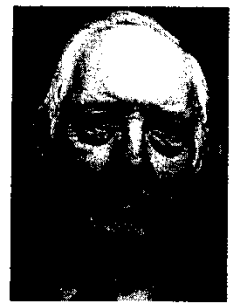
Section 25: Slavery and involuntary servitude forbidden

Slavery and involuntary servitude in this state are forbidden, except as a punishment for crime, whereof the party shall have been duly convicted.

Section 26: Bill of Rights to remain inviolate

To guard against transgression of the high powers which we have delegated, We declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.

GEORGE NICHOLAS: FATHER OF THE KENTUCKY CONSTITUTION



Thomas D. Clark

George Nicholas (1753-1799) was born into a prominent tidewater Virginia family in Williamsburg. Early in life young Nicholas demonstrated a brilliance of mind which was to characterize his too brief life. Though a resident of Kentucky for only a decade, he was to have a profound influence on the formation of the Commonwealth and the setting of legal precedents in its formative years. At age thirty-five George Nicholas emigrated to Kentucky in 1788. He came west after having had a seasoning experience in the furious Virginia debate over ratification of the United States *Constitution*. Too he had been a representative in the Virginia General Assembly from Hanover County, and later from Albemarle County.

Nicholas leaned more to the Madisonian philosophy of constitutional government. As a matter of fact he had incurred some Jeffersonian enmity in pushing an investigation of Thomas Jefferson's gubernatorial administration. As a legislator Nicholas was actively involved in debating several cardinal issues which came before the General Assembly. Among them public debt, established religion, and the matter of land policies.

As an active politician in Virginia Nicholas was thrown into association with James Madison, Thomas Jefferson, George Washington, and many of the other prominent men of the times. No doubt the most important political experience George Nicholas had was his involvement in the stirring debates over the ratification of the Federal *Constitution*. He was a strong proponent of ratification, a fact which threw him into opposition to Patrick Henry and the delegation from the Kentucky District.

As a participant in the constitutional debates Nicholas became thoroughly grounded in both the process of constitutional drafting, and in gaging the cross-currents of opinion on the subject. The Virginia debate had drawn into context the varying views on the nature and acceptability of the United States *Constitution*. Beyond this he was given an insight into the role of the state in the Union of States.

George Nicholas expressed strong views on representative government, the rights of the states, and the general provisions of extended rights. In the fundamental debates he confronted Patrick Henry in a defense of the work of the framers of the *Constitution*. He also confronted the delegation from the Kentucky District which voted unanimously against ratification. At the moment the Kentuckians were highly agitated over three major issues, separation from Virginia, dealing with the Indian policy, and opening the Mississippi River to free access to all western boatmen. The latter topic had almost obscured the separation question in the Danville convention of 1787.

Thus when George Nicholas arrived in Kentucky in 1788, he brought with him a mature knowledge of constitutional drafting, and of many of the issues confronting the Kentuckians in their move for independent statehood. In 1789 the Virginia General Assembly had for the third time enacted enabling legislation prescribing the terms by which Kentucky might separate itself from the mother state.

In 1792 George Nicholas may have had one of the best legal-constitutional mind in the Kentucky District. He certainly had had the most experience in the field. Besides his experience in debating constitutional issues he demonstrated in Danville the capacity to draw together and form a consensus of the delegation in the Tenth Separation Convention.

Unanimously both contemporary delegates and later historians have called George Nicholas the "Father of the First Kentucky *Constitution*." In the convention of April 1792, and after the admission of Kentucky into the Union had been sanctioned by Congress, George Nicholas became the key delegate in the drafting of the constitution. He was a member of the nine member Committee onPrivileges delegated to produce a constitution. He sought to end slavery in Kentucky by constitutional fiat, defended the sanctity of land titles when properly registered, equality of the individual under the application of the laws, a strong executive power, universal manhood suffrage, and the direct election of the governor. The latter fact was eloquently documented in the strong statements of executive power made in Article III.

Though George Nicholas was well informed and profoundly influenced by the United States *Constitution* he had at hand other constitutional sources, including the Massachusetts *Constitution* and the second one of Pennsylvania. In a final analysis the first *Constitution* of Kentucky reflected all three of these sources, plus the *Constitution* of Virginia, and the writings in the *Federalist*. Nicholas was able to prevail upon the Committee on Privilege to accept much of his political philosophy.

When the Government of the Commonwealth of Kentucky was organized on June 4, 1792, George Nicholas became the state's first Attorney General, and in a sense the main actor in the application of the constitutional principals to the administration of the new government. Beyond this he became a key defender of Kentucky in the long simmering dispute with Spain over the free access to the Mississippi River and the New Orleans interchange produce market. In the conflict with the Federal Government over the excise tax on whiskey, Nicholas favored the tax, but opposed President Washington's use of the militia to enforce its collection. He raised a strong republican voice in the west in opposition to the despised federalist Alien and Sedition laws, contributing to the composition and adoption of the famous Kentucky Resolutions.

On November 10,1798, George Nicholas wrote "A Friend" an extended letter in which he set forth his views on the Alien and Sedition Laws along with much of his political philosophy in general. Aside from his influence on the framing of the

first Kentucky *Constitution* and his opposition to the oppressive Spanish issues and the obnoxious federal laws, George Nicholas was to exert a strong and lasting influence in the field of teaching the law. As the first professor of law in Transylvania Seminary, he taught William T. Berry, Martin D. Hardin, Joseph Hamilton Daviess, Robert Wickliffe and other bright stars of the Kentucky Bar. Nicholas' life in Kentucky spanned only a decade. He died in Lexington at the age of fifty-five years, in 1799, the year his *Constitution* underwent a review and a revision. Following the Kentucky custom of naming its emerging counties for its military heroes and politicians, George Nicholas' memory was commemorated in the naming of Nicholas County which was formed the year of his death, and the last one organized in the eighteenth century.

THOMAS D. CLARK
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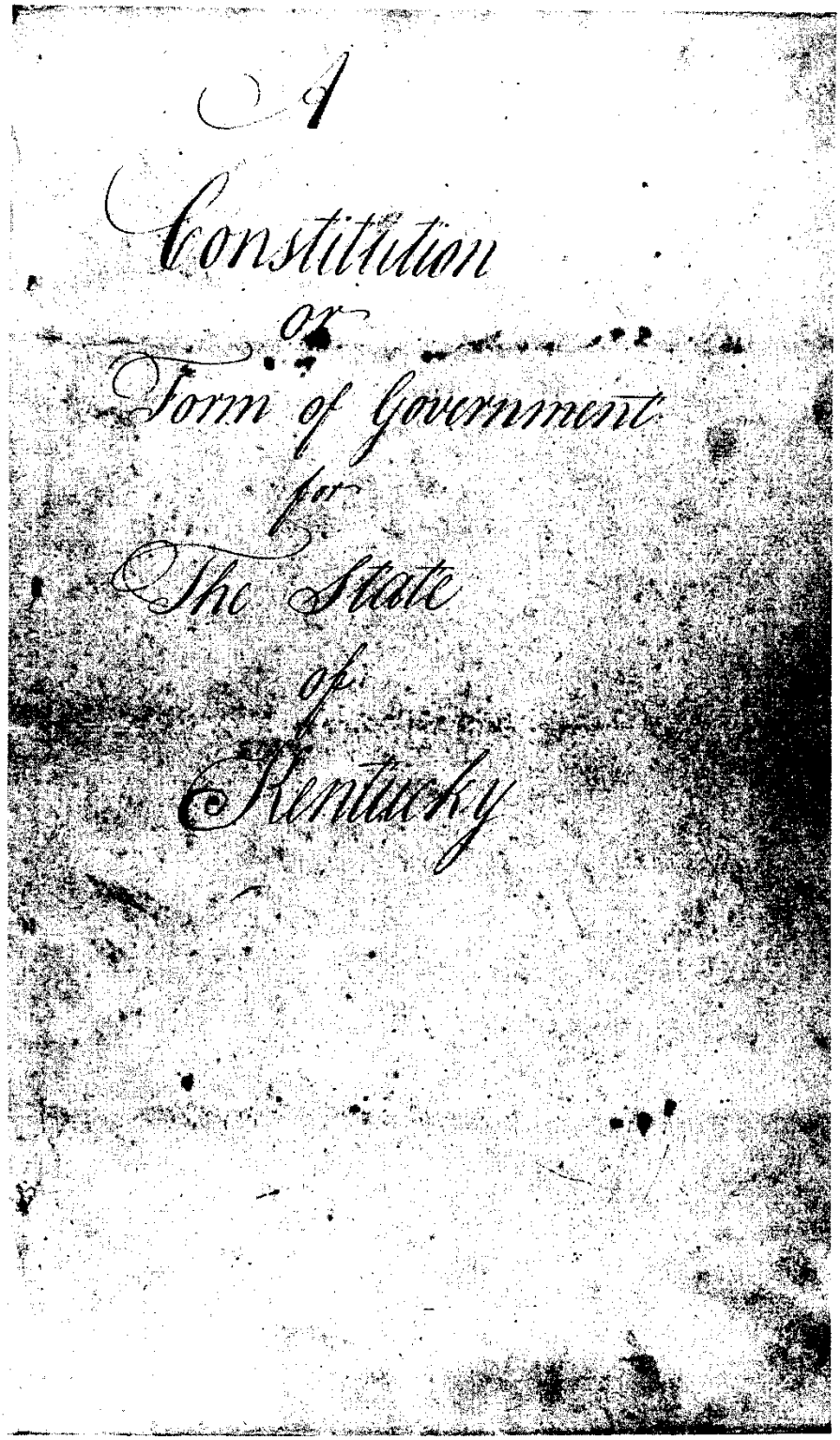
Dr. Clark is a Kentucky landmark; the Dean of Kentucky historians. What Kentuckians know of their past is a gift of Dr. Clark. No scholar has contributed more to the progress of Kentucky. He has authored scores of books and edited more than a dozen more. A Mississippi native, Dr. Clark taught at U.K.'s History Dept. retiring in 1965 as its Chair. Dr. Clark has strong opinions about Kentucky's Constitution and what the future requires of it. He recently spoke at DPA's 1991 Annual Conference on the Kentucky Bill of Rights, and his remarks there appear in this issue.

We owe Dr. Clarks a great deal for his assistance to us in the understanding the history of Kentucky's Bill of Rights.


A
Constitution
or
Form of Government
for
The State
of
Kentucky

Title Page of Kentucky's 1792 *Constitution.*
Original at Kentucky's Historical Society, Frankfort.

1792 Kentucky Bill of Rights
ARTICLE XII.

Done in Convention at Danville, the nineteenth day of April, 1792, and of the independence of the United States of America the 16th.

That the general, great and essential principles of liberty and free government may be recognized and established, WE DECLARE-

1. That all men when they form a social compact, are equal, and that no man or set of men are entitled to exclusive separate public services.

2. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness. For the advancement of these ends, they have at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper.

3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies or modes of worship.

4. That the civil rights, privileges, or capacities of any citizen shall in nowise be diminished or enlarged on account of his religion.

5. That all elections shall be free and equal.

6. That trial by jury shall be as heretofore, and the right thereof remain inviolate.

7. That printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature or any branch of Government; and no law shall ever be made to restrain the right thereof; the free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

8. In prosecutions for the publication of papers, investigating the official conduct of officers or men in public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have a right to determine the law and the facts under the direction of the court as in other cases.

9. That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizures and searches; and that no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation.

10. That in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; that he can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land.

11. That no person shall, for any indictable offense, be proceeded against criminally by information; except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office.

12. 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.

13. That all courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law; and right and justice administered, without sale, denial, or delay.

14. That no power of suspending laws shall be exercised, unless by the Legislature or its authority.

15. That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

16. That all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.

17. That the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law.

18. That no ex post facto law, nor any law impairing contracts, shall be made.

19. That no person shall be attained of treason or felony by the Legislature.

20. That no attainder shall work corruption of blood, nor except during the life of the offender, forfeiture of estate to the Commonwealth.

21. The estates of such person as shall destroy their own lives, shall descend or vest as in case of natural death, and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.

22. That the citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes by petition, address, or remonstrance.

23. The rights of the citizens to bear arms in defense of themselves and the State shall not be questioned.

24. That no standing army shall, in time of peace, be kept up without the consent of the Legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power.

25. That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

26. That the Legislature shall not grant any title of nobility of hereditary distinction, nor create any office the appointment of which shall be for a longer time than during good behavior.

27. That emigration from the State shall not be prohibited.

28. To guard against transgressions of the high powers which we have delegated, WE DECLARE, that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this *Constitution*, shall be void.

1799 Kentucky Bill of Rights ARTICLE X.

Done in Convention at Frankfort, the seventeenth day of August, 1799, and of the independence of the United States of America the 24th.

That the general, great, and essential principles of liberty and free government may be recognized and established: WE DECLARE-

1. That all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services.

2. That all power is inherent of the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness. For the advancement of these ends, they have at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper.

3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority ought, in any case whatever, to control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies or modes of worship.

4. That the civil rights, privileges, or capacities of any citizen shall in nowise be diminished or enlarged on account of his religion.

5. That all elections shall be free and equal.

6. That the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate.

7. That printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature or any branch of Government; and no law shall ever be made to restrain the right thereof; the free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

8. In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.

9. That the people shall be secure in their persons, houses, papers and possessions from unreasonable seizures and searches; and that no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation.

10. That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; that he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land.

11. That no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger, by leave of the court, for oppression or misdemeanor in office.

12. 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.

13. That all courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law; and right and justice administered, without sale, denial or delay.

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17. That the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law.

18. That no ex post facto law, nor any law impairing contracts, shall be made.

19. That no person shall be attainted of treason or felony by the Legislature.

20. That no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the Commonwealth.

21. That the estates of such persons as shall destroy their own lives, shall descend or vest as in case of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.

22. That the citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government for redress or grievances or other proper purposes by petition, address, or remonstrance.

23. That the rights of the citizens to bear arms in defense of themselves and the State shall not be questioned.

24. That no standing army shall, in time of peace, be kept up without the consent of the Legislature; and the military shall, in all cases, and at all times, be in strict subordination to the civil power.

25. That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

26. That the Legislature shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment to which shall be for a longer term than during good behavior.

27. That emigration from the State shall not be prohibited.

28. To guard against transgressions of the high powers which we have delegated, WE DECLARE, that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this *Constitution*, shall be void.

1850 Kentucky Bill of Rights
ARTICLE XIII.

be recognized and established, WE DECLARE-

1. That all freemen, when they form a social compact, are equal, and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services.

2. That absolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a Republic, not even in the largest majority.

3. The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever.

4. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, happiness, security, and the protection of property. For the advancement of these ends, they have, at all times, an inalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper.

5. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority ought, in any case whatever, to control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious societies or modes of worship.

6. That the civil rights, privileges, or capacities of any citizen shall in nowise be diminished or enlarged on account of his religion.

7. That all elections shall be free and equal.

8. That 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.*

9. That printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly, or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, responsible for the abuse of that liberty.

10. In prosecutions for the publication of papers investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the facts under the direction of the court, as in other cases.

11. That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizures and searches, and that no warrant to search any place or to seize any person or thing, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation.

12. That in all criminal prosecutions, the accused hath the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; that he can not be compelled to give evidence against himself; nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land.

13. That no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger, or by leave of the court, for oppression or misdemeanor in office.

14. 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.

15. That all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law, and right and justice administered, without sale, denial, or delay.

16. That no power of suspending laws shall be exercised, unless by the General Assembly, or its authority.

17. That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

18. That all prisoners shall be bailable by sufficient securities, unless for capital offenses, when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

19. That the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law.

20. That no ex post facto law, nor any law impairing contracts shall be made.

21. That no person shall be attainted of treason or felony by the General Assembly.

22. That no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the Commonwealth.

23. That the estates of such persons as shall destroy their own lives shall descend or vest as in case of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.

24. That the citizens have a right, in a peaceable manner, to assemble together for their common good, and apply to those invested with the powers of government for redress of grievances, or other purposes, by petition, address, or remonstrance.

25. That the rights of citizens to bear arms in defense of themselves and the State shall not be questioned; but the General Assembly may pass laws to prevent persons from carrying concealed arms.

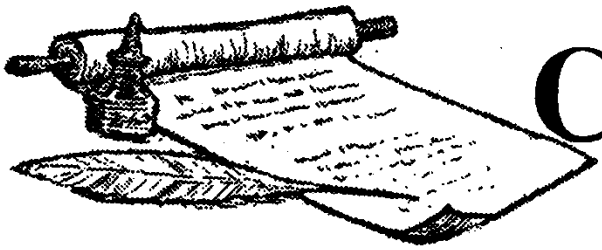
26. That no standing army shall, in time of peace, be kept up, without the consent of the General Assembly; and the military shall, in all cases and at all times, be in strict subordination to the civil power.

27. That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

28. That the General Assembly shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment to which shall be for a longer time than for a term of years.

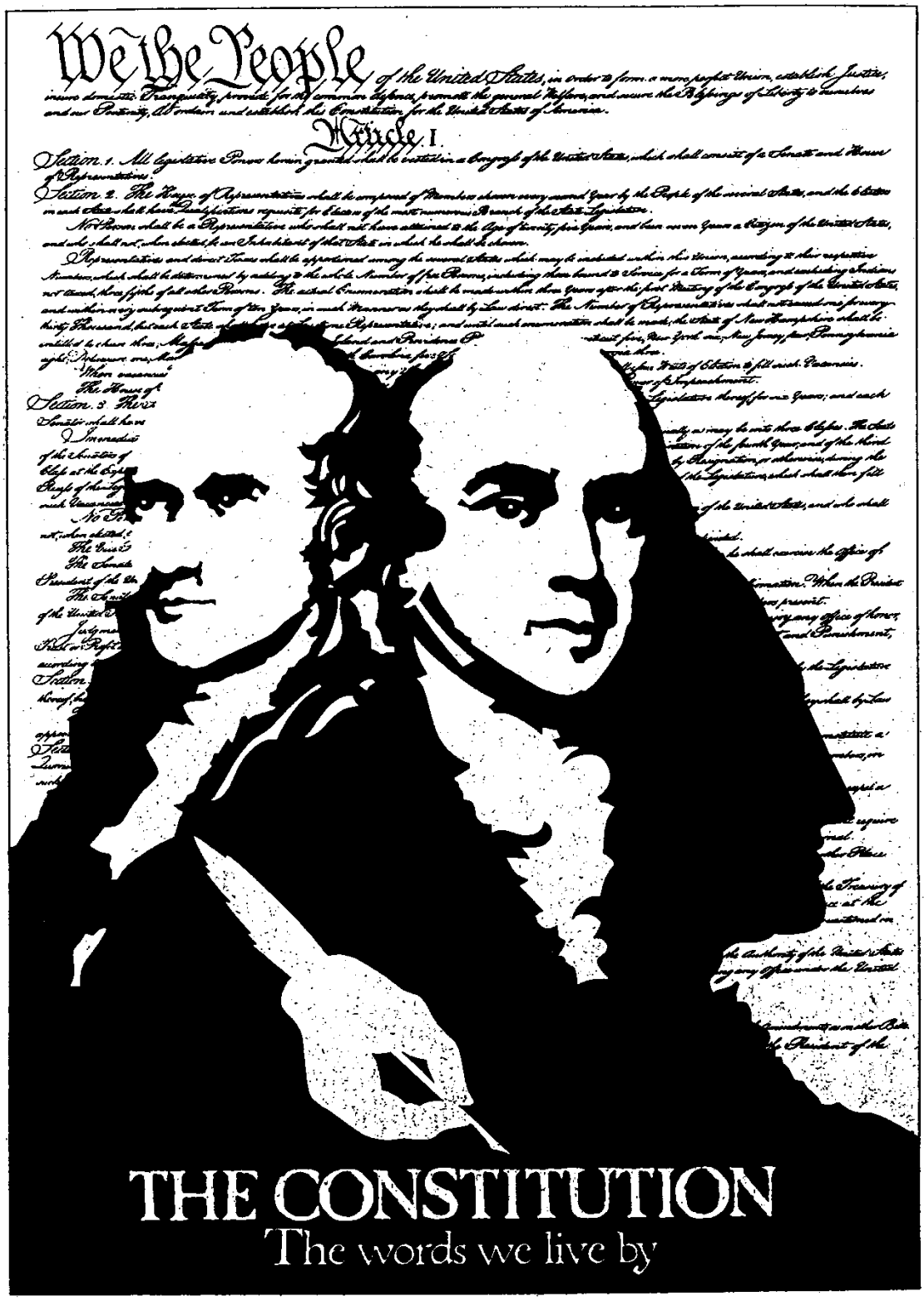
29. That emigration from the State shall not be prohibited.

30. To guard against transgressions of the high powers which we have delegated, WE DECLARE, that everything in this article is expected out of the general powers of government.

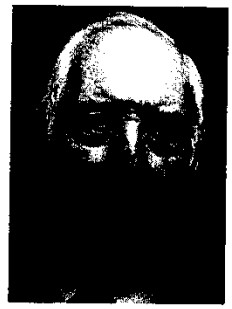


CHAPTER 2

Many Kentuckians are never aware they live under a Constitution .They never see it .They never feel it directly. The Constitution may exist as a vague conception of State government in the abstract, but it seems remote to every day life on rural mail routes and pleasant streets in little towns....Yet without this set of fundamental principles to guide our local and State governments, the whole structure would fall down in confusion....(Allen M. Trout, 1947)


We the People
of the United States, in order to form a more perfect Union, establish Justice,
Article I.
THE CONSTITUTION
The words we live by

The Kentucky *Bill of Rights*



Thomas D. Clark

The History of Kentucky's *Bill of Rights*: A living dedication to the free individual

GEORGE NICHOLAS: FATHER OF KENTUCKY'S *BILL OF RIGHTS*

The history of the inclusion of the 28 sections of the *Bill of Rights* in the first Kentucky constitution is vague. However, every source describing the process of framing that document declares unequivocally that George Nicholas was the principal author. The constitution was drafted in the brief period between April 2-18, 1792. There seems to be no documentary proof that any delegate had in hand a copy of the second Pennsylvania constitution, but evidence is clear that a copy was present.

With only the slightest variations the Kentucky *Bill of Rights* used the term, *all freemen* instead of *all men*. Also the Kentucky statement opened with a direct quotation from the 1776 "*Virginia Declaration of Rights*." Section (4) of the Kentucky listing eliminated the phrase, "neither ought the offices of magistrates, legislators, or judge, to be hereditary."

GROUNDED IN MASON AND LOCKE

Neither the Pennsylvania nor Kentucky *Bill of Rights* was original. One might make a tenuous case that the elements of freedom reiterated in all stated American bills of rights, and even in the first 9 amendments to the Federal *Constitution*, have a vague tracery to the *Magna Charta* of Britain. This, however, must be viewed as the slenderest of historical threads. More modern interpretations of the *Magna Charta* indicate that it was distinctly conservative and reactionary in tone and intent. The document contained no real essence of personal guarantees of freedom in the sense of the people achieving individual liberties.

Basic constitutional issues back of the formulation of George Mason's *The Virginia Declaration of Rights* were extensive during the first three quarters of the 18th century. This was a seminal era when both British and American political history underwent significant changes. Certainly the influence of John Locke, 17th century philosopher-essayist, had a profound impact on late 18th century American political thought. This was reflected in the rising doctrine of the equality of men, the sanctity of property, and the checks and balances thesis of government. In the Lockean sense man was born free and equal, a philosophy clearly written into the various American bills of rights.

George Mason's declaration of rights reflected the political and social tenor of the times in most of the American colonies. Beyond this it asserted in terse wording the essence of the underlying feeling of a large number of thoughtful colonial Americans that they shared with all Englishmen the emerging freedoms. Mason had ready access to his uncle John Mercer's fifteen hundred volume library. Surely in that collection were titles which revealed contemporary English political thoughts and reactions of the 18th century. At the same time he was conversant about affairs in the American colonies on the eve of independence and revolution. As indicated above, Mason's most distinctive accomplishment was that of compiling a clear statement of political freedom in the 16 sections of the *Virginia Declaration of Rights*, an outline which was to be followed in the formulation of the present-day statements of human freedoms and rights under the law.

FREEDOM FROM ARBITRARY DECISIONS

Standing, always like a ghost in the political wings of the 16th and 17th centuries, was the abhorred Star Chamber with its harsh and arbitrary delivery of judicial decisions in criminal and religious matters. This abhorrence lingered well into the 18th century in a sensitivity to charges of seditious libel as interpreted and adjudicated by a highly biased form of crown justice. Incipient was the fear that the Star Chamber might be reinstated.

The following cases will suffice to illustrate the contentions of seditious libel and the adjudication of the issues. There was that of John Tutchin and the *Observator* (1707). The editor stood accused by the government of seditious libel. He had written that the crown government had accepted bribes in gold from France in connection with a naval matter. After considerable arguments to the precise place of the writing and of its publication the jury found Tutchin guilty of publishing the article but because of a procedural blunder on the part of the Crown's Counsel he was set free.

A second case involving libel, actually the direct freedom of the press, was that of Richard Franklin and the *Craftsman* in 1731. This issue arose out of Franklin's comments on King George II's attitude toward the observance of the Treaty of Ghent, an act which Franklin claimed was unsettling to international peace. The argument in this case as to the fact of seditious libel by the Lord Chief Justice Sir Robert Raymond was to make the Franklin incident a classic one in the future. Franklin was convicted but received only modest punishment.

There was published in London during the first quarter of the 18th century a series of writings known as the "*Cato Letters*." These were written and published by John Trenchard and Thomas Gordon. They denounced the excesses of the frauds during the reign of Queen Anne, especially those growing out of the great South Seas Bubble speculations. The authors, out of fear of crown lawyers searching constantly for published statements which could be proceeded against as libelous, were cautious. Nevertheless the collected "*Cato Letters*," one of which pertained to the freedom of the press, were published in pamphlet form and received wide distribution in both England and America. On this side of the

Atlantic they added further to the growing political unrest and stirrings for freedom.

For American colonials the classic test of freedom of the press was that provoked by the German immigrant John Peter Zenger in 1735. Zenger, publisher of the *New York Weekly Journal*, was brought to trial in April of that year on the charge of criminal and seditious libel stemming from his criticism of colonial crown officials. He had accused colonial Governor William Cosby of arbitrarily removing Chief Justice Lewis Morris from office. In the celebrated trial, in which the distinguished colonial lawyer, Andrew Hamilton of Philadelphia, volunteered to defend Zenger, engaged in a contest with the Crown's Counsel in citing English authorities on the subject of seditious libel. Hamilton won a jury decision of not guilty for his client and John Peter Zenger was released from jail, and was voted freedom of the corporation by the common council.

The following year Zenger published the pamphlet entitled, *A Brief Narrative of the Case and Tryal of John Peter Zenger*. Irving Brant wrote of this publication in his book *Bill of Rights*, that the "Great Noise in the world" was not due to the New York jury's revolt against British judicial rulings but rather because of its dramatic effects. The *Zenger* case has had a life of its own in the history of American journalism. There, however, in 1735 was already an advancing movement to permit free men to express their thoughts, whatever they were, and without restraint or fear of charges of seditious libel. These cases were seminal ones in the struggle to gain complete freedom, and to the writing into American Bills of Rights freedom of speech and press sections.

The evidence of just what the delegates to the 10th Kentucky Convention meeting in Danville in April 1792 had in hand is scanty at best. The sources of the Kentucky *Bill of Rights*, however, are not difficult to trace. Clearly delegates had at hand *The Virginia Declaration of Rights* and that state's constitution and must have had that of Massachusetts, and certainly the secorid constitution of Pennsylvania. There can be no doubt that the leading delegate George Nicholas was familiar with all of these documents plus the addition, in 1791, of the first ten amendments to the 1787 United States *Constitution*.

GRANITE SANCTITY OF KENTUCKY'S *BILL OF RIGHTS*

Historically the Kentucky *Bill of Rights* has survived almost wholly intact in four constitutional conventions. No substantive subtractions or additions have been made to it during two centuries. In reading the available debates and discussions one gathers the impression, that the few exceptions, any changes made in the *Bill of Rights* have been almost purely stylistic ones, or, maybe, simply careless copying by public printers. Whatever the differences may be in the four versions, none has altered the long and arduous tradition behind their formulation. Though not engraved in stone, the Kentucky *Bill of Rights* over two centuries has taken on a sanctity which has given a heart and soul foundation to the entire democratic process in the Commonwealth, even though a vast percentage of the population is ignorant of its actual provisions. Its history through four constitutional conventions, during times of war and peace, and the enactment of volumes of laws and the handing down of endless court decisions, the *Bill of Rights* has retained a granitic durability.

The half century, 1800-1850, was an era of considerable political and social stress. Because of the embittered slavery controversy there were threats to freedoms, especially that of the press. The *Bill of Rights* received extensive discussion in the constitutional convention of 1849. John W. Stephenson of Kenton County was chairman of the committee on general provisions. He reported on November 3rd that the committee recommended no changes in the statement of rights.

SECTION 2: PROPOSAL

Three days later Archibald Dixon, of Henderson County, offered an amendment to section (3) to read: *"That all power is inherent in the people, and all free governments are founded on their authority and consent, and instituted for their peace, safety, and happiness, and the security of their property, they have at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper."*

Dixon's contentions were that his suggested changes strengthened the section by giving it the necessary element of clarity. There, however, may have been a subtly in the use of, *"and the security of their property."* This amendment came on the heels of an on-going and rapidly intensifying debate over slavery. In 1849 Kentuckians were agitated over the anti-slavery and emancipationist crusades, and with the bitter argument over the repeal of the anti-importation law of 1833.

Again, on December 5th, Archibald Dixon offered a new section (2) to be included in the *Bill of Rights*. This amendment provided, *"That absolute arbitrary power over the lives, liberty, and property of freemen (except for crimes) exits nowhere in a republic - not even in the largest majority."* After considerable debate this statement was added as the new section (2) to the *Bill of Rights*.

SECTION 6: JURIES

In section (6), which pertains to trial by jury, Thomas W. Lindsay of Franklin County proposed the rather reactionary addition, *"But the General Assembly may provide by law that juries, in civil cases, shall consist of less number than twelve, and that 2/3rds of a jury may find a verdict in any case either civil or criminal."* This proposal evoked extensive discussion among the lawyer delegates, a debate which, on both sides, reflected the prevailing social and political conditions in Kentucky at the time. Finally, delegates supported the addition only of the phrase to the original section (6), "subject to such modifications as may be authorized by the constitution."

SECTION 7: FREEDOM OF THE PRESS

Thomas James, a Whig farmer from Hickman and Fulton counties, moved on December 6th to strike out of section (7) the words, "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may fully speak, write, and print, on any subject, being responsible for the accuracy of that liberty." James quoted the age-old adage about a robber stealing ones purse stealing trash, but robbing one of his good name leaves the injured individual poor indeed. He launched into an eloquent but angry discourse aimed at limiting the freedom of the press. Just as eloquently he revealed a total ignorance of the hard won freedoms of the press and of its historical significance. Obviously farmer James had never heard of the celebrated John Peter Zenger case.

Delegate James' anger was directed against the Louisville *Chronicle* which had recently published an anti-Whig article in which it spoke caustically of the actions of "Kitchen Knife" Ben Hardin of Larue County. The piece entitled, "Sale Avowed," said, "We understand that Old Ben Hardin has at last openly come out and declared that he will oppose the new constitution. We stated sometime since that Old Ben was at heart against constitutional reform, and had sold himself to the central power at Frankfort, and now the avowal of the sale is made by himself. Nor does he stand alone. There are many others with him who have their price in their pockets; and the democratic party will learn with astonishment that among them are men who dare to tell themselves democrats."

James' fervent speech fell on the deaf ears and he realized it by withdrawing his amendment. The convention proceeded to restate intact the 1792 section pertaining to the freedom of the press with only the most minor difference in wording, a fact which may be accounted for by an inexact transcribing by a clerk or the public printer.

A NEW SECTION 2 ADOPTED

After considerable debate as to the inclusion of Archibald Dixon's proposed new section, "That absolute, arbitrary power over the lives, liberty and prosperity of freemen (except for crime) exist nowhere in a republic - not even in the largest majority." This section was adopted with the amendment to be included in the *Bill of Rights* by a vote of 55 to 34.

THE SLIGHT REVISIONS OF 1849

In its plenary session of December 21, 1849, the convention delegates adopted the full and slightly revised *Bill of Rights*. As stated above, a new section (2) was added. This necessitated a change of numbering the subsequent sections. The new section (2) contained the additional phrase, *security, and the protection of property*. The new section (7) also contained the additional phrase, *subject to such modifications as may be authorized by this constitution*. In old sections (23) and (24), bearing on the subject of citizens' rights to bear arms, a phrase was added, *but the general assembly may pass laws to prevent persons from carrying concealed arms*. In section (27), pertaining to titles and the creation of new offices, the statement was changed from *during good behaviour* to *for a term of years*.

Running through the debates of the constitutional convention of 1849 was the thread of a profound concern for the sanctity of the statement of rights included in the first Kentucky *Constitution*. Occasionally a lawyer exposed a prejudice based upon adverse experiences in gathering evidence and the trial of cases, but these were overlooked after the plaintiff had been heard. By no means were the modest changes accepted unanimously. In a concluding analysis of the actions of the convention, changes made in the *Bill of Rights* were exceedingly limited with the possible exception of section (2). In several cases, including section (2), the modifications may have been redundant, as many delegates had suggested. Occasionally there were reflected either politically partisan feelings or an ignorance of the history of the age-old contentions to gain the personal liberties enshrined in the *Bill of Rights*, or the nature of perpetuating them in federal and state constitutional revisions.

THE 1890 CHANGES

The *Bill of Rights* included in the fourth Kentucky *Constitution* is almost identical with those included in the three earlier documents. The major exceptions appear in the sections relating to property and franchises in which the phrase was added, *but no property shall be exempt from taxation except as provided in the constitution, and every grant of franchise, privilege of exemption, shall remain subject to revocation, alteration of amendment.*

In conformity with the 13th Amendment to the *Constitution* of the United States, delegates to the Kentucky convention in 1890 provided in the new section (25) that, *Slavery and involuntary servitude in this state are forbidden, except as a punishment for crime, whereof the party shall have been duly convicted.* The intent and sentiment of this new section was far removed from the positive sentiments which were expressed in the constitutional convention of 1849. The latter convention had devoted much time and journal space to devising a protection of the institution of slavery from the ravages of freedom. The 13th Amendment to the Federal *Constitution* nullified Kentucky's iron-bound guarantee of the survival of slavery in the state. In 1890 section (25) of the *Bill of Rights* ratified this fact.

Delegates to the 4th Constitutional Convention began an extended debate on the subject of the *Bill of Rights* on October 2, 1890 and continued on the subject for the next 21 days. It required 512 pages of the journal to cover all the oratory. Consideration of changes in the bill was excuse enough for the outpouring of late Victorian declamation, some of it vapid, some historically uninformed, and most of it unproductive of change. When the whooping and shouting died down the *Bill of Rights* of 1792 was left essentially intact. The preamble which expressed gratefulness to God for the political, civil and religious liberties about to be included in the new *Constitution*. Fundamentally the spirit of 1792 was given new life, only a light editorial hand was applied to most of the section.

Strangely, delegates to the constitutional convention of 1890 gave no particular attention to the *due process* clauses in the 5th Amendment to the Federal *Constitution*, or its restatement more forcefully in the 14th Amendment. In time, after the adoption of the 14th Amendment in 1868, the due process clause was to have enormous bearing upon legislation and judicial decisions. There has been created a veritable myriad of interpretations, applications, and litigation, all of which has some sort of bearing, directly or indirectly, upon the individual rights of Americans.

Strangely, delegates to the Kentucky constitutional convention of 1890 gave no particular attention in its adoption of a bill of rights to the due process clauses of the 5th and 14th Amendments. This clause, especially that in the 14th Amendment, was to have enormous bearing on future judicial decisions and upon legislation at both state and national levels. Since its adoption in 1868, the 14th Amendment has provoked a veritable myriad of interpretations, applications, and litigation, all of which has borne directly or indirectly upon personal freedoms and privileges.

Though no mention is made in the more recent Kentucky *Bill of Rights* of the federal amendments, it may be contended that inherent in the entire declaration made in the 26 sections of the statement of rights is the fact that the due process under the law may be applied to all actions involving personal freedoms. In cases the federal law versus those of the states the clause has been applied to all legislation. In all instances the interpretation of personal rights under the due process clause has reflected a condition of constantly changing times and their assessment of old values.

SOCIAL AND POLITICAL INFLUENCES

Tangentially Kentucky's *Bill of Rights* has been affected in many ways by changing political and social conditions. This has been especially true in the matter of the massive body of court decisions and legislation in the field of civil rights. The cases applying to the segregation of races in the fields of public education, accommodations, and the voting franchise, especially, had a bearing on the basic nature of the Kentucky *Bill of Rights*. In the field of education *Missouri ex rel. Gaines v. Canada, Johnson v. University of Kentucky*, and *Brown v. Board of Education* were important to this state. In addition the passage by Congress of the Civil Rights Laws in the 1960's influence fundamentally the course of legislation in the states. In the case of Kentucky's *Bill of Rights* this has meant the antiquation of all references to race and gender. Perhaps it even implies substantial rephrasing of many of the sections of the *Bill of Rights* so as to insure equality of treatment in the laws without inference by phraseology to race and gender.

1987 REAFIRMATION OF INDIVIDUAL LIBERTIES

The sub-committee of the Special Commission on Constitutional Review in

1987, made an extensive examination of the Kentucky *Bill of Rights*. It suggested numerous emendations of the broad spectrum of rights covered in sections (1-261). The most fundamental changes proposed concerned gender, race, prosecution by information, exacting the death penalty, use of evidence by unreasonable search and seizure, use of the term " Commonwealth" instead of "State," recognition of the increasing use of electronically gathered information, and the removal of section (12) relating to indictable offenses.

As fundamental as the committee's suggestions were, none of them in any way even remotely implied a weakening of the Kentucky *Bill of Rights*, quite to the contrary, an effort was made to bring this segment of the constitution into conformity with the changing times and the ever-broadening of the individual's central position in the complex matrix of the laws while asserting a guarantee of personal freedoms, but reminding of personal responsibilities.

AMERICA'S HISTORICAL DEVOTION TO INDIVIDUAL RIGHTS CONTINUE AND EXPAND

A central historical fact pertaining to the Kentucky *Bill of Rights* is that the rash of events in the first three-quarters of the 18th century in both England and America drew together the strands of man's search for guarantees of individual freedoms. That a statement of the long and arduous travails in this area of human affairs could be refined and compacted into as succinct a formula as the first 9 amendments of the United States *Constitution* and in the various statements of rights in state constitutions is at once a major American intellectual-historical accomplishment. Equally as important is the fact that over the past two centuries there has been implanted in much of the American political mind an abiding dedication to the basic freedoms assured in the various constitutional versions of the fundamental rights of mankind functioning as a free individual in an open democratic society.

Just as important is the fact that the general public concept of the freedoms guaranteed in the *Bill of Rights*, federal and state, is that with the enactment of much legislation, the handling down of court decisions, and the production of scholarly legal studies, the basic element of the *Bill of Rights* have been able to survive and to be expanded. In the 20th century alone the application of personal freedoms have far exceeded anything either 18th and 19th century constitutional fathers could possibly have conceived, yet the changes have been made as an expansion of rights rather than as restraints.

OUR *BILL OF RIGHTS* IS LIVING AND VIBRANT

Both the national and Kentucky bills for rights have proved to be living vibrant things. For instance, the Open Records Law has taken the freedom of investigation and the press far beyond anything Peter Zenger of his counsel Andrew Hamilton, Richard Franklin or "Cato" could have conceived. The Civil Rights laws of the 1960's opened broad legal vistas of race and gender not dreamed of in Danville in 1792. A single instance, *Brown v. Board of Education* killed Kentucky's Day Law dead in its tracks, and instigated a social revolution, the end of which is not in sight. *Roe v. Wade* has even permeated local politics.

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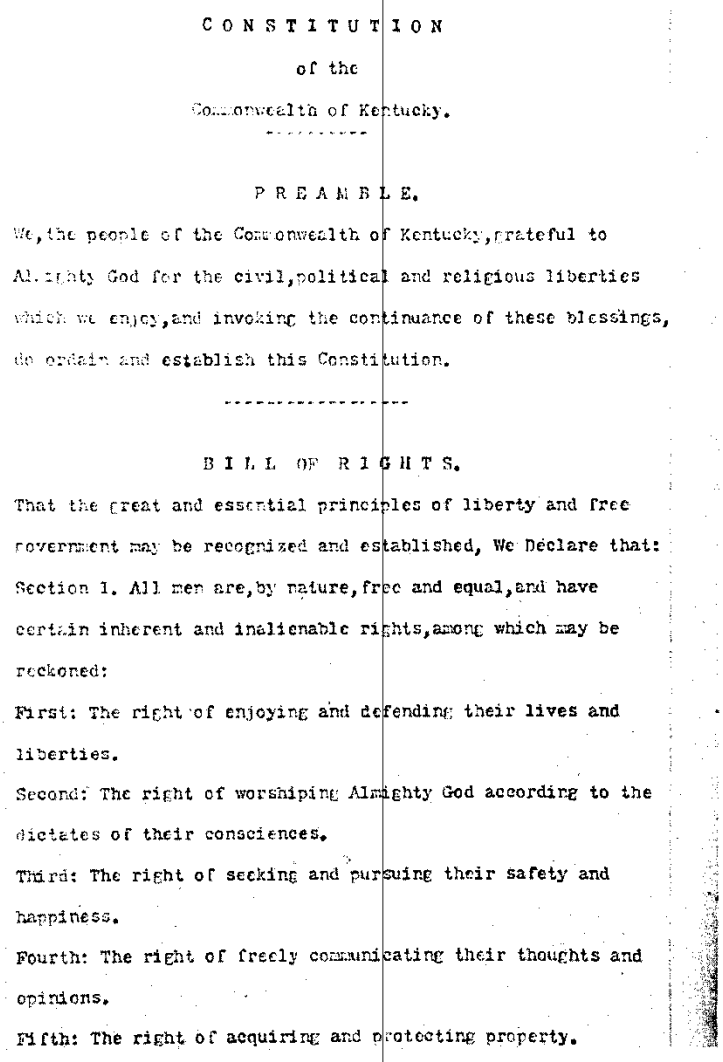
Dr. Clark is a Kentucky landmark; the Dean of Kentucky historians. What Kentuckians know of their past is a gift of Dr. Clark. No scholar has contributed more to the progress of Kentucky. He has authored a score of books and edited more than dozen more. A Mississippi native, Dr. Clark taught at U.K.'s history department, retiring in 1965 as its chairman. Dr. Clark has strong opinions about Kentucky's Constitution and what the future requires of it. He recently spoke at the 1991 Annual DPA Conference on the Kentucky Bill of Rights, and this article reflects his remarks.



CONSTITUTION

of the

Commonwealth of Kentucky.

PREAMBLE.

We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties which we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution.

BILL OF RIGHTS.

That the great and essential principles of liberty and free government may be recognized and established, We Declare that:

Section 1. All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties.

Second: The right of worshiping Almighty God according to the dictates of their consciences.

Third: The right of seeking and pursuing their safety and happiness.

Fourth: The right of freely communicating their thoughts and opinions.

Fifth: The right of acquiring and protecting property.

Page 1 of 1891, official copy of the Kentucky *Constitution*. Original at the Kentucky Histor Society.

THE *BILL OF RIGHTS*: OLD LESSONS AND NEW CHALLENGES

Charles J. Ogletree

It is with great pleasure that I participate in the 1991 training program of the Kentucky Public Defenders office. Public Defenders in Kentucky have been leaders in the fight, not only to constantly reaffirm the critical importance of the *Bill of Rights*, but also in the vanguard of those attempting to preserve them. This battle has become increasingly difficult over the last century, and, regrettably during this term of the United States Supreme Court. I am pleased to be in a room full of people who are committed to insuring the full protection of each and every indigent defendant in the criminal justice system. Having served as a public defender in the District of Columbia for seven years, I can fully appreciate your resolve to lead our clients through these most difficult times. Your battle is a difficult one. We are in a time when the criminal justice system is on the verge of collapse. We have seen the signals for some time, but it is difficult to fight against such a strong national tide against the rights of the indigent accused. I can appreciate the simple, but incredibly important statement by the civil rights leader Fannie Lou Hamer, who, in the middle of some of the most difficult days of the civil rights struggle, paused to observe: **"I'M SICK AND TIRED OF BEING SICK AND TIRED."** The easiest thing for all of us to do would be to close out our files, pack our bags, get a few hours of much needed sleep, put on our power suit, (that one nice outfit we have not worn since joining the ranks of poverty law practitioners) and show up Monday at the plush law offices of DEWEY, CHEATEM & HOWE, and, during the traditional power lunch, tell the hiring partner how much we look forward to working in the corporate department handling mergers and acquisitions. It sounds tempting doesn't it?

But I implore you to continue in your efforts to fight for the realization of the *Bill of Rights*. Although what I plan to say for the next few minutes does not offer a pretty picture of the current state of the *Bill of Rights*, we cannot give up. If not for the struggles of Kentucky abolitionists more than a century ago, and the progressive and innovative advocates who fought for the creation of a public defender system in this state more recently, I would not be able to stand before you and discuss the *Bill of Rights*. I certainly would not be able to stand here and criticize those who continually try to eviscerate those rights at every turn. Every day that you stand before judges and defend the *Constitution*, you make a difference. Every time you insist that a prosecutor offer a sensible plea to a client, you are fighting for the *Constitution*. Every time you stand before a jury and demand that they recognize that your client is cloaked in gowns proclaiming that the *Constitution* guarantees her the presumption of innocence, you are enforcing the *Bill of Rights*. Every time you stand here and hear the trier of fact whisper the two greatest words in the English language, you are keeping the *Bill of Rights* alive and vital. When you, as investigators, find facts and prepare witnesses; when paralegals find those cases, statutes, and legislative histories, you invigorate the *Constitution* which you, as sentencing advocates, present our clients as sympathetic human beings, you give real meaning to the concept of justice. Remember, when you give up, there is no alternate line of defense. You are the only buffer between your client and a hostile world. Don't give up, and don't give in.

The notion that the *Constitution* has not lived up to its billing, and that the *Bill of Rights* is constantly undermined, it not new. In fact, complaints about its impact in the criminal justice system, and the particular impact on Blacks and other minorities, women, gay and lesbian persons, the disabled, the elderly, and the poor, are centuries old. The comments made by Frederick Douglass more than a century ago, are eerily reminiscent of our current malaise. In fact, some of the problems of the criminal justice system were brought to our attention more than a century ago, near the time that the Kentucky *Bill of Rights* was adopted. Frederick Douglass, born a slave, but a freedom fighter all his life, lamented about the criminal justice system:

> Justice is often painted with bandaged eyes. She is described in forensic eloquence as utterly blind to wealth or poverty, high or low, white or black. But a mask of iron, however thick, can never blind American justice when a black man happens to be on trial.
>
> It is not so much the business of his enemies to prove him guilty, as it is the business of himself to prove his innocence. The reasonable doubt which is usually interposed to save the life in liberty of a white man charged with crime, seldom has any force or effect when a colored man is accused of crime.

It would be disappointing enough if we could simply conclude that Frederick Douglass's comments in the 1800's were now obsolete, or only applied to African Americans. However, when I take a look at the *Bill of Rights* in this country, and the deplorable nature of the criminal justice system, I can only confirm what you already know: The problems of the criminal justice system are still with us, and are likely to continue into the future, unless some critical changes occur. Those committed to fighting for the rights of the disenfranchise, the abused, the underprivileged, are painfully aware of the cuts in all programs designed to help the helpless, and realize that our budgets have not only been cut to the bone, but these uncaring fiscal maniacs are now cutting into the bone. We can't take much more of these insane policies.

Frederick Douglass is not alone in the criticism of our founding fathers in the way in which the criminal justice system has had a devastating impact on poor people. Justice Thurgood Marshall, during the recent celebration, pomp and circumstance in observance of the anniversary of our *Constitution*, expressed considerable reluctance at the notion of "celebrating" that venerable document. Rather, Justice Marshall called for a serious period of examining the history, purpose, and shortcomings of the *Constitution* in an evolving society. Justice Marshall noted :

> I do not believe that the meaning of the Constitution was forever fixed at the Philadelphia convention. Nor do I find the wisdom, foresight, and sense of jus-

> tice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today".

What Frederick Douglas and Thurgood Marshall tell us is that although the *Bill of Rights* has played an important role in our society, we cannot overlook the harm that has occurred to our client population over these years. Indeed, in my view the future of the *Bill of Rights*, as a document designed to protect the interest of the people, is in serious jeopardy. From my vantage point, the *Bill of Rights* has become a "Bill of Wrongs." Your job as public defenders, and your efforts to defend the indigents in the criminal justice system, has become increasingly difficult. There was a time when we thought our responsibility was simply to insure that our clients 4th, 5th, 6th, 8th and 14th Amendment rights were fully protected. We would do that by being vigorous in our investigation, zealous in our bail arguments, scrupulous in our research or motions to suppress evidence, confrontational in our efforts to challenge the government's evidence, and visionary in our ability to develop imaginative and compelling theories of defense for our clients. However, every step we have taken forward, the Supreme Court and many State Courts, issue opinions forcing us two steps backward.

Our task today then, as public defenders, is to determine new strategies to insure that the *Bill of Rights* is reinvigorated in a system that proclaims its commitment to justice.

This will not be an easy task, nor are these easy times.

Just this term, the Supreme Court has engaged in a wholesale assault on every provision of criminal procedure in the *Constitution*. The limited time I have today doesn't permit a full examination of all the cases, or a complete and thorough examination of each opinion's shortcomings. However, it should be said that the assault on the *Bill of Rights* extends from the moment of suspicion, under the Fourth Amendment, to the infliction of the ultimate punishment, under the Eighth and Fourteenth Amendments.

For example, in *California v. Hodari*, the United States Supreme Court permits law enforcement to use a new weapon to fight the war on crime, a weapon as lethal as the most deadly gas at Dachau, by interpreting the Fourth Amendment in such a fashion that law enforcement officers can ignore it at will. It is already so riddled with so many exceptions that it has lost most of its meaning and all its vitality. Many of us thought there was no more damage that could be done. We were wrong.

One of the most precious rights of all citizens is the right to be left alone. The more we see the encroachments on this fundamental right, the more we understand when legal commentators refer to the Fourth Amendment as "ever shrinking." In *Hodari*, that shrinking of the protected zone reached new heights. In *Hodari*, an unmarked police car was patrolling a Black neighborhood in Oakland, California. Several Black youths were standing on the corner, when the police, who were in plain clothes, but wearing jackets with "Police" embossed on the front and back, pulled up. The young Black men began to flee. The officers gave chase. Hodari nearly ran into an officer, tossed a vial of cocaine away, and was tackled by the officer, handcuffed, and charged with several offenses. In a measured and persuasive opinion, the California Court of Appeals and the California Supreme Court concluded that an unlawful seizure occurred, and affirmed the suppression of the seized evidence.

Although *Terry v. Ohio* long ago told us, among other things, that the Fourth Amendment covers restraints on the liberty of citizens by police, *Hodari* refuses to follow that view. Moreover, in *Florida v. Royer*, the Supreme Court reaffirmed these rights of respect and dignity to be accorded citizens by observing:

> The person approached need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even *momentarily* without reasonable, objective grounds for doing so.

Before the ink completely dried on the opinion, the United States Supreme Court, in an opinion by Justice Scalia, reversed. Justice Scalia's reasoning was predictable and harsh:

> Street encounters always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are not obeyed. Since police officers do not command "stop" expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.

Justice Stevens was not persuaded by this reasoning, commenting in dissent:

> In its decision, the Court assumes, without acknowledging, that a police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment- as long as he misses his target.

What both the majority and the dissent both miss is what I would describe as the "Rodney King" factor. There is no doubt in my mind that, after watching the unmerciful beating of Rodney King, many Americans will not hesitate to run from police, as a matter of sheer survival. As California State Assemblyman Curtis Tucker observed: "When Black people in Los Angeles see a police car approaching, they don't know whether justice will be meted out or whether judge, jury, and executioner is pulling up behind them."

Don Wycliff was equally poignant, observing: "Even Black men who share no other problem with the black underclass share this one. The most successful, respectable Black man can find himself in a one-sided confrontation with a cop who thinks his first name is "Nigger" and his last name is "Boy." Yet, our Supreme Court has adopted a "no harm, no foul" rule with respect to the Fourth Amendment. If I don't touch you, I haven't implicated your privacy rights. Or, to rephrase *Katz v. United States*, the current interpretation of the Fourth Amendment is that it protects neither people nor places. This assault on the *Bill of Rights* picked up steam this term in *Arizona v. Fulminante*. *In Arizona v. Fulminante*, the Supreme Court increased the power of prosecutors to utilize coerced confessions, by invoking harmless error analysis in considering coerced confessions. The United States Supreme Court, in my view committed fatal error, by revoking its long held doctrine that coerced confessions are now subject to harmless error analysis. Not only does the Supreme Court, by such decisions, undermine the integrity of our *Bill of Rights*, but more importantly decisions such as *Fulminante* send a message to police that they are free to use whatever methods are necessary to obtain coerced confessions knowing that they are not likely to be excluded at trial. In an opinion that defies logic, the Supreme Court abandoned the axiomatic proposition that in a criminal case, a defendant if denied Due Process if her conviction is founded, *in whole or in part*, upon an involuntary confession, without regard to the truth or falsity of the confession.

For decades, the Supreme Court firmly held the view that three forms of constitutional error, trying a defendant before a biased judge, depriving a defendant of counsel, and using a coerced confession against a defendant, could never be categorized as harmless. However, after *Fulminante*, prosecutors are licensed to use coerced confessions. In Fulminante's case, he was incarcerated, and persistently pursued by a government informant seeking evidence of a crime, with the constant admonition to Fulminante of the ill that would befall him if he did not confess, and let the informant protect him. Fulminante confessed, and the "protection" he received was a prosecution for murder, and this confession was introduced at trial. Fortunately, for Fulminante, a majority of the Supreme Court reversed his conviction. Unfortunately for the rest of the world, the harmless error analysis will now be applied to future coerced confessions. One wonders how long it will take the Supreme Court to find convenient vehicle to eliminate the remaining exceptions to the harmless error rule. In the not too distant future, perhaps a biased judge, or the absence of counsel, won't provide grounds for complaint.

But it doesn't stop there, the *Bill of Rights* underwent a further assault when the United States Supreme Court decided *County of Riverside v. Mclaughlin*. Not only are the police allowed to seize you, and coerce a confession from you, but they also are now authorized to deny indigents the right to an arraignment for 48 hours. It is absolutely clear that this case, like so many others decided this term, will have a disproportionate impact on blacks, the poor and the underprivileged. In upholding the delay in McLaughlin's arraignment, the Supreme Court Observed:

"Everyone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail. One way to do so is to provide a judicial determination of probable cause immediately upon completing the administrative steps incident to arrest..." As the dissent explains, several states, laudably, have adopted this approach. The *Constitution* does not compel so rigid a schedule, however.

In an interesting dissent by Justice Scalia, he relates a story that, regrettably, describes the Supreme Court's *Bill of Rights* jurisprudence.

This term: the story is told of the elderly judge who, looking back over a long career, observes with satisfaction that "when I was young, I probably let stand some convictions that should have been overturned, and when I was old, I probably set aside some that should have stood; so overall, justice was done." I sometimes think that is an appropriate analog to this court's constitutional jurisprudence, which alternately creates rights that the constitution does not contain and denies rights that it does."

Thus, we are moving closer to that dual society, those who are treated justly and those who are frequently victims of injustice. I have great confidence in public defenders. I am confident that even after the Supreme Court allows police officers to illegally seize your client, coerce confessions from your client, and deny you the opportunity to talk with him for 48 hours, that you can still be zealous advocates. Unfortunately, the Supreme Court has gone even further in assaulting the *Bill of Rights* by tying our hands, behind our back, blindfolding you, and then asking you to reach for the correct box that will free your client. In the most recent expression of nonsense, the Supreme Court held that bilingualism is not an accomplishment to be praised for those who put in the effort to learn English, but is a source of potential disqualification in jury service. Later in the term, in *Hernandez v. New York*, the Supreme Court upheld the ability of prosecutors to strike jurors who were bilingual because of the risk that they might interpret statements made in a case inconsistent with the interpretations provided translators. While some of you may see this as a small and innocuous case, it really goes to the heart of our criminal justice system. For decades, Spanish speaking people in general were denied the opportunity to be jurors because they could not speak English. Now that they can master English, they are being punished because they speak Spanish. There are three responses for advocates to consider in assessing the absurdity of *Hernandez:* (1) the court didn't inquire whether whites also spoke Spanish; (2) there is value in insuring that interpreters accurately present testimony, and if there are differences, the interpreter may be engaging in a miscarriage of justice; (3) if there is conflict in a translation, jurors can bring it to the judge's attention via a note and the discrepancy can be cleared up. I cannot imagine a more senseless expression of racial and ethnic chauvinism than the courts' tortured analysis in this case. Thus, not only will your client be seized, but a confession can be coerced from your client, and your client, based solely on poverty, will be denied access to a judicial officer for 48 hours, and your efforts to get a representative jury will be denied. If you have the misfortune of going to trial and your client is convicted, you then encounter the Supreme Court's last expression of utter nonsense, *McCleskey v. Zant*. In *McCleskey*, the Supreme Court has finally gotten its wish. The Supreme Court has in effect ruled that the failure to raise a claim at the state court level will prevent you from having it considered on review. Many meritorious claims will be ignored, and in some cases, innocent clients will be put to death.

It goes without saying that this was anticipated. Not only has the Supreme Court made our job difficult from the moment of arrest, but it also has restricted our remedies throughout the appellate process. I suspect some of you are saying, why should I continue to do this work?

There are a number of good reasons. What the Supreme Court has done, and its assault on the *Bill of Rights*, is to make the challenge even greater for us. What can we do? There are a number of things we can and must do. First, *McCleskey v. Zant*, on the one hand, deprives clients of the opportunity to have compelling claims raised when they are discovered, but on the other hand it is the precise firm and clear authority that we need to file every single motion, raise every single issue, litigate every matter, no matter how premature, or incomplete at the trial phase. Rather than raising the usual 4 or 5 issues, we must now raise 15 or 16. And we must indeed cite *McCleskey v. Zant* as telling us that if we don't raise it now, it is forever waived. We must argue, in case after case, how these arrests disproportionately impact minorities and the poor, and persuade judges that it is so. We must also show how coerced confessions deny our clients equal protection of the law, and due process. We must show that poverty, not administrative efficiency, is the victim of the 48 hour detention rule. We must show that the *Hernandez* rule has the impact of disenfranchising the fastest growing segment of our diverse population and in the end, it will be impossible to allow such exclusions. We must examine the disparate impact of the criminal laws, as Judge Alexander did recently in Minnesota, concluding that certain penalties were discriminatory against minorities.

Perhaps over the course of the next decade, and hopefully much sooner, trial and appellate judges will tell the Supreme Court that these pronouncements, as a whole, are ridiculous and that the impact on the state courts, investigators, sentencing advocates and public defenders necessitates litigating every single issue at every juncture of the trial, with the result possibly bringing the criminal justice system to a grinding halt. If this is what it takes, I hope that each and every one of you are prepared for the task.

What we have witnessed at the Supreme Court is just a small part of the problem in the criminal justice system and the

burdens it places upon public defenders and other advocates for indigent defendants. Throughout the program today, we will focus on other methods to fight this erosion of the *Bill of Rights*. The struggle must continue.

There is major work that must be done. You are the chosen few. Let us begin. Thank You.

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These remarks were made at the 1991 Kentucky Department of Public Advocacy Bill of Rights Conference.

THE UNITED STATES SUPREME COURT

When the Constitution created the federal judiciary, the country's state and local courts had already been in existence for generations, an important legacy from colonial times. Then, as now, these courts conducted almost all of the judicial business. The federal courts would handle cases dealing with the violation of federal law or as otherwise specified by the Constitution.

Article III of the Constitution defined the judicial branch of government in three brief sections, but it was the Judiciary Act of 1789 that created the federal judicial structure of 13 district courts, three *ad hoc* circuit courts, and the office of Attorney General, and provided for Supreme Court review of state court decisions that dealt with federal issues.

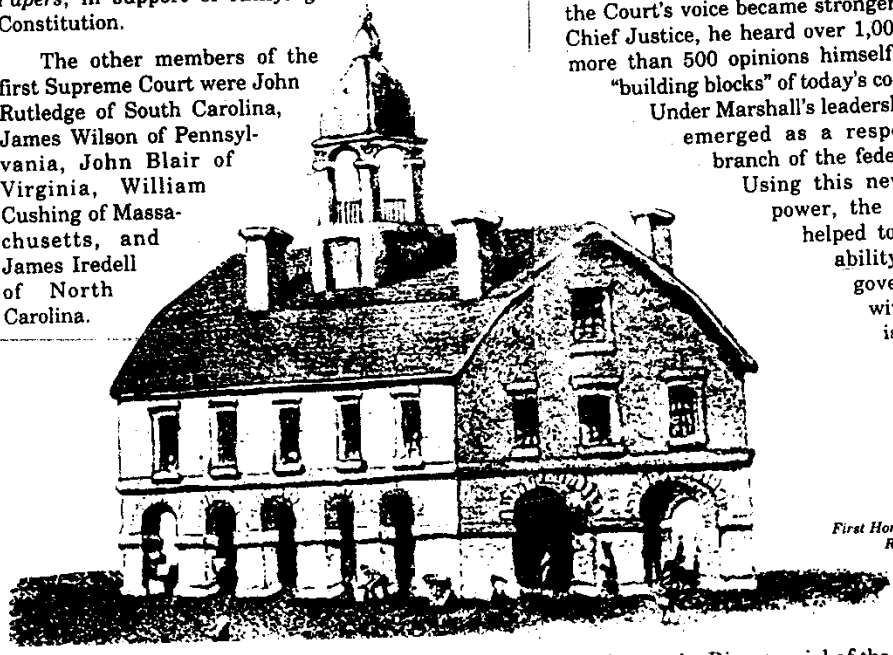
The first Chief Justice of the United States, John Jay of New York, was a staunch Federalist. A leader in New York's ratification battle, Jay joined with James Madison and Alexander Hamilton to author *The Federalist Papers*, in support of ratifying the Constitution.

The other members of the first Supreme Court were John Rutledge of South Carolina, James Wilson of Pennsylvania, John Blair of Virginia, William Cushing of Massachusetts, and James Iredell of North Carolina.

For the first three years, meeting in New York and then in Philadelphia, the Supreme Court heard no cases. But its six members were kept busy, traveling the roads of America as they presided over both trial cases and appeals in the circuits. Under the Judiciary Act, two Justices were assigned to each of the three circuits. Travel in those days was difficult, sometimes hazardous. The Justices would sometimes travel together by horseback or carriage, usually over poor roads. Justice Iredell complained of circuit riding as "leading the life of a Postboy." Today, the federal circuit courts have their own appointed judges.

In the first decade of the Supreme Court, only about a dozen cases received written decisions by the full Court. Although established, the Court's authority was yet to be determined. Like the English practice, the Justices issued separate opinions, which tended to be confusing, even when the Justices agreed on the result.

When John Marshall was appointed fourth Chief Justice in 1801 by President John Adams, the Court's voice became stronger. In 34 years as Chief Justice, he heard over 1,000 cases, writing more than 500 opinions himself, many of them "building blocks" of today's constitutional law. Under Marshall's leadership, the judiciary emerged as a respected, co-equal branch of the federal government. Using this newly invigorated power, the Marshall Court helped to strengthen the ability of the federal government to deal with problems and issues of national concern.



First Home of the Supreme Court
Royal Exchange Building
New York City, NY

From "To Establish Justice" a pamphlet published by the Commission on the Bicentennial of the United States *Constitution*.

THE MOST PRECIOUS BATTLE PLAN OF ALL

OUR BILL OF RIGHTS

Judith G. Clabes

Americans rallied 'round American troops in a massive allied effort in the Persian Gulf in the fall and winter of 90-91. America, unquestionably a world superpower, led the fighting forces that liberated Kuwait.

We fought for "democracy" because that's what we stand for and not because that's what Kuwait is, because it isn't. To Americans, "democracy" often is extrapolated to mean standing up for the underdog, the oppressed, the mistreated, the disenfranchised. And, in that sense, we fought for "democracy" in the Mideast.

In addition to all else, America did show that democracies can be strong and resolute. This was a bitter lesson for those who misunderstood and grossly underestimated the power of democracies to act decisively. And the capability of democracies to produce people willing to do so of their own free will.

Just 200 years ago, in the fall and winter of 1790-91, a different kind of American rally was going on. It, too, had widespread popular support as an infant country was laying a solid foundation for a kind of self-government never before seen. The topic of that time was the *Bill of Rights*, important amendments to the new *Constitution* that would guarantee certain individual rights that government could never take away. The *Bill of Rights* is a bill of restraint upon the government: It places certain rights above and beyond the reach of majorities and officials and establishes them as fundamental legal principles. The divine right of kings or crown princes or born-royalty was forever set aside in the new American order.

Two-hundred years is not a very long time, a grain of sand perhaps in the Saudi desert. Yet, democracy, and the republic on which it is built, has brought America into its adolescence a strong, rich and powerful country. Nothing is proved, of course, and adolescence is a testy time. All that is earned so far is the possibility of making it work a little longer.

The test of democracy was not passed in the Saudi desert. It continues every day, very close to home. It is never done. This *Constitution* is not a self-executing document.

Essential to a successful democracy is a well-informed citizenry — and an involved one. Yet deep apathy at times seems to threaten the health of a hard-fought self-governance. This apathy appears in poor voter turnout, a public choosing to shut out the issues of the day, a citizenry unfocused on its governance, a people turned out to the plight of neighbors, or in the general disconnectedness of communities.

John Gardner of Common Cause sounded this alarm: "Communities have been disintegrating for a long time, and the sense of community is increasingly rare. A steadily increasing proportion of our people do not belong to any community. They float around like unconnected atoms; they have no sense of common venture."

A sense of common venture is what makes democracies work.

Of all the freedoms Americans cherish, freedom of expression is the keystone, crucial to all others. It involves more than the right to communicate ideas, beliefs and information. More than the right to carry a placard in protest. More than the right to write a letter to the editor, appeal to the courts, complain to the mayor, criticize the president, or boycott a brand of gasoline. It involves responsibility, too.

It embodies the right to receive ideas and information, to evaluate these with our consciences and intellect, to accept or reject or form another opinion. It involves the responsibility for defending the rights of others to express opinions with which we disagree.

Without the right to receive these expressions of others, our own freedom of expression is limited. This inherent right to know enables us to understand and participate in the issues of the day, whatever they are. It is our right to think and conclude. Without it, we are fooled by the charade of freedom. Freedom of expression is the road upon which disparate voices and ideas in America have travelled to liberty.

The First Amendment alone is a potpourri of basic ingredients of individual liberty, expressing as it does give great civil liberties: freedom of religion, freedom of speech, freedom of press, freedom to assemble, and the right to petition for a redress of grievances.

Oliver Brown understood the importance of the latter. He didn't believe his daughter should have to go to a "black" school a mile away when the "white" school was closer to home. *Brown v. Board of Education* also showed that the *Constitution* is an evolving, living thing in an America where justice and fairness matter.

Seeds of tyranny spring up, not just in distant lands, but in our own — in the form of censorship, limitations on the rights of minorities, government secrecy, in acceptance of the idea that public officials should be insulated from criticism or accountability. These may seem small things in comparison to massive coalition ground and air assaults on evil Iraqi forces.

But they are important, on-going skirmishes in the struggle to keep America what our founding fathers intended it to be. Just 200 years ago when they presented us with the most precious battle plan of all: *The Bill of Rights*.

ROOTS OF OUR *BILL OF RIGHTS*

When the American Colonies achieved their independence, they were a loose association of independent states held together by the *Articles of Confederation*. This first constitution proved unwork-

able for the needs of a union of states, but it served as a bridge between the initial government by the Continental Congress of the Revolutionary period and the federal government provided by the United States *Constitution* of 1787.

As the founding fathers sweated through the sultry summer of 1787 in Philadelphia — working in secret — they created a government with three branches, each with powers to check the others. There was no country in the world that governed with separated and divided powers, providing checks and balances on the exercise of authority of those who governed. But the founding fathers, having lived through oppression of liberties, braved a revolution for just such a government — by the people, for the people and of the people.

The work of those 55 men marked the beginning of the end for the concept of the divine right of kings.

A great debate ensued during the deliberations over the new *Constitution*. It centered on a *Bill of Rights*. Should it or should it not be included?

James Madison, who would be known as the father of the *Constitution*, opposed a bill of rights in the convention. He believed everyone agreed that individual rights would be secure in this new society. The fact that these rights weren't spelled out did not mean they did not exist. Besides, he argued, 8 of the then 13 states had bills of rights in their own constitutions.

"Publius," the name used by John Jay, James Madison and Alexander Hamilton to write the Federalist Papers to garner support for the *Constitution*, also argued against the need for a bill of rights.

The most impassioned pro-bill of rights stance came from George Mason, a wealthy Virginia planter with no formal education, who had written *Virginia's Declaration of Rights*. In June, 1776, George Mason's *Declaration of Rights* had been embodied in Virginia's new constitution — and served as an inspiration for Thomas Jefferson as he drafted a national *Declaration of Independence*.

Mason was an active member of the convention and when a bill of rights was not included, he told his colleagues that he "could neither give it his support or vote in Virginia" and "he could not sign here what he could not support in Virginia."

When the *Constitution* was signed on September 17, 1787, therefore, George Mason refused to sign it, despite his conviction that the strong central government it established was the only hope of survival for the newly independent United States. He continued to press for a *Bill of Rights* as essential to insulate the people from oppressive government. A close friend of George Washington, Mason was described by Thomas Jefferson as being "of the first order of greatness."

Thomas Jefferson himself — though in Paris at the time — pressed for a *Bill of Rights* from afar. In a letter to Madison, he wrote: "Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inferences."

Jefferson and Mason had more accurately assessed the mood of the people, for the strongest opposition to the new *Constitution* surfaced over the absence of a bill of rights. States passed strong resolutions demanding the *Constitution* be amended to include a strong declaration of rights. In every instance, freedom of the press was an expressed concern. People simply wanted written guarantees of individual liberties against a powerful federal government.

Fearing for the survival of the *Constitution* and facing opposition in his campaign as a representative to the first Congress, James Madison changed his mind. He promised the voters of Virginia that he would push for a bill of rights — and he rose in the very first session of the House of Representatives to propose amending the new *Constitution* "in order to prevent misconstruction or abuse of its powers" and to extend "the ground of public confidence in the government."

There were originally 12 amendments known as the *Bill of Rights*. The first 2 dealt with congressional apportionment and with compensation for members of Congress. They failed. Thus, the "Article the Third" moved up to "Article the First," and the 45 enduring words of the First Amendment have fundamentally shaped individual liberties throughout our history.

New Jersey was the first state to approve the bill on November 29, 1789; Virginia became the ninth state to ratify amendments 3 to 12 on December 15, 1791 — and the *Bill of Rights* joined the *Constitution* in providing a framework for national governance.

BILL OF RIGHTS FACTS:

- Seven counties of the Kentucky Territory of Virginia sent 14 delegates to the ratification convention — and 10 voted to reject the *Constitution;*
- Roger Sherman of Connecticut was the only individual to sign the *Constitution*, the *Declaration of Independence* and the *Articles of Confederation*. He handwrote a working draft of a bill of rights.
- The Founding Fathers were diverse. Of the 55 men, 34 were lawyers, 29 were college graduates; the average age was 42; 14 were land speculators; six had signed the *Declaration of Independence;* 21 were military veterans of the Revolution; 15 owned slaves; 24 served in Congress; the youngest was 29; the oldest (Ben Franklin) was 81.
- Since 1789, more than 10,000 amendments have been offered in Congress. Only 33 of these have been sent to the states for ratification.
- Since 1791, when the *Bill of Rights* was ratified, only 16 other amendments have been approved.

Betrayed by Kuwait's 'justice'

Kuwait's attitude toward rebuilding its shattered infrastructure may strike many as excessively casual; but when it comes to dispensing Draconian justice, the Kuwaitis march to a very different drumbeat indeed.

The United States did not send 540,000 of its best and brightest to make the world safe for potentates.

A military tribunal prohibited witnesses from testifying and did not permit defendants to meet with their government-appointed attorneys, who saw them for the first time in court. Defense attorneys were forbidden to cross-examine witnesses, clients' evidence was kept secret and some defendants charged their confessions had been coerced by torture.

The so-called trials make a mockery of Western notions of justice and constitute a cynical betrayal by the Kuwait and Saudi Arabia owe not only their thrones, but their very hides, to American resolve and military skill. The world community should not passively permit them to resume their bad old ways without expressing its disapproval in the strongest possible terms.

This editorial is from *The Sun-Sentinel*, Fort Lauderdale, Fla. Guest editorials do not necessarily reflect the viewpoint of the *Herald-Leader*.

- Each provision in the *Bill of Rights* was included in at least one of the constitutions of the states: 12 state constitutions protected the free exercise of religion, 10 protected freedom of press, 5 protected freedom of petition, 4 protected freedom of assembly, 2 protected freedom of speech.
- The United States of 200 years ago ended at the Mississippi and was still about 15 times the size of England.
- The first census in 1970 counted 4 million Americans.
- Of the 13 original handwritten copies of the *Bill of Rights*, only 8 are known to exist today.

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Judith G. Clabes is editor of The Kentucky Post, where this article first appeared. She spoke at the 1991 Annual Public Defender Conference in Covington.

THE UNITED STATES BILL OF RIGHTS

George Mason

WHEN the *Constitution* was signed on September 17, 1787, it contained no *Bill of Rights*. In fact, the idea of adding a *Bill of Rights* was not even mentioned on the floor of the Constitutional Convention until five days before the document was signed. George Mason, who had written Virginia's *Declaration of Rights* in 1776, argued in vain for the inclusion of such a provision. The majority felt that to list specific individual rights was unnecessary, however, and the proposal was defeated.

DURING the battle over the ratification of the *Constitution*, those opposed the Anti-Federalists-argued that the *Constitution* needed amendments to guarantee individual rights and freedoms before it could be ratified. Proponents of ratification-- the Federalists-- contended that most state constitutions already guaranteed such rights. And the *Constitution* itself guarded against tyranny by its separation of powers among the three branches of the federal government and division of power between the federal and state governments, together with specific guarantees already in the *Constituiton*, such as the right of the writ of *habeas corpus*. Moreover, those who opposed a federal *Bill of Rights* feared that any incomplete enumeration of certain rights endangered those inherent rights not specified.

ONCE the Anti-Federalists organized their campaign, it took the promise of a national *Bill of Rights* to secure narrow Federalist victories in such key states as Massachusetts, Virginia and New York.

James Madison

ON May 4, 1789, with the First Federal Congress only one month old, Representative James Madison of Virginia-- who had opposed a *Bill of Rights* at the Philadelphia Convention-- proposed that debate on amendments to the *Constitution* begin at the end of the month. Madison then revised the 210 suggested amendments submitted by the states and, on June 8, proposed eight amendments, several with language similar to George Mason's Virginia *Declaration of Rights*.

Madison proposed that each amendment be placed in the *Constitution* in the article and section where it pertained. But at the insistence of Roger Sherman, the House chose to add amendments to the *Constitution* in numerical order, as they are today.

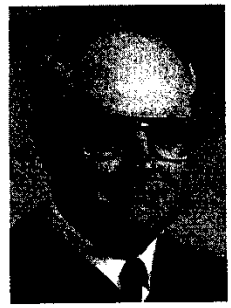
AFTER considerable debate, the House on August 24, approved 17 proposed amendments and sent them to the Senate. The Senate debated and finally, on September 25, 1789, agreed with the House on 12 proposed amendments. These were submitted to the states for ratification, a process that took two years. On December 15, 1791, Virginia became the eleventh state to ratify ten of the twelve proposed amendments, and these, known as the *Bill of Rights*, became part of the *Constitution*.

THE *Bill of Rights* and subsequent Amendments have made our *Constitution* a beacon to the rest of the world-- especially evidenced at this time in Eastern Europe-- by providing a model for a political system that effectively guarantees the rights of the individual.

From "The *Bill of Rights* and Beyond," a pamphlet published by the Commission on the Bicentennial of the United States *Constitution*.

GEORGE MASON AND HIS DECLARATION OF RIGHTS

A Presence in Kentucky



John D. Miller

The Virginia Declaration of Rights

A DECLARATION OF RIGHTS made by the representatives of the good people of Virginia, assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government.

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

3. That government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community, of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration; and that whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the publick weal.

4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge, to be hereditary.

5. That the legislative and executive powers of the state should be separate and distinct from the judiciary; and, that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for publick uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented for the publick good.

7. That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

8. That in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

10. That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

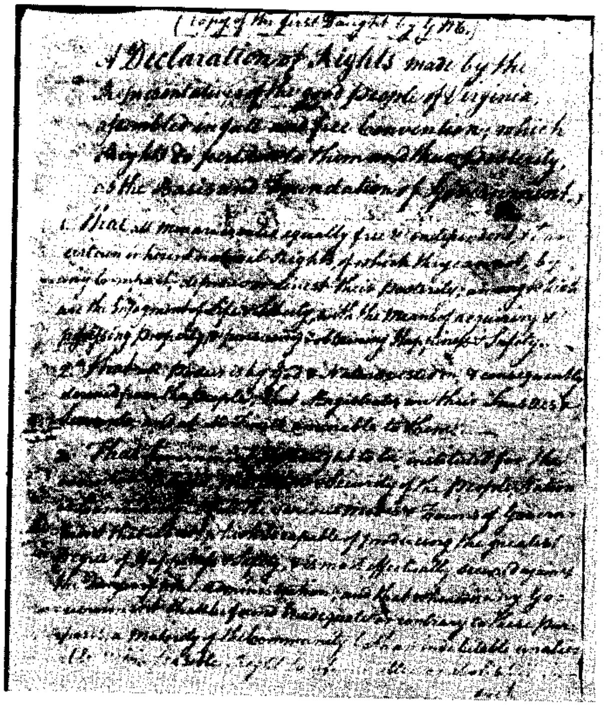
12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

13. That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

14. That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

15. That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

16. That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.



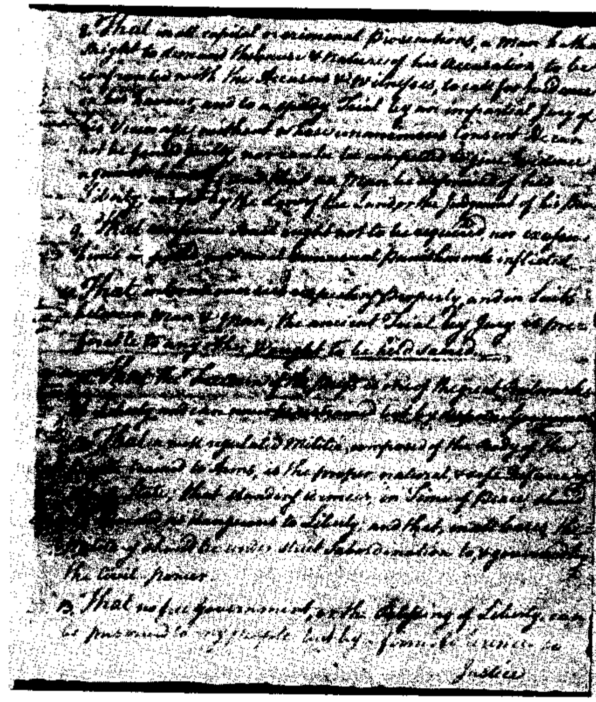
(Copy of the first Draught by G M.)

A Declaration of Rights made by the Representatives of the good People of Virginia, assembled in full and free Convention; which Rights do pertain to Them and their Posterity, as the Basis and Foundation of Government.

1. That all Men are born equally free & independent, & have certain inherent natural Rights, of which they can not by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring & possessing Property, & pursuing & obtaining Happiness and Safety.

2. That Power is by God & Nature vested in, & consequently derived from the People; that Magistrates are their Trustees & Servants, and at all times amenable to them.

3. That Government is, or ought to be instituted for the common Benefit, Protection & Security of the People, Nation, or Community. Of all the various Modes & Forms of Government, that is best, which is capable of producing the greatest Degree of Happiness & Safety, & is most effectually secured against the Danger of mal-administration; and that whenever any Government shall be found inadequate, or contrary to these Purposes, a Majority of the Community hath an indubitable, unalienable and indefeasible Right to reform, alter or abolish it, in such



8. That in all capital or criminal Prosecutions, a Man hath a Right to demand the Cause & Nature of his Accusation, to be confronted with the Accusers or Witnesses, to call for Evidence in his favour, and to a speedy Trial by an impartial Jury of his Vicinage; without whose unanimous Consent, he cannot be found guilty; nor can he be compelled to give Evidence against himself. And that no Man be deprived of his Liberty, except by the Law of the Land, or the Judgment of his Peers.

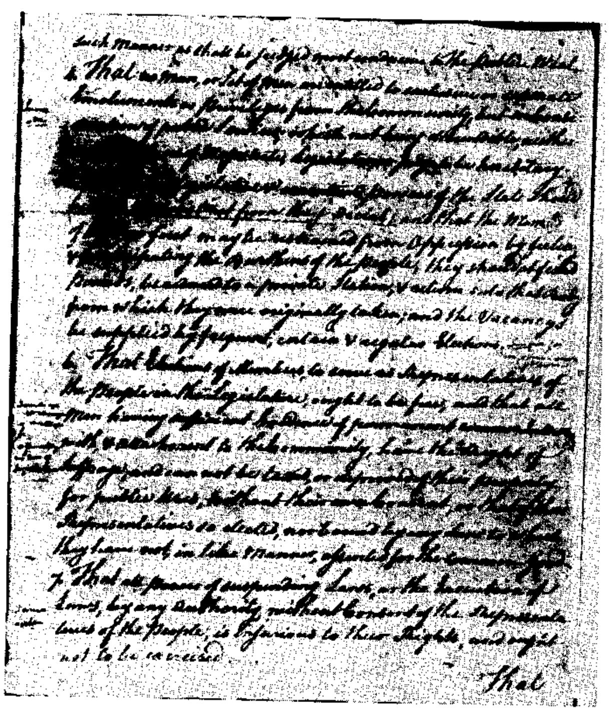
9. That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel & unusual Punishments inflicted.

10. That in Controversies respecting Property, and in Suits between Man & Man, the ancient Trial by Jury is preferable to any other, and ought to be held sacred.

11. That the Freedom of the Press is one of the great Bulwarks of Liberty, and can never be restrained but by despotic Governments.

12. That a well regulated Militia, composed of the Body of the People, trained to Arms, is the proper, natural, & safe Defence of a free State; that standing Armies, in Time of Peace, should be avoided as dangerous to Liberty; and that in all Cases, the Military should be under strict Subordination to, and governed by the Civil Power.

13. That no free Government, or the Blessings of Liberty can be preserved to any People, but by a firm Adherence to Justice



such Manner as shall be judged most conducive to the Public Weal.

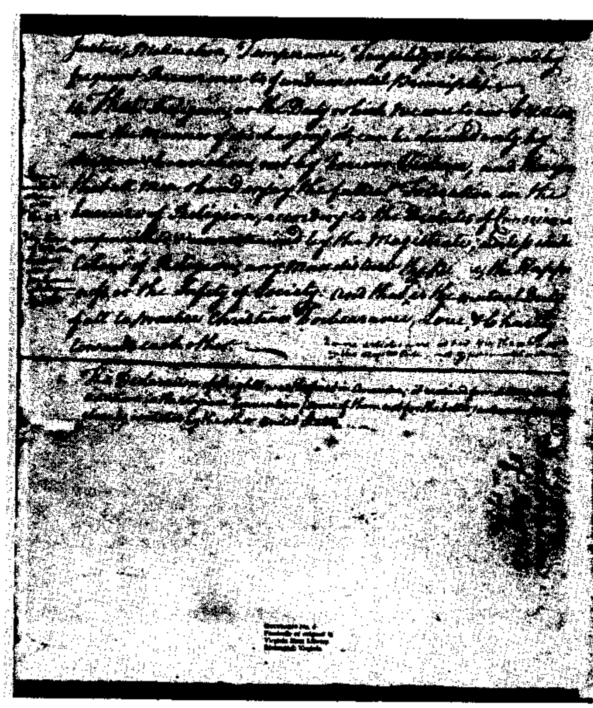
4. That no Man, or Set of Men are entitled to exclusive or separate Emoluments or Privileges from the Community, but in Consideration of public Services; which not being descendible, neither ought the Offices of Magistrate, Legislator, or Judge to be hereditary.

5. That the legislative & executive Powers of the State should be separate and distinct from the Judicative; and that the Members of the two first may be restrained from Oppression, by feeling & participating the Burthens of the People, they should, at fixed Periods be reduced to a private Station, & return into that Body from which they were originally taken; and the Vacancies be supplied by frequent, certain & regular Elections.

6. That Elections of Members to serve as Representatives of the People in the Legislature, ought to be free, and that all Men having sufficient Evidence of permanent common Interest with, & Attachment to the Community, have the Right of Suffrage; and cannot be taxed, or deprived of their Property for public Uses, without their own Consent, or that of their Representatives so elected, nor bound by any Law to which they have not, in like Manner, assented for the common Good.

7. That all Power of suspending Laws, or the Execution of Laws, by any Authority, without Consent of the Representatives of the People, is injurious to their Rights, and ought not to be exercised.

That



Justice, Moderation, Temperance, Frugality, and Virtue, and by frequent Recurrence to fundamental Principles.

14. That as Religion, or the Duty which we owe to our divine and omnipotent Creator, and the Manner of discharging it, can be directed only by Reason & Conviction, not by Force or Violence; and therefore that all Men should enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate, unless, under Colour of Religion, any Man disturb the Peace, the Happiness, or Safety of Society. And that it is the mutual Duty of all to practice Christian Forbearance, Love & Charity towards each other.

This eloquent manifesto, drawn by George Mason, a Virginia planter shy of formal education but steeped in the history of humankind, is the blueprint of a republic. The didactic proclamation that "all men are by nature equally free and independent," entitled to "the enjoyment of life and liberty" and to "pursuing and obtaining happiness" is the creed of free people everywhere and forms the infrastructure of democratic government. In June 1776, but a few days before our separation from England, these principles, called by Mason a *Declaration of Rights*, were embodied in Virginia's *Constitution* and served as a beacon for Thomas Jefferson when drafting our national *Declaration of Independence*.

And so it was on a day in June 1789 that diminutive James Madison, the narrowly-elected Virginia representative, arose with customary genius in the very first session of the House of Representatives assembled in New York and proposed amending the new *Constitution*. Early amendment of the *Constitution* was desired "in order to prevent misconstruction or abuse of its powers" and to extend "the ground of public confidence in the Government." Congress quickly considered Madison's efforts and on September 25, 1789, proposed twelve articles of amendment to the *Constitution* of the United States. On December 15, 1791, the final ten of the proposed amendments were approved by Virginia, the last ratification necessary to make them a part of our *Constitution*, now known to every school child as the *Bill of Rights*. These amendments, too, embodied Mason's *Declaration*. The mind of Mason became forever embedded in our *Constitution*.

Many are unaware of the values embodied in the *Bill of Rights* and why the amendments were offered at such an early date when the fledgling government was grappling with extant issues pertaining to foreign affairs, commerce, debt, and the onerous task of elevating the new republic to world status. Both the values and the urgency to an immeasurable extent can be laid to the same gout-ridden Virginia planter, a man described by Thomas Jefferson as "of the first order of greatness," yet never elevated to a proper position in history.

Mason's life [1725 - 1792] spanned the greater part of the 18th Century. He was a person of extraordinary wealth residing at Gunston Hall on the Potomac in the vicinage of George Washington's Mount Vernon. He and Washington were lifelong friends and adjoining landowners.

Mason first advanced to public prominence in 1769 as author of Virginia's Non-Importation Resolutions calling for the boycott of English goods and designed, *inter alia*, to combat taxation without representation. The resolution was introduced into the Virginia House of Burgesses in Williamsburg by his friend, Washington, causing royal Governor Lord Botetourt to order the dissolution of the assembly, whereupon the members adjourned to the Raleigh Tavern across the street and hastened their rebellious efforts. Again, in 1774, Mason authored twenty-four Fairfax Resolves which Chairman Washington read at a meeting of the county's freeholders. These resolves clearly stated the colonists' position in relation to Britain on matters of representation and taxation, and made a strong denunciation of slave trade. Although Mason, as well as Washington, was a slave owner, his attack on that institution was a position he vehemently demonstrated at the Constitutional Convention four years later. Mason denounced slave trade as "wicked, cruel and unnatural," and considered slavery both morally wrong and an impractical labor force for the nation. From these times on, Mason's views of government and mankind were etched along the road to revolution and establishment of the new nation.

Mason came to own thousands of acres of western land, much being in the then-unformed state of Kentucky in and around what is now Owensboro in Daviess County. It is particularly appropriate that we as Kentuckians know more of Mason and his impact on our federal *Constitution* and what might, in great measure, be called his gift of the *Bill of Rights*.

When the Constitutional Convention was to assemble in Philadelphia on May 14, 1787, the second Monday of that month, for the limited purpose of amending the *Articles of Confederation* toward strengthening the confederacy in areas of commerce, defense, and revenue, the Virginia legislature had designated Mason a deputy. After reflection, he accepted the commission and prepared to attend.

Mason was supremely attuned to the art of government. He possessed a voluminous library, shelving works of the world's leading philosophers and scholars. His formal education was tutorial as mandated by the Piedmont gentry of his age. Mason had never travelled so far from home as would be required of the five-day trip by private coach to Philadelphia. He was, indeed, provincial by any standard. Moreover, he eschewed gatherings, conventions, and, in general, the political arena. On occasion, he had begged pardon of participating in public affairs by reason of near-insufferable gout and the loss of his wife, Ann Eilbeck Mason, leaving him with nine children to whom he was "father and mother both." His shunning of public life warranted description by biographer Robert A. Rutland as the "Reluctant Statesman."

Nevertheless, in keeping with his commitment, Mason, accompanied by his son John, arrived in Philadelphia on May 17, three days after the convention was originally to commence. Dressed in fine black silk and travelling in a carriage befitting landed wealth, Mason's presence was indeed imposing. He bore a certain air about him that led the rankest stranger to know he had approached a man of standing and importance. He and son John took accommodations at the Indian Queen Tavern at 4th and Market Streets, a noted stage terminal for the travelling elite. Washington and Madison were already in attendance, as well as four other Virginia deputies of imposing stature. Virginia's seven-member delegation was second in number only to that of Pennsylvania. Two famed Virginians were conspicuously absent: Patrick Henry, who chose not to serve, and the incomparable Jefferson, at the time our consul in France. By the twenty-fifth of May, the states were represented by *quorum*. Ultimately, 12 of the 13 states would participate. Rhode Island, fearing inundation at the hands of larger states, declined to send representatives.

Madison, a graduate of the College of New Jersey (Princeton), held plans in his ubiquitous valise for a tripartite government of the people — a variety unprecedented in the history of civilization. These plans, subsequently introduced by Virginia compatriot Edmund Randolph, formed the anvil for forging the new republic.

Sweltering heat gripped the summer from end to end. Flies were atrocious, by some accounts requiring the sweeping of public floors throughout the day to remove dead carcasses. Mason, comfortably ensconced at the Indian Queen, gave piercing attention to the foundation of the new nation. His attendance was extraordinary. He spoke to virtually every aspect of the *Constitution*, taking exception and offering incisive advice to those of more formal accreditation, always demonstrating a fear of an overly-strong government, too far removed from the people, that might someday oppress human rights. Mason characteristically left behind a record reflecting a mind distrustful of authority. His effort in forming a *Constitution* to check unbridled power of those privileged to govern was monumental, easily comparable to Madison and Jefferson, the latter acting vicariously from abroad.

As the summer dragged on, Mason be-

came disenchanted with the direction of the convention. It became apparent the *Constitution* would be submitted to the states for ratification without his Declaration. This and lesser objections led him to join with fellow-Virginian Randolph and Massachusetts's Elbridge Gerry as three deputies in attendance on September 17th who would not sign the proposed *Constitution*.

Mason maintained that a *Bill of Rights* was essential to insulate the people from oppressive government. Opponents pointed out that the *Constitution* already contained personal safeguards, such as preservation of trial by jury in criminal cases, condemnation of *ex post facto* laws, and maintenance of the ancient writ of *habeas corpus*. Moreover, they contended the *Constitution* itself and the establishment of the republican government presupposed that Mason's enumerated rights already existed in each individual and that to enumerate them within the *Constitution* was superfluous. Then, too, it was suggested that the enumeration of such rights in a bill to the *Constitution* might mislead future generations into thinking those were the only rights held by the people. For whatever their individual reasons, the assembled states on that September day unanimously sent forth the proposed *Constitution* consisting of seven articles without Mason's *Declaration of Rights*. The document was submitted to the respective states for ratification.

Chagrined and dismayed, Mason left in considerable huff. En route home, he suffered a carriage accident in Baltimore. Convalescing at Gunston Hall and fuming over his rebuff in Philadelphia, Mason joined forces with the redoubtable Patrick Henry in a campaign opposing ratification of the *Constitution*. It was disseminated throughout the states that Mason "would sooner chop off his right hand than put it to the *Constitution*" as written. This was Mason's way of protesting the absence of a *Declaration of Rights* which he believed indispensable in safeguarding the "free and independent" and "inherent" rights of man against government.

Mason's forces, known as the Anti-Federalists, were formidable, but no match for the Anti-Federalists. Henry's charming oratory and the political savvy of Mason were not equal to the genius of Madison, Hamilton, and Jay who collectively brought forth the *Federalist Papers*, logically and skillfully explaining the proposed document with hermetic reason.

Debate over the *Constitution* raged throughout the states. Pros and cons were fervently argued at every village and crossroad. The Virginia convention reduced the argument not to whether the Constitution would be ratified, but whether it was to be amended by a *Bill of Rights* before or after ratification. Originally, Randolph, one of the three not signing the document in Philadelphia, supported the Anti-Federalist Henryites in holding for amendment before ratification. He vacillated, however. Finally, he left the ranks of Anti-Federalists and opted for amendment subsequent to ratification. On the convention floor, Henry delivered what, in modern terms might be considered a "sellout" charge. Randolph responded appropriately. Almost immediately, Henry's second called upon Randolph for satisfaction upon the dueling field. Friends intervened and a probable tragedy was averted.

In France, Jefferson was dismayed that the *Constitution* was submitted for ratification without a *Bill of Rights*. A letter to Madison reflects his position.

> *Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inferences.*

On December 7, 1787, Delaware, by unanimous vote, was the first state to adopt the *Constitution*. On June 21, 1788, New Hampshire, by close count, became the ninth and final state necessary to place the document in effect as the *Constitution* of the United States. On June 25, Mason's Virginia, as the tenth state, voted approval with 89 yeas and 79 nays. Mason, Henry, and the Anti-Federalist movement had failed. Or had they?

Several states approved the *Constitution* very narrowly, premised upon the understanding that a *Bill of Rights* would be forthcoming. North Carolina withheld ratification until November 21, 1789, after Congress had proposed a *Bill of Rights*. The nation's pulse was throbbing in favor of a bill restricting the new and untried government.

It is now apparent why Madison arose in the initial Congress to offer proposals embodying Mason's manifesto destined, in measure, to become our *Bill of Rights*. His honor was at stake, for in the heat of seeking ratification, he had committed himself to offer those amendments. By that time, however, he had clearly succumbed to Mason's notion that a *Bill of Rights* was necessary to insulate the people from government and to protect their "inherent" rights.

In the end, Mason had won. The planter's values were to be forever incorporated within the *Bill of Rights* to the *Constitution* of the United States of America. By his death on Sunday, October 7, 1792, Mason had wanly approved the *Constitution* and its *Bill of Rights*. With a few other amendments (relating largely to constricting the federal judiciary), he wrote, "I could cheerfully put my hand & heart to the new government."

Although Mason's contribution to our *Constitution* is quintessential, it is certain that world scholars and historians are more acquainted with his amazing mind than are the people of this Commonwealth. His views on government had immediate impact upon our *Declaration of Independence* and the 1789 French *Declaration of the Rights of Man and the Citizen*. Post World War II constitutions, the United Nations charter, and indeed free governments of the ensuing two hundred years have emulated Mason's views. When emerging democracies consider constitutional government, they are inextricably drawn to the blueprint left by the Virginia planter.

Mason's presence in Kentucky is marked by ownership of vast tracts of land on the waters of Panther Creek in Daviess County. That creek, finding its source in the thin hill country east of Daviess County, is a zigzagging tributary of Green River. It traverses the entire county, intersecting the Green at Curdsville, west of Owensboro, at a point just briefly before the Green empties into the Ohio. Today, the lands adjacent the creek are some of the Commonwealth's finest soil given to the raising of cattle and the production of fine tobacco, corn, wheat, and soybeans. In Mason's day, the land, yet a part of the Commonwealth of Virginia, was "waste" and "unappropriated."

In 1779, while Mason was engrossed in public concerns, the Virginia legislature opened lands along Panther Creek and the Ohio River for purchase. Any person paying into the Virginia treasury "forty pounds" per one hundred acres would receive a certificate which, when presented to the land office, entitled that person to a "land warrant" for described acreage. The warrant authorized the surveying of the boundary purchased. The stated purpose of the legislature was to sell the waste and unappropriated lands for the raising of revenue needed to discharge public debt and, at the same time, encourage migration into the area. Mason was one of the first to purchase under the law.

In 1780, Mason obtained warrants for two tracts numbering 8,400 and 8,300 acres on Panther Creek. Because of a blunder in describing one of the tracts, a dispute arose with one George Wilson, the holder of a conflicting warrant. In 1784, the parties sued each other in the state court of Virginia. The suit dragged on. After Mason's death in 1792, the

action was revived in the name of a grandson, Richard Mason, and, upon diversity jurisdiction, was transferred to the federal court in the newly-formed Commonwealth of Kentucky. Mason prevailed in the United States District Court, but Wilson carried the litigation to the United States Supreme Court in a matter styled *Wilson v. Mason, etc. and Mason, etc. v. Wilson* [5 U.S. 45 (1801).] The great Chief Justice John Marshall, a federalist appointee, delivered the opinion of the Court deciding adversely to Mason. Had George Mason lived, he would doubtless have borne unbelievable insult. Not only had he lost an important litigation at the hands of Marshall, but the opposing counsel, Joseph Hamilton Daviess, later married the sister of Justice Marshall. Daviess County is named (albeit misspelled) for Joseph Hamilton Daveiss, pronounced "Davis." The error occurred when a clerk, inscribing the law creating the county, inadvertently transposed the "e" and the "i" in Daveiss's name, thus explaining the local custom of pronouncing Daviess County as "Davis."

Presumably, Mason never visited his Kentucky holdings. His presence, however, is patently evidenced by yellowing paggs of legal documents reflecting his struggle for "acquiring and possession property," a right he equated with the "enjoyment of life and liberty." A towering limestone monument in tiny St. Lawrence Cemetery in eastern Daviess County marks the grave of Mason's grandson, George W. Mason, who died in that county on June 11, 1855. Northside moss and the ashen gray of weathering lime have all but obscured the Mason name. Only the curious trouble to know the relationship of the grave's occupant to one of the world's greatest lawgivers.

Today, Mason descendants abide in Daviess County, enjoying prosperity in a nation predicated upon the principles espoused by their ancestral genius.

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John D. Miller was born in Daviess County, Kentucky. He is a 1953 graduate of the University of Kentucky College of Law. A former state representative, he has served on the Court of Appeals since 1983.

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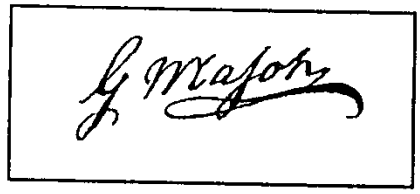
GEORGE MASON and THE *BILL OF RIGHTS*

Albert Rosenthal / Gunston Hall



(1725-1792)

In May and June of 1776, George Mason wrote Virginia's *Declaration of Rights*, a statement of principles that became a model for other states, as they wrote their own constitutions, and later inspired the federal *Bill of Rights*.

When the Confederation Congress called a meeting for May, 1787, Mason was chosen as one of Virginia's delegates, and he hastened to Philadelphia.

During the four months of the Federal Convention, George Mason was very active. His comments appear frequently in Madison's notes of the proceedings. But Mason had two concerns. First, he was unhappy that the new *Constitution* permitted the continuation of slavery - and, second that the new *Constitution* contained no guarantee of individual rights.

On September 12, 1787, Mason spoke in favor of a bill of rights and told the convention one could "be prepared in a few hours." A motion to include a bill of rights failed, with ten states - including Virginia - voting no and Massachusetts abstaining.

Mason was crushed. He told the convention that as the *Constitution* then stood, he "could neither give it his support or vote in Virginia," and he "could not sign here what he could not support in Virginia." When the *Constitution* was signed on September 17, 1787, George Mason refused to sign it, despite his conviction that the strong central government it established was the only hope of survival for the newly independent United States.

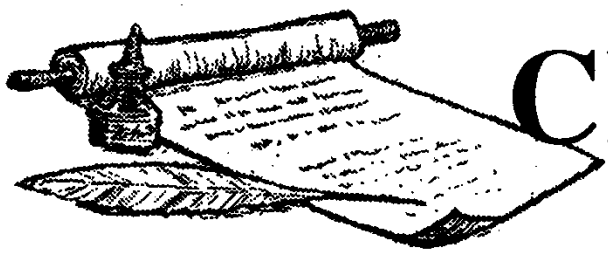
In the Virginia ratifying convention of June, 1788, Mason and Patrick Henry led those opposed to ratification, but for different reasons: Mason because of the lack of a bill of rights; Henry to preserve the sovereignty of the states. On June 25, Virginia ratified the *Constitution*, then appointed a 20-member committee - from both sides - to draw up a list of desired amendments. The list included a bill of rights taken from Mason's *Virginia Declaration of Rights* of 1776 and 20 other amendments.

After the *Constitution* was ratified, Mason retired from public life and refused to become a candidate for the Senate in the new Federal Congress. Poor health and family considerations kept him from straying far from his plantation, Gunston Hall, located about 20 miles south of the present city of Washington, D.C. On the bank of the Potomac River. From there, he watched as James Madison led the right for a *Bill of Rights* in the First Federal Congress and noted the progress of the *Bill of Rights* as the states ratified it, culminating with Virginia on December 15, 1791.

Mason died on October 7, 1792 at Gunston Hall, secure in the knowledge that the *Constitution* he helped draft now had a *Bill of Rights*.

Gunston Hall, built in 1755 by Mason, is open to the public every day except Thanksgiving, Christmas, and New Year's Day. Work continues to restore the home to its original appearance.

Charles Baptie / Gunston Hall



CHAPTER 3

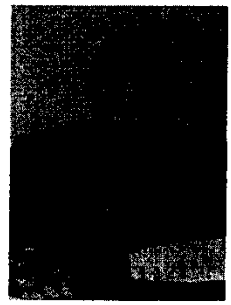
Constitution of The United States
Amendment X

Rights reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States repectively, or to the people.

Constitution of Kentucky
Section 26

General powers subordinated to Bill of Rights; laws contrary thereto are void. To guard against transgression of the high powers which we have delegated, We Declare that every thing in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.

USING KENTUCKY'S *BILL OF RIGHTS* IN CRIMINAL CASES



Frank Heft

In a recent speech to the Criminal Justice Section of the ABA, United States Solicitor General Kenneth W. Starr described the 1990-91 term of the United States Supreme Court as "a fine term in many respects for prosecutors." 49 CrL 1431 (8/21/91). In light of decisions such as *Arizona v. Fulminante*, U.S.111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Florida v. Bostick*, 501 U.S. ___, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *McNeil v. Wisconsin*, 501 U.S. ___, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991); *McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) and *Riverside County v. McLaughlin*, ___ U.S. ___, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), Mr. Starr's observation is a monumental understatement. In the past few years, we have witnessed a steady decline in the rights that citizens enjoy under the United States *Constitution.* Although that trend is likely to continue for the next few years, there is still a ray of hope that the impact of the constitutional issues decided in Washington will be blunted by state appellate court decisions which are firmly rooted in state constitutional law.

The States may, of course, interpret their own constitutions in a manner which affords their citizens "individual liberties more expansive than those conferred by the Federal *Constitution.*" *Pruneyard Shopping Center v. Robins*,447U.S.74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741 (1980); *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967). *Pruneyard Shopping Center* and *Cooper* are the embodiment of true federalism because they recognize the different purposes underlying the federal and state constitutions. The United States *Constitution* sets the floor on individual rights while state constitutions, on the other hand, prescribe the ceiling. The ability of the state courts to interpret their own constitutions vests them with incredible power to chart their own course without interference from the federal government. The task for criminal defense attorneys is to effectively implement the concept of federalism by enabling the state courts to develop an independent body of law that is grounded in the state constitution. History, or perhaps our legal education, has imbued us with a perception that the federal courts are the primary source of protection for the rights of citizens. We should, by this time be fully disabused of that notion. As a result of that perception, the criminal defense bar may have been infected with a complacency which caused us to be lax about pursuing issues of state constitutional law since we believed that our clients would ultimately be vindicated in federal court. But those days are gone and we can no longer afford to ignore the potential offered by Kentucky's *Constitution* as a means to safeguard the rights of citizens.

Defense attorneys can't expect our state courts to articulate the rights which exist under our *Constitution* unless we provide them with the opportunity of doing so. The ground work for a state constitutional law argument must be laid in the trial court. Consequently, written and oral motions must be based not only on the Federal *Constitution* but also on their Kentucky counterparts. Similarly, objections to rulings by the trial court should be grounded on the Kentucky *Constitution* as well as the United States *Constitution* wherever possible. For example, in arguing that an illegal search and seizure has occurred, defense counsel should cite not only the 4th Amendment but also Section 10 of the Kentucky *Constitution.* If both constitutions are cited to the trial court, and the case is eventually appealed, our appellate courts will have an opportunity to decide the issue as a matter of Kentucky constitutional law.

At the appellate level, there are four methods of analyzing state constitutional law issues. Since the development of Kentucky constitutional law is still in the embryonic stages, it is difficult, with one exception, to suggest that any particular analytical method be adopted by our courts. For the time being, attorneys should consider which methodology works best in a particular case. Our appellate courts may eventually favor one approach over another but until that day arrives, defense attorneys should be flexible and experiment with the analytical methods available to us.

Under the *Lockstep Method,* the state court always interprets a similarly worded provision of the state constitution in the same manner that the United States Supreme Court interprets the federal constitutional counterpart. In essence, the state court becomes a clone of the United States Supreme Court. The *Lockstep Method* is probably the least attractive analytical tool because the concept of federalism is better served by a state judiciary that demonstrates to the general public and the bar its willingness to consider legal issues independent of United States Supreme Court precedent.

A state court which uses the *Dual Reliance Method* will examine a constitutional issue under the State and Federal Constitutions and tie its decision to both documents. *See e.g. State v. Badger*, 450 A.2d 336 (Vt. 1982) in which the Vermont Supreme Court analyzed the United States and Vermont constitutions to determine the admissibility of certain evidence in a murder case. The court ruled that the defendant's first confession was involuntary under the Vermont *Constitution* and had to be suppressed. His second confession also had to be suppressed under the Vermont *Constitution.* However, during the first confession, the police noticed blood stains on the defendant's shoes and the court, relying on the United States and Vermont Constitutions, upheld the admissibility of the shoes.

Courts using the *Supplemental Method* of analysis will first consider whether a certain result is dictated by the United States *Constitution.* If so, the issue is decided without consulting the state constitution. However, if the Federal *Constitution* does not protect the right involved or is unclear or unsettled, or the state constitution specifically encompasses the asserted right or contains textual differences from the Federal Constitution, the state court will rely on the state

constitution to resolve the legal issue in question.

An example of the *Supplemental Method* of analysis can be seen in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808(1986) in which the Washington Supreme Court declined to follow *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). In Gunwall, the court held that the use of pen registers violated the Washington *Constitution*. The Washington Supreme Court noted that Smith did not safeguard the right to privacy specifically delineated in the Washington *Constitution*. The court also noted that there were significant differences in the textual language of the 4th Amendment and the applicable section of the Washington *Constitution*. The Washington Supreme Court also based its decision on independent consideration of the state interests involved and a review of decisions by the appellate courts of other states.

Under the *Primacy Method* of analysis, the state court will first analyze a constitutional violation under state law. If the state constitution protects the litigant's rights, then analysis under the Federal *Constitution* is unnecessary. A state court will independently interpret the applicable provisions of its own constitution to comport with state history and state law. However, if the state constitution does not protect the asserted right, then the court will analyze the issue under the United States *Constitution*. That analytical method was utilized in *State v. Cadman*, 476 A.2d 1148 Me. 1974).The Maine Supreme Court first considered whether the defendant's speedy trial claim was meritorious under the Maine *Constitution*. Finding no state constitutional law violation, the Court then considered the issue under the Federal *Constitution* and also found no violation. *Cadman* is important for its recognition that since decisions of the United States Supreme Court express minimum rights required by the Federal *Constitution*, policy considerations and particular state interests may require a state to depart from federal precedent even where there are no textual or historical differences between the federal and state constitutional provisions.

In *State v. Gunwall, supra*, 720 P.2d at 812-813, the Washington Supreme Court identified six non-exclusive, neutral criteria which are relevant to determining whether a state constitution should be interpreted as granting broader rights than the United States *Constitution*. Those criteria include:textual language of the state constitution; significant differences in the texts of parallel provisions of the federal and state constitutions;state constitutional and common law history;pre-existing state law; differences in the structure (purposes) between the federal and state constitutions; and matters of particular state interests or local concern.

The foregoing criteria provide an analytical framework from which the state courts can articulate a reasoned approach to deciding legal issues as a matter of state constitutional law. They are especially important where a state court declines to follow federal precedent because they provide the state court with an articulable basis for insulating its decision from review by the United States Supreme Court. Thus, it's worth examining several of those criteria.

With regard to the textual language of the state and federal constitutions, a state constitution may provide an explicit right not recognized by the federal constitution. In such instances, it is a relatively simple matter for a state to develop its own body of constitutional law unimpeded by precedents established by the United States Supreme Court. But even if the federal and state constitutional provisions are identical or substantially similar, the states are not required to automatically interpret their constitutions as the United States Supreme Court would interpret the Federal *Constitution*. The freedom afforded the states in this regard is an integral part of federalism and manifests a respect for their individual sovereignty. *See People v. Brisendine*, 119 Cal.Rptr. 315, 531 P.2d 1099, 1112-1113 (1975). As the Minnesota Supreme Court recognized in *State v. Hamm*, 423 N.2d 379, 382 (Minn. 1988) a decision of the United States Supreme Court which interprets an identical provision of the federal constitution may be persuasive but "it should not automatically be followed or a separate constitution will be of little value."*Brisendine* and *Hamm* are examples of where state courts declined to follow the precedent of the U.S. Supreme Court precedent even though the language of the state and federal constitutions were identical.

Significant differences between the language of the state and federal constitutions can also affect the result of a particular case. For example, in *State v. Fain*, 94 Wash.2d 387, 617 P.2d 720 (1980) the defendant was given a mandatory life sentence as a habitual criminal. He had been convicted of three felonies involving bad checks totalling less than $470. As noted above, Washington uses the *Supplemental Method* of analysis and the court first considered the result required by the United States *Constitution*. The Washington Supreme Court, relying on *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), concluded that the defendant's sentence did not violate the 8th Amendment. However, the sentence did violate the Washington *Constitution* which is identical to Section 17 of the Kentucky *Constitution* in that it prohibits cruel punishment. The Washington *Constitution*, like the Kentucky *Constitution*, says nothing about unusual punishment. Since the language of the Washington *Constitution* was substantially different from the 8th amendment, the Washington Supreme Court was not bound to follow U.S. Supreme Court cases interpreting the 8th Amendment.

State v. Neville, 346 N.2d 425 (S.D. 1984) offers another example of how the differences between the language of the United States *Constitution* and the state constitution can affect the result of a case. In *Neville*, the U.S. Supreme Court reversed the South Dakota Supreme Court and held that the 5th Amendment was not violated by admitting evidence of the defendant's refusal to submit to a blood-alcohol test. On remand, the South Dakota Supreme Court held that under the South Dakota *Constitution*, the defendant's refusal to submit to the blood-alcohol test was evidence of a testimonial nature and was within the protection of the privilege against self-incrimination.

The South Dakota Supreme Court in *Neville* recognized a distinction between the language of the 5th Amendment and South Dakota's constitutional counterpart. The 5th Amendment provides that no person shall be compelled to be a witness against himself. The South Dakota *Constitution*, like Section 11 of the Kentucky *Constitution*, provides that no person shall be compelled to give evidence against himself. The South Dakota court noted that other courts found that the phrase "to give evidence against himself" is intended to mean something different and broader than the phrase "to be a witness against himself". *Neville*, 346 N.W.2d at 428. Thus, *Fain* and *Neville* may be very useful in trying to persuade our state courts to speak with an independent voice on the interpretation of Sections 11 and 17 of our *Constitution* and pursue a path that is different from that taken by the United States Supreme Court in interpreting the 5th and 8th Amendments. Another criteria that should be considered is the strength of the analysis and the legal reasoning underlying a decision of the United States Supreme Court. For example, in *Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985), the Massachusetts Supreme Judicial Court declined to follow*Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76L.Ed.2d527(1983). The Massachusetts court considered the *Gates* standard to be too vague to be conducive to consistent application. Consequently, the court found that the *Gates*

test did not comport with the probable cause standard required by the Massachusetts *Constitution* and retained the standard enunciated in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *United States v. Spinelli*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) for determining when an informant's information was sufficient to establish probable cause for a search warrant. Upton is but one indication of the policy considerations and interests of a particular state that might be relevant in the determination of whether to follow the precedent established by the United States Supreme Court.

Another issue considered to be a matter of particular state concern is the death penalty. *See e.g. State v. Gerald*, 113 N.J. 40, 549 A.2d 792 (1988) in which the New Jersey Supreme Court expressed its opinion that the death penalty is a matter of an individual state's concern and therefore declined to follow *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

The development of state constitutional law is becoming more pronounced as state courts indicate their willingness to rely on their own constitutions and, with greater frequency, decline to follow the precedent established by the United States Supreme Court. A sample of state cases which reject U.S. Supreme Court precedent include *State v. Jackson*, 102 Wash.2d 432, 688 P.2d 136 (1984) declining to follow *Illinois v. Gates, supra*; *State v. Dixon* 307 Or. 195, 766 P.2d 1015 (1988) declining to follow *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); *State v. Novembrino*, 105 N.J. 95, 519 A.2d 820 (1987) declining to follow good faith exception of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *State v. Albrecht*, 465 N.W.2d 107 (Minn.App. 1991) decling to follow *Leon; State v. Boland*, 115 Wash.2d 571, 800 P.2d 1112 (1990) declining to follow *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988); *Bryan v. State*, Del.Supr., 571 A.2d 170 (1990) declining to follow *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)and *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991) declining to follow *Leon*. These cases illustrate a growing trend by the states to develop state constitutional law and not blindly follow the lead of the United States Supreme Court.

Kentucky courts have also demonstrated a willingness to rely on our *Constitution* to resolve legal issues. For example, in *Commonwealth v. Elliott*, Ky.App., 714 S.W.2d 494 (1986) and *Commonwealth v. Shelton*, Ky., 766 S.W.2d 628 (1989) the courts, on the facts of those cases, declined to apply the good faith exception of *United States v. Leon, supra*. In *Benge v. Commonwealth*, Ky., 321 S.W.2d 247 (1959) which involved a search incident to an arrest, the court declined to follow *Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1946) and *United States v. Rabinowitz*, 339 U.S.56, 70 S.Ct. 430, 94 L.Ed. 653 (1950). Although the former Court of Appeals noted that the language of the 4th Amendment and Section 10 of the Kentucky *Constitution* do not materially differ, the Court found the dissenting opinions in *Harris* and*Rabinowitz* were a better reasoned analysis of the 4th Amendment and the Kentucky court was inclined to follow that rationale as a matter of Kentucky constitutional law under Section 10. Indeed, the Court in *Benge*, 321 S.W.2d at 250, noted that "History, before and after the adoption of the Fourth Amendment, upon which Section 10 of Kentucky's *Constitution* is based, has shown good police intentions to be inadequate safeguards for certain fundamental rights of man." This recognition certainly militates against Kentucky's adoption of a good faith exception to the warrant requirement. Thus, there is precedent for Kentucky courts to reject decisions of the U.S. Supreme Court.

More recently, in *Ingram v. Commonwealth*, Ky., 801 S.W.2d 321, 323 (1990) the Kentucky Supreme Court, for purposes of double jeopardy analysis, indicated its adherence to the doctrine that "a single impulse or a single act constitutes but one offense." The court noted that "This view of Section 13 is obviously broader than the included offense approach of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)] and KRS 505.020."

In *Commonwealth v. Johnson*, Ky., 777 S.W.2d 876, 8801989), the Kentucky Supreme Court refused to blindly adhere to the United States Supreme Court's 4th Amendment precedent. "We are not willing ... to recognize exceptions [to the 4th Amendment] so broad as to render meaningless the right secured by the *Constitution* of Kentucky." *Ingram* and *Johnson* reflect the Kentucky Supreme Court's willingness to base decisions solely on the Kentucky *Constitution*. Criminal defense attorneys must seize this initiative and aggressively urge our state courts to continue in that direction. The United States Supreme Court has embarked on a course that is steadily decreasing the protections offered to citizens by the Federal *Constitution*, our response as criminal defense attorneys must be to ensure that the individual rights and freedoms which the people cherish continue to be fully protected by the Kentucky *Constitution*.

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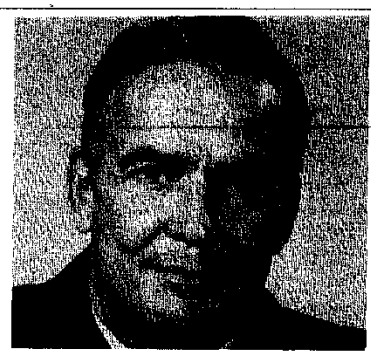


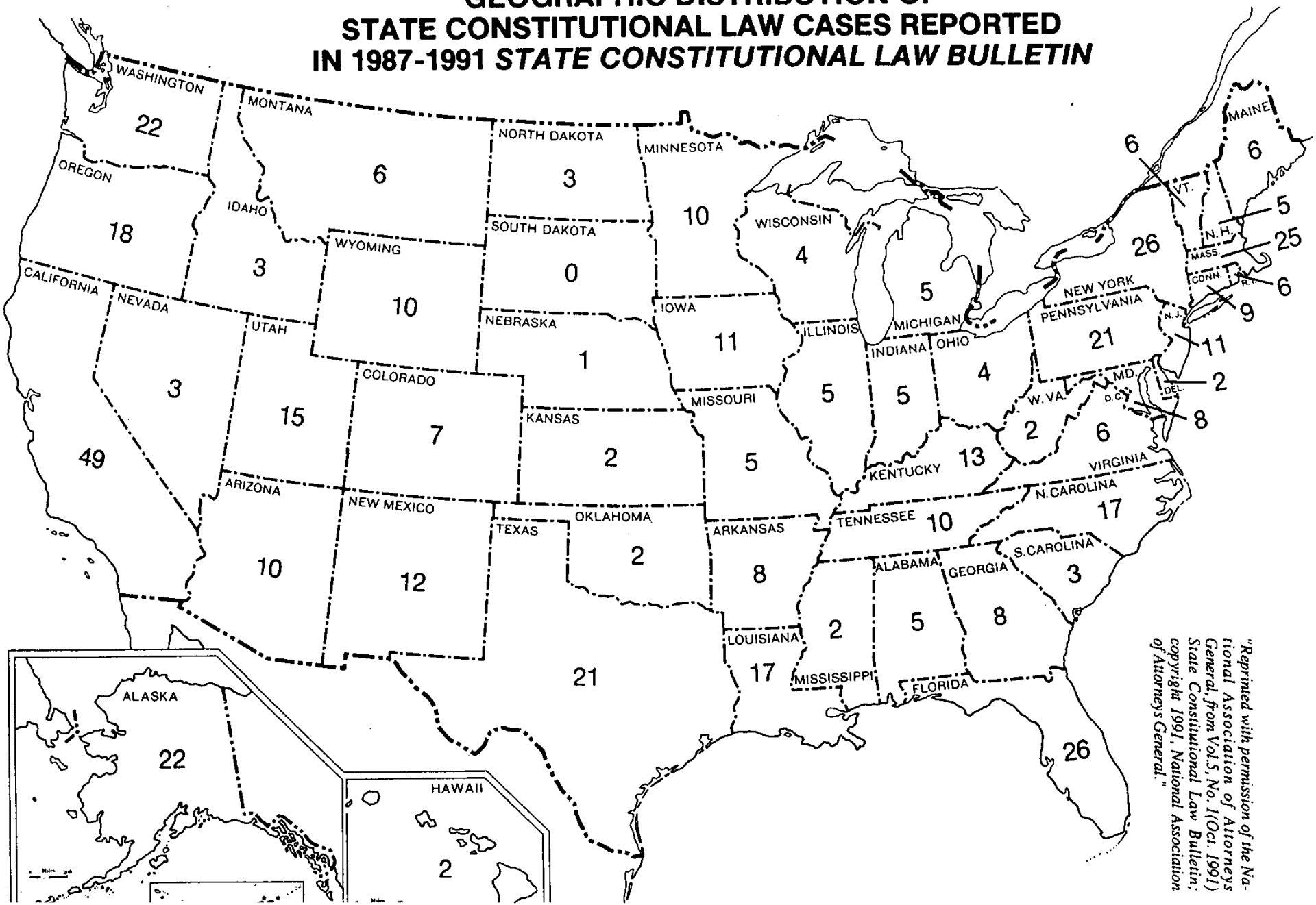
Chief Justice

Robert F. Stephens

No document ever written by man, save only the Holy Bible, is more important to mankind and its eternal quest for freedom than the Bill of Rights. No profession has ever had a heavier responsibility than that of the legal profession's duty to advocate and protect the rights guaranteed thereunder.

Every citizen-even those not specifically involved is the direct beneficiary of this great document. The bell of freedom would never ring without the Bill of Rights.

GEOGRAPHIC DISTRIBUTION OF STATE CONSTITUTIONAL LAW CASES REPORTED IN 1987-1991 *STATE CONSTITUTIONAL LAW BULLETIN*



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STATE CONSTITUTIONS & THE CRIMINAL DEFENSE LAWYER:
A Necessary Virtue

John H. Hingson III

I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be unwise these days not also to raise state constitutional questions.

William J. Brennan, Associate Justice, United States Supreme Court[1]

Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution, except to exert federal limitations, should be guilty of malpractice.

Robert E. Jones, Associate Justice, Oregon Supreme Court[2]

The United States Supreme Court, as presently constituted, has made it abundantly clear that it is not interested in preserving the rights embodied in the federal charter. Consequently, it is up to the lawyers litigating cases in the state courts to become state constitutional scholars and to press state constitutional law claims.

John Henry Hingson, III, A Country Lawyer from Oregon City, Oregon[3]

INTRODUCTION

A LOOK BACKWARD

I decided to go to law school in my last year of college. The life of Clarence Darrow was the inspiration for my desire to become a defender of the downtrodden and defenseless. His spirit was with me when, in 1968, I began the study of law at the University of Texas.

I took as many criminal law courses as were available. One of my favorites was Constitutional Criminal Procedure. The professor— an "adjunct"—was a bald-headed man who practiced law in Austin. He taught to students the very law that he worked with every day. Frank Maloney later became the President of NACDL.

Those were exciting times to study constitutional criminal law. The names of the cases I remember to this day: *Miranda v. Arizona, Gideon v.Wainwright, Escobedo v. Illinois, Sandford v. Texas, Mapp v. Ohio, Massiah v. United States*. The Warren Court had rewarded innovative legal theories by accepting them and erecting a framework of American Constitutional law—a skeleton, if you will, that Clarence Darrow would have been proud to see constructed. The law had stepped forward and offered its helping hand to the weak and defenseless. Imagine, if you can, the dreams of an idealistic law student about to step forward into a legal system like that. Perhaps I would be able to take part in helping develop yet another earth-shaking precedent! And then Richard Nixon was elected President. And the Walls Came Tumbling Down.

AND THE WALLS CAME TUMBLING DOWN

The law has changed in America. The pillars of freedom erected by the Warren Court were not stout enough to withstand the eroding effects of the storm created by subsequent judicial appointments. Conservative and arch-conservative judges have put in place a climate that has, and will continue to have, relentlessly eroding effects on those beautiful pillars of freedom. It seems as if the walls of Jericho are about to come tumbling down.

The doors of the federal court are shut to state prisoners whose convictions were based on illegal search and seizure. *Stone v. Powell*, 428 U.S. 465 (1976). The "right of privacy" does not protect Americans from being spied upon by government agents from the sky. *California v. Ciraolo*, 476 U.S. 207 (1986). If an American lives in a houseboat parked on "navigable water," federal police may search the aquatic "castle" from bow to stern without the need for a search warrant. *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983). If a citizen places a long distance call, government agents may use electronic gadgetry to find out the telephone number called—without the need of a warrant. *Smith v. Maryland*, 442 U.S. 735 (1979). If a citizen uses a bank for financial transactions, federal agents may obtain those financial records from the bank without the need for a warrant. *States v. Miller*, 425 U.S. 435 (1976). If a lawyer is told by the police they will not interrogate her client, the police are permitted to break their promise, and the confession thereby obtained is admissible evidence. *Morgan v. Burbine*, 475 U.S. 412 (1986). If a poor person is arrested for drunken driving where the maximum punishment is 6 months in jail, the law may deny that person both a lawyer and a jury trial. *Banton v. City of North Las Vegas, Nevada*, 489 U.S. 538 (1989). No Justice of the United States Supreme Court even bothers to ask the question in a dissenting opinion: "Is that a fair battle in the War On Drunk Driving?" And now, a retained lawyer's fees may be taken away, as part of the price we are paying for this horrible "War On Drugs." *United States v. Monsanto*, 109 S.Ct. 2657 (1989). Juveniles and mentally retarded defendants may be executed.

If compassion was a hallmark of the Warren Court, cruelty seems to be a hallmark of the Rehnquist Court. The Rehnquistion is on.

A LOOK FORWARD

There is a safe harbor from the storm that has been ravaging federal constitutional rights. State courts are permitted to reject the miserly view of the United States Supreme Court when it comes to constitutional rights. Criminal defense lawyers who practice in state courts must educate themselves about state constitutional litigation if they are to provide adequate assistance of counsel to their clients. Indeed, it has been suggested that the failure to raise state constitutional law claims in state court amounts to legal malpractice. *State v. Jewett*, 500 A.2d 233, 234 (Vt. 1985).

Unfortunately, there is no casebook published on state constitutional law. Few

law schools offer courses in state constitutional law. However, there are over 170 law review articles concerning this "hot topic."[4]

HOW TO "DO" STATE CONSTITUTIONAL LAW

If you live in a state where a law school teaches a course in state constitutional law, audit the course. If there are no such courses taught in your state, contact the deans and suggest the curriculum be expanded to include such courses. If there are no courses at the law schools available, what follows is a short course in self-education. First of all, read your state's constitution. Then, with the United States *Constitution* beside your state constitution, read it again. Compare the language between the two. The difference in the language of the two documents may become significant.

Let's digress for a little bit of history. State constitutions existed before the United States *Constitution*. The federal *Bill of Rights* was based, in large part, on the constitutions of the colonies and the states.[5] The state constitutions were truly "first in time."

Many states that were not colonies or states way back then (like Oregon) "borrowed" or copied the language from other state constitutions for use in their own constitutions. The "lending" state constitution may itself have "borrowed" language from yet another state constitution, and so on. The states did not borrow language from the United States *Constitution*. The "genealogy" of state constitutional provisions can be important in establishing "principled" reasons why a state provision should compel a result different from an application of the federal constitution. For instance, if a provision of the Oregon *Constitution* was "borrowed" from the Indiana *Constitution*, which itself was "borrowed" from the Massachusetts *Body of Liberties*, and the Massachusetts provision was judicially interpreted in favor of a rights claimant, a persuasive argument may be made that the Oregon court should reject the federal rule under a seemingly identical provisions.

Let's turn back to the process of self-education about your state constitution. Find out if any law review articles have been written about your state constitution. Make a quick read of them. This approach may help you to get up to speed rapidly. Looking under West's Key Number 18 under the heading Constitutional Law will reveal your state court interpretations of its constitution. Of course, shepardizing a particular provision of your constitution will provide guidance for your arguments. If you feel you live in a state where your supreme court will react negatively to state constitutional law arguments, pay particular attention to old law review articles. Sometimes "conservative" judges are also traditionalists.

Now that you have a bit of a "feel" for your own state constitution, let's turn to how to deal with a particular problem. As our first example,[6] we will look at a way to approach arguing that there should be no "good faith" exception (*a la United States v. Leon*) in your state's constitutional search and seizure jurisprudence. As we work through this problem, we will use a method of analysis that can be used each time we approach a state constitutional law issue.

HOW TO ANALYZE & RESEARCH A STATE CONSTITUTIONAL LAW ISSUE

Read the State Cases

In the "good faith" example, read the search and seizure provision(s)[7] of the state constitution; then look under West's Key Number 18 under the heading Constitutional Law in your state digest for state court interpretations of the state constitution.

Determine the Source

As explained earlier, the state constitutional provision undoubtedly was not "copied" from the federal bill of rights. If the source of your state constitutional search and seizure provision was borrowed from a state that has interpreted that provision to contain no "good faith" exception, your pulse should quicken. There are numerous books that can help you find out where your state constitutional provision originated.[8] Some of the very old law review articles may explain the debates that raged over the adoption of the search and seizure clause. Newspaper articles published at the time of constitutional conventions, you may find helpful materials in your state's historical society.

Compare Other States Constitutions and Interpretive Case Law

Find out what other states have similar clauses in their constitutions.[9]

Be creative. It is up to you to attempt to identify and explain criteria for determining when and why to invoke your state constitution as an "independent and adequate state ground." Few courts despite the anti-liberty decisions of the United States Supreme Court as much as we do. That is why we have to work so hard to give our state courts sound reasons for rejecting federal constitutional decisions. Courts have looked at numerous criteria in deciding whether to follow federal precedent, of which the following are two examples:[10]

Sate v. Gunwall, 720 P.2d 808 (Wash. 1986):
a. Textual language
b. Differences in the texts
c. Constitutional history
d. Pre-existing state law
e. Structural differences
f. Matters of particular state or local concerns

State v. Hunter, 450 A.2d 952, 965-67 (N.J. 1982) (Handler, J., concurring):

a. Textual language
(1) Distinct provision
(2) Phrasing of the provision
b. Legislative history
c. Pre-existing state law
d. Matters of particular state interest or concern
e. State traditions
f. Public attitudes

When you compare other state court decisions, determine if their reasoning can be of assistance to you in an attempt to make an argument that your state should do likewise. For our example, we will look at other state court decisions that have rejected *United States v. Leon*.

The "good faith" exception. As we all know, *United States v. Leon*, 468 U.S. 897 (1984), holds that the Fourth Amendment exclusionary rule does not bar evidence obtained by police officers acting in reasonable reliance on a search warrant issued by a neutral and detached magistrate but later found to be invalid for lack of probable cause. This case has dramatically changed motion practice in federal court.

Some state courts have decided not to follow *Leon* as a matter of state constitutional law. In *People v. Bigelow*, 488 N.E.2d 451, (N.Y. 1985), the court refused to admit evidence seized by police acting in good faith reliance on a search warrant later declared invalid for lack of probable cause. New York's highest court based its rejection of on the ground that a good faith exception encourages police lawlessness. As the court stated:

> [I]f the People are permitted to use the seized evidence, the exclusionary rule's purpose is completely frustrated, a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future.[11]

New Jersey quickly followed its sister state's lead and similarly rejected the "good faith" exception in *State v. Novembrino*, 519 A.2d 820 (N.J. 1987). Justifying its departure from the federal rule based upon "the privacy rights of [its] citizens and the enforcement of [its] criminal laws," *Id*. at 850, New Jersey's highest court criticized *Leon* the rule on several grounds. First, *Leon* encourages police officers to be less meticulous in their search warrant applications. Second, a "good faith" exception reduces respect for and compliance with the probable cause standard. Finally, a "good faith" exception dilutes the strength of the constitutional protection against unreasonable and unwarranted search and seizure. *Id*. at 853-54.[12]

In *State v. Carter*, 370 S.E.2d 553 (N.C. 1988), North Carolina's highest court flatly rejected *Leon* and held that the exclusionary rule is an indispensable part of the North Carolina *Constitution*. The court criticized the "cost/benefit" analysis employed by the United States Supreme Court in fashioning a "good faith" exception as simply swallowing the exclusionary rule. *Id*. at 557. The court embraced the "judicial integrity" rationale of the exclusionary rule, and rejected the notion of a civil remedy against the police as unworkable. The court quoted Sen. Sam Ervin in tracing the history of the "right to be let alone" from Biblical times (900 B.C.)[13] through the English common law to the present.

In a pair of cases, *State v. Marsala, 579 A.2d 58 (Conn. 1990), and State v. Morrissey*, 577 A.2d 1060 (Conn. 1990), Connecticut's highest court similarly has rejected the "cost/benefit" analysis employed by the United States Supreme Court. The Connecticut court identified the negative effects a good faith exception has on the warrant issuing process; *Viz*., (1) police "judge shopping" for "less than exacting magistrates; (2) a message to magistrates that they "need not take great care in reviewing warrant applications"; (3) the likelihood that overburdened trial and appellate courts would take the time to write advisory opinions declaring warrant applications flawed when it is just as easy to let the evidence in under a good faith exception. The court concluded that "a good faith exception does not exist under Connecticut law."[14]

Various states have dealt with the issue of a good faith exception in various ways[15] and some excellent law review articles have been written about the subject of state courts' rejection of *Leon*.[16]

Finally, persuasive arguments about why it is unworkable, illogical, and wrong as a matter of federal law can be found in the law review articles criticizing *Leon* itself.[17]

SUBSTANCE AND PROCEDURE: STATE-BASED REMEDIES AND THE "PLAIN STATEMENT" RULE

Let us return to the language of the North Carolina Supreme Court in *State v. Carter, supra*, as an introduction to the next two topics for discussion: (1) a state constitutionally based exclusionary rule; and 2) the "plain statement" rule of *Michigan v. Long*.[18] Of particular interest was North Carolina's looking to its own constitution for a textual source for an exclusionary rule undilutable by "good faith." The court stated:

> Article I, section 18 of our state constitution directs our courts to provide every person with a remedy for injury. We will not abandon a proven remedy in favor of one which, because its ineffectualness is patent beforehand, mocks this constitutional guaranty. *Carter* at 560.

This passage may be persuasive indeed for crafting an argument against a "good faith" exception and in support of a state constitutionally based exclusionary rule *a la Mapp v. Ohio*.

Many state constitutions have a remedy clause that may have the same origins as Article I, section 18 of the North Carolina *Constitution*, which provides: "All courts shall be open; every person for an injury done him in his lands, goods, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." It was upon this provision that the *Carter* court concluded that exclusion of evidence was required irrespective of "good faith." Now compare Article I, section 10, of the Oregon *Constitution*, which provides: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation." It is no accident that those provisions seem so similar. They are based upon the ancient common law *maxim ubi jus ibi remedium* (there is no wrong without a remedy).

State constitutional remedy clauses are clearly not to be confused with "due process" clauses.[19] Oregon borrowed its remedy clause from the Indiana *Constitution* of 1851. The 1776 Delaware *Declaration of Rights* provision was the model for the Indiana clause. The clause from the Delaware *Declaration* was modeled after Chapter 39 of none other than the *Magna Carta*. Maryland's and North Carolina's *Constitutions* of 1776 repeated Chapter 39 of the *Magna Carta* virtually verbatim.[20]

If you find language in your state constitution that derives from Chapter 39 of the *Magna Carta*, or from the 1776 Delaware *Declaration of Rights*, or from the Indiana *Constitution* of 1851, you may have found the right legal ammunition for making a "principled" argument for a state-based exclusionary rule.[21]

The "Plain Statement" Requirement. Let us now turn to a procedural requirement that must be complied with, lest all your hard work go for naught. The United States Supreme Court does not take kindly to state courts disagreeing with its rules. Consequently, it erected, in *Michigan v. Long*, the "plain statement" rule, which is a trap for the unwary criminal defense lawyer and/or state court judge.

It is not enough for a state court to merely say that it is "relying on" its state constitution in reaching its decision, for the United States Supreme Court *presumes* that a state court constitutional decision rests upon federal constitutional grounds unless the state court explicitly complies with the "plain statement" requirement. A state court must:

> Make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.
>
> If the state court decision indicates clearly and expressly that it is alternatively based on *bona fide* separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.[22]

Independent—but hardly adequate. The United States Supreme Court meant what it said in *Michigan v. Long*. For example, in a case in which the Montana Supreme Court had stated times its decision was based upon state constitution as well as federal constitutional grounds, the U.S. Supreme Court nevertheless *vacated* the judgment (instead of sending the case back to the state court asking it to certify the basis of its holding as in *Herb v. Pitcairn*, 324 U.S. 117 (1945)). *Montana v. Jackson*, 460 U.S. 1029 (1983). This was truly unfortunate for Montana's Mr. Jackson. His attorney had convinced the Montana Supreme Court that evidence of refusal to take a breath test in a DWI case violated the Montana self-incrimination clause. On remand, however, the constituency of the Montana Supreme Court had changed, and Jackson lost on state constitutional grounds. If the Montana Supreme Court had initially complied with the "plain statement" rule, the United States Supreme Court would never have had the

opportunity to snatch defeat from the jaws of victory.

Don't think that just because the "plain statement" requirement was handed down in 1983 that your state supreme court is aware of the requirement, or that it complies with the requirement. In *Kentucky v. Stincer*, 482 U.S. 730 (1987), the Court reversed (without remanding for further proceedings not inconsistent with the opinion) a decision of the Kentucky Supreme Court that had ruled in favor of a criminal defendant on a confrontation issue. The Kentucky Supreme Court decision had stated that it based its decision on the Kentucky *Constitution*, but the opinion failed to contain the "plain statement" required by *Michigan v. Long*. On remand, the Kentucky Supreme Court ruled it was unable—due to the outright reversal—to decide the case under the Kentucky *Constitution*.[23] The failure of state courts to comply with the "plain statement" rule continues, apparently unabated. In *Pennsylvania v. Muniz*, 110 S.Ct. 2634 (1990), the Court noted that the court below, while citing the Pennsylvania *Constitution*, did not comply with the "plain statement" rule. Accordingly, we now have a rule—that applies throughout the nation—that a videotape of a booking and testing procedure of a DWI arrestee is admissible insofar as it shows slurred speech and incriminating comments made while trying to perform sobriety tests and answering routine booking questions. The defendant had won in the court below in *Muniz*. But because the Pennsylvania Superior Court failed to comply with the "plain statement" rule, the United States Supreme Court was able to turn a defense victory into a governmental coup.

Defense counsel's briefing papers—in the trial court as well as in the appellate courts—should contain **"Plain Statement Boilerplate"** as models for the court to employ in rendering its decision. Two excellent examples of state supreme courts complying with the "plain statement" rule follow.

> Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines.
>
> *State v. Kennedy*, 295 Or. 260, 267, 666 P.2d 1316 (1983).

> Because we decide this case on adequate and independent state constitutional grounds, we do not reach or decide the question of whether the challenged search violated defendant's fourth and fourteenth amendment rights under the Federal Constitution. The federal cases cited or discussed are being used only for the purpose of guidance and they do not compel the result that this Court has reached. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983); *Jackson v. Housing Authority*, 321 N.C. 584, 364 S.E.2d 416 (1988).
>
> *State v. Carter*, 370 S.E.2d 553, 555 (N.C. 1988).

You should (*must*) request the court to adopt such language in its opinion. Without a "plain statement," every state constitutional defense victory is in jeopardy of being undone in Washington, D.C.

IN SUM

This is not just the ranting and raving of some law professor-type of lawyer. At last glance, over half of the state constitutional defense victories surveyed did not contain a "plain statement." Such victories are too hard to come by to be lost for failing to comply with the "technicality" of *Michigan v. Long*.[24] And harken to the words of Justices Brennan and Jones, *supra*, lest you find yourself litigating/defending yourself in an ineffective assistance of counsel action or malpractice claim.

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FOOTNOTES

[1]Brennan, *State Constitutions and the Protections of Individual Rights*, 90 Harv. L. Rev. 498, 502 (1977).

[2]*State v. Lowry*, 667 P.2d 996 (Or. 1983) (Jones, J., specially concurring).

[3]J. Hingson, *How to Defend a Drunk Driving Case* 4-3 (4th ed. 1989).

[4]Citations to these 170 articles are collected, together with over two hundred state constitutional case citations, in J. Hingson, *supra*, at 4-3. I apologize for citing my own book, but it is the only show in town.

[5]Linde, *Things First: Rediscovering State's Bills Of Rights*, 9 U. Balt. L. Rev. 379, 381 (1980).

[6]NACDL Editor's note: This article is the beginning of a regular bimonthly column on State Constitutional Rights.

[7]The plural is used for a reason. Some state constitutions not only have language similar to the Fourth Amendment, but also have a separate provision creating a right of privacy.

[8]*See* B. Schwartz, *The Bill Of Rights:Documentary History* (2 Vols. 1971); W. Swindler, *Sources And Documents Of U.S. Constitutions* (11 Vols. 1977); *The American Bench. Judges of the Nation. Bills and Declarations of Rights Digest* 1985-86 (Forster Long 3d ed. 1986) (this book is about the backgrounds of judges in America. The back part of the book has a section on state constitutional law.)

[9]For help in this task, see *Constitutions of the United States: National & State* (F. Grad 2d ed. 1982) (Oceana Publications, 6 vols.); *Constitutions Of The United States: National & State— Fundamental Liberties & Rights, A 50-State Index* (B. Sachs ed. 1980).

[10]*See also State v. Simpson*, 622 P.2d 1199, 1217 (Wash. 1980) (Horowitz, J., dissenting); *People v. Teresinski*, 640 P.2d 753, 758 (Cal. 1982); Comment, *Developments In The Law: The Interpretation Of State Constitutional Rights*, 95 Harv. L. Rev. 1326 (1982).

[11]*Id*. at 458. NACDL members should take particular pride in the *Bigelow* decision. The NACDL *Amicus* Committee, then chaired by Past President Ephraim Margolin, filed a brief in *Bigelow*. Written by Mark Mahoney, Vice-Chair of our current State Constitutional Rights Committee, the 90-page brief contains a 10-year study of search warrants in Buffalo City Court showing the number of mistaken searches to be 15%-25% of total. A copy of this brief is available from the NACDL BriefBank.

[12]NACDL member Joseph A. Hayden, Jr. filed an *amicus* brief on behalf of the Association of Criminal Defense Lawyers of New Jersey. ACDL-NJ is now an NACDL affiliate.

[13]*See Micah 4:4.*

[14]Connecticut NACDL member William F. Dow III authored a marvelous brief on behalf of the defendant in *Morrissey*. The brief is available through the NACDL BriefBank.

[15]*See People v. Sundling*, 395 N.W.2d 308 (Mich. App. 1986) (rejecting *Leon*); *Dees v. State*, 722 S.W.2d 209 (Tex. Crim. App. 1986) (rejecting on statutory grounds); *Lighter v. State*, 743 S.W.2d

568 (Tex. Crim. App. 1987) (statute amended in light of *Leon*); *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985) (rejecting *Leon* on statutory grounds); *State v. Vanhaele*, 649 P.2d 1311, 1315, 1313 (Mont. 1982) (rejecting good faith exception and adopting judicial integrity rationale); *People v. Grawien*, 367 N.W.2d 816 (Wis.1985);*Stringer v. State*, 491 So.2d 837 (Miss. 1986) (Robertson, J., concurring); *Commonwealth v. Melilli*, 555 A.2d 1254 (Pa. 1989) (state constitution requires warrant for installation of pen register, rejecting *Smith v. Maryland*; whether state constitution contains a "good faith" exception left open).

[16]*See Note, The Good Faith Exception to the Exclusionary Rule: The Latest Example of "New Federalism" in the States*, 71 Marq. L. Rev. 166 (1987);*Note , Criminal Law—Exclusionary Rule—North Carolina Constitution Does Not Contain A Good Faith Exception*, 102 Harv. L. Rev. 724 (1989); *Note, Criminal Procedure—Search and Seizure—New Jersey Supreme Court Rejects a Good-Faith Exception to the Exclusionary Rule*, 19 Rutgers, L.J. 197 (1987).

[17]*See, e.g.*, LaFave, *"The Seductive Call of Expedience": United States v. Leon, Its Rationale and Ramifications*, 1984 U. Ill. L. Rev. 895.

[18]The *Carter* court complied with the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983), with classic precision.

[19]*See* A.E. Howard, *The Road From Runnymede* (1968); Linde, *Without "Due Process,"* 49 Or. L. Rev. 125 (1970); Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165 (1984); Comment, *State Constitutions' Remedy Guarantee Provisions Provide More Than "Lip Service" to Rendering Justice*, 16 U. Tol. L. Rev. 585 (1985).

[20]Linde, *supra* note 19, 49 Or. L. Rev. at 137-38.

[21]For further assistance in researching this issue, *see State v. Davis*, 666 P.2d 802 (Or. 1983); *State v. Brown*, 543 A.2d 750 (Conn. App. 1988); *Commonwealth v. Ford*, 476 N.E.2d 560 (Mass. 1985); Note, *The Newly Discovered Exclusionary Rule of Article 14 of the Massachusetts State Constitution*, 20 Suffolk U.L. Rev. 617 (1986); Comment, *The Future of the Exclusionary Rule and the Development of State Constitutional Law*, 1987 Wis. L. Rev. 377 (1987); Note, *Criminal Law/ Constitutional Law—The Exclusionary Rule Dilemma in Florida (Bernie v. State*, 524 So.2d 988 (Fla. 1988), 17 Fla. St. U.L. Rev. 177 (1989).

[22]*Michigan v. Long*, 103 S.Ct. 3469, 3476 (1983).

[23] *See also Colorado v. Bertine*, 479 U.S. 367 (1987).

[24] *See* Comment, *The Use of State Constitutional Provisions in Criminal Defense After Michigan v. Long*, 65 Neb. L. Rev. 605 (1986); Note, *Ohio v. Johnson: The Continuing Demise of the Adequate and Independent State Ground Rule*, 57 U. Colo. L. Rev. 395 (1986).

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PLAIN STATEMENT BOILERPLATE

In the Defendant's Motion To Suppress, reliance is placed upon Oregon statutes and the Oregon *Constitution* as well as the United States *Constitution*, in that order. This is the "proper sequence" in which to analyze legal issues in Oregon. *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123 (1981); Carson, *"Last Things Last": A Methodological Approach To Legal Argument In State Courts*, 19 Willamette L.J. 641, 643-645 (1983).

The temptation to treat this Motion To Suppress as "just another *Miranda*" issue will be almost overwhelming. But, that temptation must be resisted, because it is this Court's duty to consider and resolve our Oregon law claims *prior* to any analysis of constitutional questions (such as the application of *Miranda*) arising under the Fourteenth Amendment of the federal constitution. The rule has been expressed that all questions of state law be considered and disposed of before reaching a claim that this state's law falls short of a standard imposed by the federal constitution on all states. *State v. Kennedy*, 295 Or. 260, 262, 666 P.2d 1316 (1983).

It is not enough that this court consider and resolve all state law issues before reaching federal constitutional questions. In deciding state law issues, care must be taken that this court make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

If the state court decision indicates clearly and expressly that it is alternatively based on *bona fide* separate, adequate, and independent grounds, we, of course, will not undertake to review the decision. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983).

See also, Collins, *Plain Statements: The Supreme Court's New Requirement*, 70 A.B.A.J. 92-94 (1984).

When defense counsel cites federal opinions in analyzing a provision of Oregon law in this case, we do so because we find the views expressed persuasive, not because we claim the federal opinions bind this court on purely state law issues. Likewise, when this court announces its decision, it should make it clear that when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines. *State v. Kennedy*, 295 Or. 260, 267, 666 P.2d 1316 (1983).

The failure of the court to make a "plain statement" that its decision is based solely on state law and that federal opinions cited in that discussion are cited only for purposes of guidance can cost the defendant and the state thousands of dollars in appellate expenses, as well as "delay justice." The appellate history of *State v. Kennedy*, 49 Or. App. 415, 619 P.2d 948 (1980), *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), *State v. Kennedy*, 61 Or. App. 469, 657 P.2d 717 (1983), and *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983), is but one example of the mischief caused by a court's failure to make a "plain statement."

The failure of a court to make it plain that federal opinions cited in its discussion of state law are cited only for purposes of guidance is exemplified in the case of *Montana v. Jackson*, 459 U.S. 1029, 103 S.Ct. 1418, 75 L.Ed.2d 471 (1983). In that case the Montana Supreme Court said seven times that its decision was based on Montana law, but made the mistake of citing a Montana opinion that construed the Fifth Amendment. That was sufficient for the Supreme Court to vacate the Montana judgment holding evidence of breath test refusal violative of a Montanan's right to be free from self-incrimination in light of that court's purely federal decision that such evidence was not violative of the federal right. See *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983).

SECTION 10: USE IT OR LOSE IT !

Ernie Lewis

My attention has once again been drawn to Section 10 of the Kentucky *Constitution.*

Judge John D. Miller of the Court of Appeals of Kentucky stated at the 1990 KACDL seminar that defense attorneys need to rely increasingly upon their state constitutions rather than the federal constitution in defending their clients. Justice Hans Linde of the Oregon Supreme Court recently was quoted in the May 27, *1988 Congressional Quarterly's Editorial Research Reports* as saying that a defense lawyer "is skating on the edge of malpractice when he doesn't rely upon his own state constitution." *Id.* p. 282.

Justice William Brennan called upon defense attorneys to look at their state constitutions rather than always citing the federal constitution. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harvard Law Review 489 (1977).

In the Congressional Quarterly article, it was noted that the 500 rulings since 1970 utilizing the state constitutions have made prosecutors and state judges uncomfortable. "In a 1986 survey of state Supreme Court judges, a member of the Georgia Supreme Court candidly confessed that he and his colleagues did not favor the use of the state constitution in deciding criminal matters simply because the document offered more protection to defendants than does the United States *Constitution.*" Understandably, prosecutors "are not very enthusiastic about the trend in state constitutional law."

Finally, I open up the December 1990 issue of NACDL'S *The Champion,* and I find a wonderful article entitled *State Constitutions and the Criminal Defense Lawyer* by John Henry Hingson III, which should be mandatory reading for all of us. [Ed. Note: In This Issue.]

With this kind of support, and not one to want to "skate on the edge of malpractice," I have begun to question what Section 10 of the Kentucky *Constitution* is all about. Is it enough for us to begin to cite Section 10 along with the 4th Amendment in our suppression motions? Does Section 10 differ in any way from the 4th Amendment? Is there any substance in our state constitution that can be used to protect the rights of our clients?

SECTION 10 COMES FROM THE 4TH

The 4th Amendment to the United States *Constitution* states:

> 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, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

One year after the 4th Amendment was adopted in 1791, Kentucky wrote in Section 9 of article 12 of the Kentucky *Constitution* of 1792:

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

Section 10 of the Kentucky *Constitution* of 1891 was taken directly from this provision of Kentucky's older *Constitution.* It now reads:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; 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.

Thus, historically Kentucky's search and seizure provision was born in the nation's *Bill of Rights.* Our forefathers' desire to be free from oppressive governmental searches and seizures lives on in Kentucky's present *Constitution.*

SECTION 10'S DIFFERENCES: POSSESSIONS, NOT EFFECTS

Yet, there are obvious differences, mostly in syntax. The only significant difference is the substitution of "possessions" for "effects."

Justice Flem D. Sampson of the Court of Appeals wrote in the *Kentucky Law Journal* Vol. XIII, May, 1925 that the word "effects" is *"property or worldly substance, devoting property in a more extensive sense than goods; embraces every kind of property, real and personal, including things in action; while the word 'possession' not only relates to the property owned but such things, both real and personal, as are under the dominion and control of the owner or possessor. In considering and construing the word 'possessions,' as employed in our constitutional provision, we have given it a broader and more general meaning than the word 'effects' is generally allowed."* *Id.* p. 253.

Counsel for a defendant should utilize this difference to counter any argument that a defendant has no standing in something that he or she possesses.

How about garbage, a student's locker, or our backyards? Does Section 10's "possession" clause provide enough of a difference to reach a different result from that reached by the United States Supreme Court under the 4th Amendment?

KENTUCKY CASELAW

Beyond the syntax, caselaw offers a wealth of material for discovering the content of Section 10. Unfortunately, during the century following its writing, Section 10 was seldom used. According to Justice Sampson, there were only three such cases. His conclusion as a result: "Kentuckians were not, therefore, greatly annoyed or harassed by these unusual processes called 'Search Warrants' during the formative and the greater part of the progressive period of the Commonwealth." *Id.* at 251. If that's the reason for the paucity of cases, Kentuckians must have been mightily harassed in the century that followed.

YOUMAN

Any exploration of Section 10 must begin with *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860 (1920). *Youman* penned by Justice Carroll, is well and passionately written. An obvious reaction to prohibition, its language soars. The facts were simple enough. Officers went to arrest a man with an arrest warrant, but not a search warrant. When they found him absent, they searched his house, and found prohibited whiskey. The Court first noted the problem that had developed in Kentucky:

> [I]t is not an uncommon thing in this state, for officers of the law, urged in some cases by popular clamor, in others by advice of persons in a position to exert influence, and in yet others by an exaggerated notion of their power and the pride of exploiting it, to disregard the law upon the assumption that the end sought to be accomplished will justify the means, and therefore no attention need be given to constitutional authority, when public approval will commend the unlawful conduct.
> *Id.* at 861.

Sound familiar? The Court next addressed the question of whether the search was "*reasonable*," and thus legal, despite there being no warrant. The reader will recall that our nation's high Court is toying with using the reasonableness clause irrespective of the existence of a warrant. Section 10, however, forecloses such a consideration in Kentucky. "[I]t might be thought that a reasonable search and seizure; or one that was not unreasonable, would be allowed without a search warrant. But there is no foundation for this construction. The section does not permit any kind or character of search of houses, papers, or possession without a search warrant." *Id.* p. 863.

Youman says any warrantless search is *per se* unreasonable under Section 10. It was "inserted to meet a practice that had grown up in Revolutionary times, and to protect citizens, not only against this practice, but against all searches and seizures of their property without a warrant" *Id.*

Youman also expresses little sympathy with those who would trade security for better law enforcement, a most "modern" sentiment expressed often by today's judiciary. "[T]his absolute security against unlawful search or seizure exists, without reference to the guilt or innocence of the person whose property or premises are searched. The mere fact that he is guilty, or that there may be reasonable grounds to believe that he is guilty, of the charge preferred against him, or the offense of which he is suspected, will afford no excuse or justification for an unlawful search or seizure." *Id.*

It has become fashionable recently to denigrate and minimize the exclusionary rule, to say that even though a search is illegal, that evidence so seized should still be admissible against the accused. After all, can our society bear to exclude evidence against a criminal merely due to some judicially created nicety known as the exclusionary rule? *Youman* forecloses such denigration of the exclusionary rule under Section 10. The Court asked:

> Will a high court of the state say in effect to one of its officers that the *Constitution* of the state prohibits a search of all person without a search warrant, but if you obtain evidence against the accused by so doing you may go to his premises, break open the doors of his house, and search it in his absence, or over his protest, if present, and this court will permit the evidence so secured to go to the jury to secure his conviction?
>
> It seems to us that a practice like this would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that courts had no respect for the *Constitution* or laws .. . We cannot give our approval to a practice like this.
> *Id.* at 866.

Youman puts to rest the notion that the exclusionary rule in Kentucky is judicially created, and a rule merely intended to deter the police. Section 10's exclusionary rule is part of the very fiber of our *Constitution*.

Youman does not apologize for the exclusion of evidence, even where the result is that a guilty person might go free. This Court understood that the constitutional right to privacy is much more important than the transient needs of law enforcement in one case. Every defense lawyer in Kentucky should use the following language somewhere in 1991:

> 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. In the exercise of their great powers, courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed him by the *Constitution*, and if at any time the protection of these rights should delay, or even defeat, the ends of justice in a particular case, it is better for the public good that this should happen than that a great Constitutional mandate should be nullified. *Id.* at 866.

So much for the good faith exception in Kentucky!

FLEMING: HOUSE

There are several other cases in the 1920's that similarly make that period the golden years of Section 10. *Fleming v. Commonwealth*, 217 Ky. 169, 289 S.W. 212 (1926) interpreted "house" to include a still located in a house located some 300 yards from the defendant's dwelling house.

MULLINS: POSSESSIONS

"Possessions" included the woodlands 30 yards from the defendant's residence in *Mullins v. Commonwealth*, 220 Ky. 656, 295 S.W. 987 (1927).

MORSE: HOUSE

Morse v. Commonwealth, 204 Ky. 672, 265 S.W. 37 (1924) extended "house" to a dugout (again with a still in it). Section 10 "means to include more than a mere dwelling house when it uses the word 'houses' . . . We know from common experience and ordinary observation that men often have protected and sheltered many of their valuable possessions in houses other than their dwelling houses." *Id.* at 38.

CHILDERS: GARDEN & POND

California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985) beware! Both "houses" and "possessions" apply to areas surrounding one's dwelling. "It would be practically if not utterly impossible to enjoy the full and free use of the 'houses' and 'possessions' without the garden and pond in such close proximity." *Childers v. Commonwealth*, 198 Ky. 848, 250 S.W. 106 (1923).

BRENT: OPEN FIELDS

Section 10 was not without its limit. In *Brent v. Commonwealth*, 194 Ky. 504, 240 S.W. 45 (1922) one will find the genesis of the open fields concept. There, the Court held that "possessions" has its limits in the context of the open field. Section 10's primary purpose is to protect a person's home. "[E]very man's house is his castle and is inviolable ...the framers of those *Constitutions* had inherited no practice or tradition that impelled them to safeguard vast tracts of land, but,"profiting by the experience of their forefathers, they were desirous of preserving inviolate the person of every citizen and those possessions intimately associated with his person, his house, his papers, and his effects." *Id.* at 49.

ASH: SUITCASE

No discussion of the golden age of Section 10 would be complete without *Ash v. Commonwealth*, 193 Ky. 452, 236 S.W. 1032 (1922). There, the Court held the search of a suitcase without a warrant was illegal. The Court reiterated the importance of the judiciary's protection of our privacy rights.

> It is doubtful if our boasted constitutional form of government boasts any greater single protection or bulwark to American liberty than the one against unreasonable search and seizure. . . [The stopping of the Germans at Verdun by the French] was no more essential to the preservation of the liberties of France, in our humble opinion, than is the prevention of the encroachment upon the constitutional provision under consideration essential to the continued perpetuity of our constitutional liberty. *Id.* at 1036.

MCMAHAN'S ADM'X: GOOD FAITH

The period which followed, loosely 1930-1970, saw the continued use of Section 10, even if enforcement was uneven, and the language used less soaring. *McMahan's Adm'x v. Draffen*, 242 Ky. 785, 47 S.W.2d 716 (1932), is the most notable, and was not surprisingly written early in the period. *McMahan's Adm'x* not only establishes how a search warrant is to be executed, it also conclusively rejects the good faith exception.

> In executing a valid search warrant, the officer must not only be considerate of the comfort and convenience and feelings of the person of the occupants of the premises at the time of the search, but must not exceed or abuse his authority with which he is clothed and under which he is acting. He may not unnecessarily injure the feelings of the defendants or unnecessarily mar the premises searched. *Id.* at 718.

The good faith of the officer, or that he was acting in full belief, and with reason to believe that the evidence of the crime sought or desired was present on the premises searched, will not justify a search without a warrant, or with a void search warrant.

MILLER: ENTRY BY RUSE

The Court condemned the use of a ruse to gain entry to a defendant's home in *Miller v. Commonwealth*, 235 Ky. 825, 32 S.W.2d 416 (1930). Section 10, "the chief corner stone upon which the liberties of the citizens . . . [are guaranteed] preserves and guarantees the privacy of the home . . . It is our first duty to uphold that section as part of our *Constitution*." *Id.* at 418.

MANSBACK SCRAP: ADMINISTRATIVE SEARCH

The beginning of the "administrative search" can be found in *Mansback Scrap Iron Company v. City of Ashland*, 235 Ky. 265, 30 S.W.2d 968 (1930). There, the Court held that Section 10 did not make illegal an ordinance requiring a junk dealer to consent to inspection and search of his junkyard as a prerequisite to obtaining a license.

CHAPLIN: AUTOMOBILE EXCEPTION

The Court used Section 10 to reject the automobile exception to the warrant requirement established in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543.

In *Commonwealth v. Chaplin*, 307 Ky. 630, 211 S.W.2d 841 (1948), the Court held that searching a car requires a warrant, or a legal arrest. "The protection afforded by Section 10 of our *Constitution* consists in requiring that probable cause for searching any place or seizing any person or thing shall be determined by a neutral judicial officer instead of by the often over-zealous police or enforcement officer." *Id.* at 845.

In *Alfred v. Commonwealth*,, Ky. 272 S.W.2d 44 (1954), the Court held a search to be illegal where the police walked onto the defendant's property to look into his truck, which contained whiskey.

YOUNG: EXCLUSIONARY RULE

Young v. Commonwealth, 313 S.W.2d 581 (1958), while holding against the defendant, reemphasized the view of the exclusionary rule established in *Youman*. The rule was created "to give actual effect to the purpose of Section Ten of the Kentucky *Constitution*. Without such rule of evidence the constitutional guaranty against unreasonable search and seizure would be sadly lacking in verity."

BENGE: GOOD INTENTIONS

Benge v. Commonwealth, Ky., 321 S.W.2d 247 (1959), was the highwater mark of this period. There, the officers serving a bench warrant were held to have made an illegal search when they searched her apartment. Although two U.S. Supreme Court cases would have approved the search, the Court held that Section 10 did not.

While "Section 10 of the *Constitution* of Kentucky does not materially differ in its language from the Fourth Amendment to the *Constitution* of the United States," that did not end the matter. Section 10 "did not mean to substitute the good intentions of the police for judicial authorization except in narrowly confined situations. History, both before and after the adoption of the Fourth Amendment, upon which Section 10 of the Kentucky *Constitution* is based, has shown good police intentions to be inadequate safeguards for certain fundamental rights of man." *Id.* at 250.

How can *Leon* possibly gain a foothold with language such as this?

LANE: MINOR VIOLATION SEARCH

A very interesting case during this period is *Lane v. Commonwealth*, Ky., 386 S.W.2d 743 (1965). There, a person was arrested for a minor violation and placed in another car. The police then searched his car, which the Court held to be illegal due to being conducted without a warrant. One wonders whether *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Gd.2d 768 (1981) is the law in Kentucky, given this interpretation of Section 10.

MITCHELL: ROADBLOCKS

While it can be said that historically Section 10 has been interpreted to require a warrant in most situations, that did not prevent the Court from approving roadblocks to look at drivers' licenses in *Commonwealth v. Mitchell*, Ky., 355 S.W.2d 686 (1962). This foreshadowed *Michigan Dept. of State Police et.al. v. Sitz*, 496 U.S. __, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) by 28 years.

SECTION 10 FROM 1970 - 1990

It was during the last 20 years, 1970-1990, that Section 10 has fallen into woeful disuse. Reading the cases during this period demonstrates that lawyers and judges alike have either forgotten or ignored Section 10. Gone is the separate interpretation of Section 10. Often, Section 10 is not even mentioned. Sadly lacking is the special dedication to the rights of privacy so hallowed by the Court of Appeals during the earlier periods.

The low point is *Beemer v. Commonwealth*, Ky. 665 S.W.2d 912 (1984). There, the Court states enthusiastically that "[w]e are fully in accord with the relaxation of the Federal requirements as expressed in *Illinois v. Gates* . . ." *Id.* at 915. There is virtually no discussion of Section 10 as the Court adopts the probable cause definition of *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Estep v. Commonwealth, Ky., 663 S.W.2d 313 (1984) is similar. There the Court adopts *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), thereby overruling *Commonwealth v. Chaplin, supra*, discussed earlier. Yet, while *Chaplin* seemed to rely on Section 10, the *Estep* Court seemed to make only a 4th Amendment analysis. In overruling *Wagner v. Commonwealth*, Ky., 581 S.W.2d 352 (1979), and *City of Danville v. Dawson*, Ky., 528 S.W.2d 687 (1975) the Court merely stated that their holding was "in harmony with Section Ten of the Kentucky *Constitution* .. . ." *Id.* at 215. How so?

Most of the decisions in the modern period have merely made a 4th Amendment analysis. One wonders how often defense counsel made only a 4th Amendment argument, thereby allowing the Court to confine itself to the increasingly conservative law coming from the federal bench?

That is not to say that the Court has ignored Section 10 altogether in recent times.

Justice Osborne, in a dissenting opinion in *Craig v. Com. Dept. of Public Safety*, Ky., 471 S.W.2d 11 (1971), stated that in his opinion, Section 10 prohibited taking someone's blood from him or her without their consent.

In *Rooker v. Commonwealth*, Ky., 508 S.W.2d 570 (1974), the Court used Section 10 side by side with the 4th Amendment to hold invalid a warrant signed by a judge who had not read the affidavit. Justice Lukowsky, again in dissent, urged his colleagues to be more "sensitive" to the privacy concerns of civizens, basing his consent out of "respect" for the 4th Amendment and Section 10. *Collins v. Commonwealth*, Ky., 574 S.W.2d 296 (1978) (J. Lukowsky, dissenting).

The Court of Appeals relied upon Section 10 and the 4th Amendment to invalidate an "any other person" warrant. *Johantgen v. Commonwealth*, Ky. App. 571 S.W.2d 110 (1978).

In an intriguing opinion, the Court of Appeals relied wholly on Section 10 in *Commonwealth v. Bertram*, Ky. App., 596 S.W.2d 379 (1980). There, the Court held that "it is clear as a matter of state constitutional law that when a defendant testified in support of a motion to suppress evidence alleged to have been seized illegally, his testimony may not be used against him later at trial over his objection."

TODAY'S POSSIBILITIES & PROMISE

There is even more hope today. The present Kentucky appellate courts in recent cases at least hint that they are willing to look at Section 10 separately from the 4th Amendment.

In *Paul v. Commonwealth*, Ky. App. 765 S.W.2d 24 (1989), the Court of Appeals cited Section 10 with the 4th Amendment in holding that a passenger in a car could not be arrested where contraband is found in the car.

More promising than *Paul* is the Court's finding a search warrant illegal where issued by a trial commissioner in a county other than his own. *Commonwealth v. Shelton*, Ky., 766 S.W.2d 628 (1989). The importance of this case is not that Section 10 is used because it is not. Rather, the court declined to use the *good faith* exception of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). It make sense for the Court to so decline.

As has been seen, Kentucky's exclusionary rule has been around as long as the exclusionary rule under the 4th Amendment. The 4th Amendment's exclusionary rule is now said to be based solely upon deterrence of police misconduct. Thus, it makes at least intellectual sense not to utilize the exclusionary rule where the officer is relying in good faith on the magistrate's issuance of a warrant.

On the other hand, Section 10's exclusionary rule established in *Youman* and *Ash*, has a much broader rationale. Essentially, our rule is there because without it, people will not respect our *Constitution*, because it is anathema to have a rule requiring a warrant or forbidding an unreasonable search and then to allow the police to flaunt that law by admitting evidence in violation of the law against an accused.

While the Court in *Shelton* did not spell out their declining to use "good faith," it is time for them to do so. They will not do so unless counsel begins to make this argument.

Most promising yet is *Commonwealth v. Johnson*, Ky., 777 S.W.2d 876 (1989). There, the Court expressly declined to condemn a search of a defendant's motel room based upon the 4th Amendment. Rather, they held "that the warrantless, forced entry by the police into appellant's room at the Ramada Inn, violated Section Ten of the *Constitution* of Kentucky." *Id.* at 880.

CONCLUSION

This is my survey of Section 10 of the Kentucky *Constitution*. It is by no means complete. There is alot to use in trying to protect the privacy rights of our clients.

As we have seen, Section 10 does not abide a *good faith* exception to the warrant requirement.

It appears to emphasize more the warrant requirement, and deemphasizes the "reasonableness" clause that is now being used so often to justify warrantless searches and seizures under the 4th Amendment.

Section 10 may provide broader standing to challenge searches and seizures of one's "possessions" than is available under the 4th Amendment.

Section 10 appears to provide more protection to outbuildings and other areas surrounding one's dwelling house.

Section 10 may not allow a search of a car incident to a lawful arrest that is allowed by *New York v. Belton*.

In short, Section 10 has a rich history. Section 10 *establishes more protection than does the 4th Amendment*. Because of that, we must use it. If we don't, we'll lose it and have no one to blame but ourselves.

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Using Kentucky's *Constitution* to Challenge Established Evidence Practices

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 v. 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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Duty of an Advocate

There are many whom it may be needful to remind, that an advocate — by the sacred duty of his connection with his client — knows, in the discharge of that office, but one person in the world — that client and none other. To serve that client by all expedient means; to protect that client at all hazards and costs to all others (even the party already injured), and, amongst others, to himself, is the highest and most unquestioned of his duties. And he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any others. Nay, separating even the duties of a patriot from those of an advocate, he must go on, reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client.

Lord Henry Brougham (1778 - 1868)

Lord Brougham was an English barrister, politician, attorney-general, chancellor, and acted as counsel for poor prisoners.

T.J. MIDDLE'S EFFORT LED TO STATE *BILL OF RIGHTS* LAW

THOMAS JEFFERSON: KEEPING HIS DREAM ALIVE

Liberty is the essence of Kentucky's heritage. Even before statehood, as a part of Virginia, Kentucky was the home of many Revolutionary War heroes. Perhaps that might explain why eleven of the fourteen delegates from western Virginia, soon to become Kentucky, opposed the Federal *Constitution* at the Virginia Convention in 1787. This original *Constitution* did not guarantee the individual liberties sought by patriots in their struggle for independence.

Nevertheless, this protest was of great historical significance. It contributed to the eventual adoption of our constitutional liberties, The *Bill of Rights*, in 1791. The protest led to statehood for Kentucky in 1792, and promoted a free new spirit to meet future conflict. That challenge soon rose with the passage of the Alien and Sedition Acts by the Federal government. These laws were a direct assault on the freedoms of speech, press, and due process of law.

Kentucky was first to take a stand for its citizens rights. The Kentucky Legislature responded to the people's demand with "The Kentucky Resolutions." Authored by Thomas Jefferson, these resolutions reaffirmed a system of checks and balances established in the *Constitution* for the protection of individual liberties, and also called for the repeal of the Alien and Sedition Acts. The Virginia Legislature proposed similar resolutions, but before any further action took place, Thomas Jefferson, in 1800, was elected President, and the Alien and Sedition Laws were repealed.

In honor of this rich heritage we are planning numerous events to publicly educate and celebrate the *Bill of Rights* and Kentucky's Bicentennial. Some of our efforts include: requesting a resolution placing a copy of The *Bill of Rights* nationwide in every public classroom; seeking a national figure to sponsor our project; and requesting the issuance of a bicentennial stamp honoring Kentucky's 200th anniversary of statehood.

Students and Staff
Thomas Jefferson Middle School

PROJECT LIBERTY

Thomas Jefferson Middle School's students and staff began Project Liberty three years ago, the theme was "THOMAS JEFFERSON: KEEPING HIS DREAM ALIVE." Our goal was to achieve the passage of legislation which would place a prominent copy of the *Bill of Rights* in every public school classroom in our state. As a result of our efforts, there is now a commemorative copy in all 30,000 public classrooms in the state of Kentucky.

To further celebrate the bicentennial of the *Bill of Rights* on December 15, 1991 and the bicentennial of Kentucky on June 1,1992, we at Thomas Jefferson are proposing that the nation follow Kentucky's leadership: that all states pass legislation placing The *Bill of Rights* in every United States public classroom. This in commemoration of the 200th anniversary of this nation's liberty.

In addition to this press we have included a historical sketch of Kentucky's great heritage in support and protection of this nation's liberties. These statements were researched and written by the students of Thomas Jefferson Middle School.

Thomas Jefferson Middle School
4401 Rangeland Road
Louisville, KY 40219
(502) 473-8273

BILL OF RIGHTS IN EACH KY SCHOOL

Thanks to the lobbying efforts of 420 students at Thomas Jefferson Middle School, 30,000 classrooms in Kentucky will have copies of the *Bill of Rights* posted on their walls.

"This shows us that us kids do have a word," said La Chonda Williams, 14, of Newburg, one of the students who successfully lobbied for a new state law requiring the postings. It shows "that we can do something even though we aren't old enough to vote."

Last year, Ron Greene, Ann Rosa and Charlie Metzger's eighth-grade social studies classes drafted a bill—eventually called the Greene Resolution— directing public schools to post the *Bill of Rights* in each classroom. Greene said the students started the project to commemorate last year's 200th anniversary of the U.S. *Constitution.*

State Rep. Dan Seum, D-South Louisville, introduced the students' bill in the Kentucky General Assembly. It passed Unanimously and was signed into law by Gov. Wallace Wilkinson in March.

During a school assembly earlier this month, Seum said he was proud that these students were committed to educating other students about an important national document.

"Everything that happens in this world has a beginning," Seum told the students. And you can be proud to know that this all started here. That's something you can remember until the day you die."

Seum said other schools that post the *Bill of Rights* do not need to have elaborate copies made. He said students could fulfill the state law by either writing or typing the document and posting it on the wall.

Jason Cochran, 14, of Highview, said he feels satisfied that he and his classmates' social studies project turned out so well. Jason said it would be neat if they could get schools across the country to do the same thing - M. David Goodwin

Order in the Court

INTERPRETING THE CONSTITUTION: The Supreme Court And the Process Of Adjudication

By Harry H. Wellington
Yale Univ. Press
New Haven, Conn.
$22.50; 192 pages

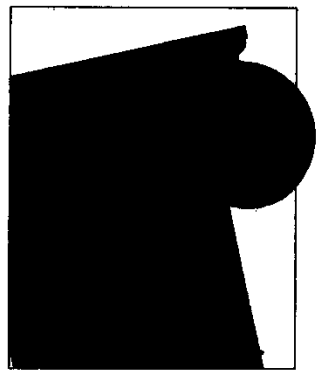
Reviewed by Kenneth Jost

The debate over the Supreme Court's role and the justification for its seemingly undemocratic powers has raged throughout U.S. history, but perhaps never more pointedly than today. A conservative school of thought has gained in influence at the Supreme Court and in the federal judiciary, challenging expansive views of the Court's power and constitutional rights that had held sway since the New Deal.

Yale Law Professor Harry H. Wellington has weighed into this debate with an extended essay advancing a thesis that will give no comfort to the conservatives but will also cause some ambivalence among liberals.

Kenneth Jost is a senior editor at Congressional Quarterly *and an adjunct professor at Georgetown University Law Center.*

Wellington debunks the conservatives' effort to divine the Framers' original intent and derides their cramped notion of judicial deference to demonstrably imperfect legislative bodies. But, to the possible chagrin of civil libertarians, Wellington also argues that the Court's power ultimately depends on public values and public morality more than on a special role for protecting individual liberties.



Wellington believes the Supreme Court should interpret the Constitution by common law principles, evolving its views over time and based on experience rather than on slavish adherence to the past or to constitutional text. He views this process of judging as one aspect of governing just as legitimate as legislating or executing the laws.

Wellington makes no apology for the Court's counter-majoritarian power. Undemocratic aspects, he points out, abound in American government: from the Framers' decision to represent states rather than people in the Senate to the modern-day system of political influence and campaign finance that gives the wealthy disproportionate power in Washington.

The judiciary's unique contribution is its ability—and obligation—to elevate one principle above other considerations: treating like cases alike, and laying down rules that achieve that end consistent with the open-ended Constitution the Framers gave us.

That duty explains why the Court can strike down an anti-flag burning law enacted by Congress. Members of Congress can read the Constitution, it is true, but their core function is political rather than legal. The Court, on the other hand, must judge a congressional enactment on whether it can be applied to other like cases consistent with constitutional principles as shaped by prevailing public morality.

The disappointment for liberals, however, comes from Wellington's view that the Court is not always bound to read public morality as favoring advances in individual freedom. Thus, on abortion rights Wellington rationalizes the Court's slow retreat from *Roe v. Wade*. He reasons that while public morality did not support the old strict anti-abortion laws, the new approach was wrong because it was not "politically digestible."

Under this view, it would seem, constitutional rights must always be in flux, dependent on shifts in public opinion as felt by nine unelected justices. This concerns Wellington no more than the sight of demonstrators outside the Supreme Court hoping to influence the votes on abortion. The Court is not an apolitical institution, he writes, and "this is not a sign that it is malfunctioning."

Wellington's book is the first in a series that Yale University Press plans on legal topics that it hopes will be provocative and accessible to expert and lay readers alike. Toward that end, Wellington keeps footnotes to a minimum, though he is less successful in avoiding jargon. The book's greatest weakness, however, is the maddeningly professorial style that will leave readers often crying, "Yes, but what do you think?"

Embedded in this mass of Socratic questioning is a thesis that challenges both conservatives and liberals. Wellington refuses to let conservatives get away with their patent misuse of history and their unreasoning obeisance to flawed political processes.

But Wellington also says, in effect, that liberals have no theoretical justification in using the courts to conspire against prevailing public sentiment.

Wellington agrees that courts have a particular function in protecting individual freedom, but they do not exercise that role in a vacuum. Those who want to maintain and enlarge constitutional rights must engage not just in the courts of law, but also in the court of public opinion, where the final verdict will be given. ■

FOREWORD

The Constitution of Kentucky is the principal law of the Commonwealth. Its authority is superseded only by the Constitution of the United States and federal law. Kentucky's present Constitution is the fourth to be used by the state. It was written in 1890-91 and became effective in 1892. Previous Constitutions of the Commonwealth were drafted in 1792, 1799, and 1849.

The Constitution of 1891 has been in effect for a much longer period of time than any of its predecessors. Since its implementation, Kentucky, and indeed the world, has seen drastic alteration and development in the areas of technology, commerce and finance, governmental operation and management, and general social structure. Ironically, our Constitution was written during a period of distrust of such change. The resultant lengthy and specifically worded document has often been criticized as lacking the flexibility to adapt to the changing times.

Sixty attempts to amend the Constitution have been made since its implementation in 1892, but only 27 have been successful, the most recent in 1986. In 1967, proposed major revisions in the present Constitution were submitted to the voters, the result of efforts by a special Constitution Revision Assembly created by the legislature. The vote was overwhelmingly against the proposed changes. Four unsuccessful attempts also have been made, over the years, to call a constitutional convention to draft a new Constitution. The most recent such failure occurred in November 1977.

In January of 1987 the Legislative Research Commission created the Special Commission on Constitutional Review. The LRC was mindful that recent past attempts at wholesale constitutional overhaul have lacked popular support. The Special Commission was therefore charged with conducting a section by section review of the Constitution. Suggestions made for improvement of these sections might then serve as a guidepost for constitutional amendments offered for voter approval over a number of years.

This report is the result of the initial review of the Special Commission on Constitutional Review. It contains seventy-seven individual suggestions for alteration of our constitutional document. The Special Commission on Constitutional Review is officially constituted as a body until May of 1988, at which time the LRC will evaluate its effectiveness.

Vic Hellard, Jr.
Director

The Capitol
Frankfort, Kentucky
1987

RECOMMENDATIONS OF THE

SUBCOMMITTEE ON BILL OF RIGHTS/ELECTIONS

George Street Boone, Chairman
Albert Quick, Vice Chairman
Judge Daniel Schneider
Representative Paul Clark
Senator Gus Sheehan
Judy Clabes

LEGISLATIVE RESEARCH COMMISSION

State Capitol Frankfort, Kentucky 40601 502-564-8100

September 1, 1987

House Speaker Donald J. Blandford
Senate President Pro Tem John A. Rose
Members, Legislative Research Commission
State Capitol
Frankfort, KY 40601

Dear Speaker Blandford, President Pro Tem Rose, and Members,
Legislative Research Commission:

The Subcommittee on Bill of Rights and Elections was charged to review various sections of the Constitution and to assign priority rankings to suggested changes. These sections relate to the Bill of Rights, elections, officers, lotteries, duelling, treason, and constitutional revision.

The Subcommittee held four meetings between February 27 and June 17, 1987. Subcommittee members recognized the importance of the opinions of interested individuals and associations. The following were invited to recommend changes in, or additions to, the Bill of Rights:

1. Former Chief Justice Palmore
2. Chief Justice of the Kentucky Supreme Court
3. Chief Judge of the Kentucky Court of Appeals
4. President, Circuit Judges Association
5. President, Association of District Judges
6. Kentucky Attorney General
7. President, Kentucky Defense Counsel
8. President, Kentucky Academy of Trial Attorneys
9. Criminal Defense Attorneys' Association
10. Kentucky Public Advocate
11. President, County Attorneys' Association
12. President, Commonwealth's Attorneys Association
13. Department of Political Science, University of Kentucky

14. Department of Political Science, University of Louisville
15. A professor at Chase College of Law
16. Three professors at University of Kentucky College of Law
17. Lexington Herald Leader
18. Editor, Louisville Courier-Journal

Bill of Rights

The Subcommittee devoted substantial time to analysis and consideration of the Bill of Rights, the first twenty-six sections of the Constitution. Areas of concentration included issues of individual privacy, prosecution by information, the exclusionary rule, detention of material witnesses and electronic surveillance. In addition to examination of current constitutional provisions, applicable case law was considered, and an exhaustive survey was made of provisions of constitutions of other states.

The recommended changes are considered to be in keeping with the spirit of the current provisions and to reflect concern with contemporary social problems and technological developments, as well as clarification of such matters as references to gender.

The only recommended provision on which the voting approval was close was in reference to a limitation on the imposition of the death penalty.

Elections

The number of elections conducted in the state was discussed at length, and it is recommended that elections in odd-numbered years be eliminated. Since Kentucky holds both a primary and general election each year, annual election expenses are approximately $4.5 million. The frequency of elections was believed to contribute to a voter turnout in Kentucky lower than that found in many other states.

The hope is that reducing the number of elections could cut costs while increasing citizen participation in the electoral process.

Officers

It was the consensus that the section placing a maximum limit of $12,000 upon the compensation of public officers was long outmoded, not a constitutional matter, and should be repealed. Removal was considered desirable, since the limitations were long ago rendered ineffectual by court rulings which permit annual salary adjustments based upon changes in the consumer price index. Such limitation should be addressed by statute.

Section 234 now requires that public officers reside within their respective jurisdictions. The Subcommittee recommends that the General Assembly should control the residency requirements of appointed or employed officers, as distinguished from elected officials. This change would give the General Assembly more control over the large number of unelected employees who hold increasing authority.

Section 145 should be amended to permit the General Assembly to establish voting residency requirements, since the current provisions of the section have been held no longer effective because they are in conflict with the U. S. Constitution. Statutory provisions concerning residency do conform to the federal court decision but are thus in conflict with state constitutional standards.

Lotteries

The Subcommittee concluded that the issue of lottery should be addressed by the General Assembly. It recommends repeal of the current section prohibiting the establishment of a state lottery. The legislature should have the option either to prohibit or to establish a lottery and to designate the use of net proceeds.

Duelling

Current constitutional provisions concerning duelling reflect the era in which the Constitution was adopted. The Subcommittee recommends removal of such references, including the one which is presently included in the oath of office. It is suggested that the document incorporate the simple and dignified oath included in our 1799 Charter.

Priority

The Subcommittee recommends that the first priority be given to adding Bill of Rights sections relative to privacy, prosecution by information, and equality. Second priority should be assigned to the addition of the exclusionary rule and a death penalty provision. Other recommendations are considered important but of less urgency.

Very truly yours,

George Street Boone
Chairman
Subcommittee on Bill of Rights, Elections and Constitution
Commission on Constitutional Review

GSB/bcr

SUBCOMMITTEE ON BILL OF RIGHTS/ELECTIONS

AMENDMENT PROPOSAL NUMBER 33

PROPOSED AMENDMENT

Amend Section 1 to add the following subsection:

"Eighth: The right to individual privacy is recognized and shall not be infringed without the showing of a compelling private or state interest."

COMMISSION MEMBER SUPPORT: COMPILATION OF RESPONSES TO THE SURVEY BALLOT OF THE COMMISSION ON CONSTITUTIONAL REVIEW OF JULY 1987

Percentage of member responses favoring inclusion of this proposal in the final report of the Commission on Constitutional Review	**71%**
Percentage of member responses opposing inclusion of this proposal in the final report of the Commission on Constitutional Review	**19%**
Percentage of member responses indicating no opinion concerning inclusion of this proposal in the final report of the Commission on Constitutional Review	**10%**
Priority ranking of this amendment as determined from response to the survey ballot. (This report contains seventy-seven amendment proposals. There are only sixty-two possible rank positions, however, due to various proposals receiving identical priority index ratings and priority rankings. A ranking of "1" indicates first priority, least priority is indicated by a ranking of "62.")	**7**
Priority index of this amendment as determined from response to the survey ballot. (Index numbers approximating "1.00" indicate high priority; index numbers approximating "5.00" indicate least priority.)	**2.06**

SUBCOMMITTEE ON BILL OF RIGHTS/ELECTIONS

AMENDMENT PROPOSAL NUMBER 34

PROPOSED AMENDMENT

Amend Section 1 to add the following subsection:

"Ninth: The right to equality under the law shall not be denied or abridged by the state or any person or private entity on account of race, color, religion, national origin, gender, age, or physical or mental handicap, absent a compelling interest."

COMMISSION MEMBER SUPPORT:
COMPILATION OF RESPONSES TO THE SURVEY BALLOT
OF THE COMMISSION ON CONSTITUTIONAL REVIEW
OF JULY 1987

Percentage of member responses favoring inclusion of this proposal in the final report of the Commission on Constitutional Review	71%
Percentage of member responses opposing inclusion of this proposal in the final report of the Commission on Constitutional Review	19%
Percentage of member responses indicating no opinion concerning inclusion of this proposal in the final report of the Commission on Constitutional Review	10%
Priority ranking of this amendment as determined from response to the survey ballot. (This report contains seventy-seven amendment proposals. There are only sixty-two possible rank positions, however, due to various proposals receiving identical priority index ratings and priority rankings. A ranking of "1" indicates first priority, least priority is indicated by a ranking of "62.")	5
Priority index of this amendment as determined from response to the survey ballot. (Index numbers approximating "1.00" indicate high priority; index numbers approximating "5.00" indicate least priority.)	2.00

SUBCOMMITTEE ON BILL OF RIGHTS/ELECTIONS

AMENDMENT PROPOSAL NUMBER 35

PROPOSED AMENDMENT

Amend the Bill of Rights to add the following section:

"Prosecution by Information. Offenses shall be prosecuted either by information after examination and commitment by a judge, unless the examination be waived by the accused with the consent of the court, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be prescribed by law."

COMMISSION MEMBER SUPPORT: COMPILATION OF RESPONSES TO THE SURVEY BALLOT OF THE COMMISSION ON CONSTITUTIONAL REVIEW OF JULY 1987

Percentage of member responses favoring inclusion of this proposal in the final report of the Commission on Constitutional Review	57%
Percentage of member responses opposing inclusion of this proposal in the final report of the Commission on Constitutional Review	5%
Percentage of member responses indicating no opinion concerning inclusion of this proposal in the final report of the Commission on Constitutional Review	38%
Priority ranking of this amendment as determined from response to the survey ballot. (This report contains seventy-seven amendment proposals. There are only sixty-two possible rank positions, however, due to various proposals receiving identical priority index ratings and priority rankings. A ranking of "1" indicates first priority, least priority is indicated by a ranking of "62.")	27
Priority index of this amendment as determined from response to the survey ballot. (Index numbers approximating "1.00" indicate high priority; index numbers approximating "5.00" indicate least priority.)	2.64

SUBCOMMITTEE ON BILL OF RIGHTS/ELECTIONS

AMENDMENT PROPOSAL NUMBER 36

PROPOSED AMENDMENT

Amend the Bill of Rights to add the following section:

"Death Penalty. The penalty of death shall be imposed for intentional murder."

COMMISSION MEMBER SUPPORT: COMPILATION OF RESPONSES TO THE SURVEY BALLOT OF THE COMMISSION ON CONSTITUTIONAL REVIEW OF JULY 1987

Percentage of member responses favoring inclusion of this proposal in the final report of the Commission on Constitutional Review	52%
Percentage of member responses opposing inclusion of this proposal in the final report of the Commission on Constitutional Review	43%
Percentage of member responses indicating no opinion concerning inclusion of this proposal in the final report of the Commission on Constitutional Review	5%
Priority ranking of this amendment as determined from response to the survey ballot. (This report contains seventy-seven amendment proposals. There are only sixty-two possible rank positions, however, due to various proposals receiving identical priority index ratings and priority rankings. A ranking of "1" indicates first priority, least priority is indicated by a ranking of "62.")	33
Priority index of this amendment as determined from response to the survey ballot. (Index numbers approximating "1.00" indicate high priority; index numbers approximating "5.00" indicate least priority.)	2.75

SUBCOMMITTEE ON BILL OF RIGHTS/ELECTIONS

AMENDMENT PROPOSAL NUMBER 37

PROPOSED AMENDMENT

Amend Section 10 to read as follows:

"The people shall be secure in their persons, houses, papers, and possessions from unreasonable search and seizure; 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. Evidence obtained in violation of this section shall not be admissible in any court against any person."

COMMISSION MEMBER SUPPORT: COMPILATION OF RESPONSES TO THE SURVEY BALLOT OF THE COMMISSION ON CONSTITUTIONAL REVIEW OF JULY 1987

Percentage of member responses favoring inclusion of this proposal in the final report of the Commission on Constitutional Review	**67%**
Percentage of member responses opposing inclusion of this proposal in the final report of the Commission on Constitutional Review	**33%**
Percentage of member responses indicating no opinion concerning inclusion of this proposal in the final report of the Commission on Constitutional Review	
Priority ranking of this amendment as determined from response to the survey ballot. (This report contains seventy-seven amendment proposals. There are only sixty-two possible rank positions, however, due to various proposals receiving identical priority index ratings and priority rankings. A ranking of "1" indicates first priority, least priority is indicated by a ranking of "62.")	**26**
Priority index of this amendment as determined from response to the survey ballot. (Index numbers approximating "1.00" indicate high priority; index numbers approximating "5.00" indicate least priority.)	**2.63**

SUBCOMMITTEE ON BILL OF RIGHTS/ELECTIONS

AMENDMENT PROPOSAL NUMBER 38

PROPOSED AMENDMENT

Amend Section 1 to refer to "Commonwealth" rather than "State."

COMMISSION MEMBER SUPPORT: COMPILATION OF RESPONSES TO THE SURVEY BALLOT OF THE COMMISSION ON CONSTITUTIONAL REVIEW OF JULY 1987

Percentage of member responses favoring inclusion of this proposal in the final report of the Commission on Constitutional Review	86%
Percentage of member responses opposing inclusion of this proposal in the final report of the Commission on Constitutional Review	5%
Percentage of member responses indicating no opinion concerning inclusion of this proposal in the final report of the Commission on Constitutional Review	9%
Priority ranking of this amendment as determined from response to the survey ballot. (This report contains seventy-seven amendment proposals. There are only sixty-two possible rank positions, however, due to various proposals receiving identical priority index ratings and priority rankings. A ranking of "1" indicates first priority, least priority is indicated by a ranking of "62.")	62
Priority index of this amendment as determined from response to the survey ballot. (Index numbers approximating "1.00" indicate high priority; index numbers approximating "5.00" indicate least priority.)	4.12

SUBCOMMITTEE ON BILL OF RIGHTS/ELECTIONS

AMENDMENT PROPOSAL NUMBER 39

PROPOSED AMENDMENT

Amend the Bill of Rights, Sections 1-26, so that gender references are neutral.

COMMISSION MEMBER SUPPORT: COMPILATION OF RESPONSES TO THE SURVEY BALLOT OF THE COMMISSION ON CONSTITUTIONAL REVIEW OF JULY 1987

Percentage of member responses favoring inclusion of this proposal in the final report of the Commission on Constitutional Review	**71%**
Percentage of member responses opposing inclusion of this proposal in the final report of the Commission on Constitutional Review	**10%**
Percentage of member responses indicating no opinion concerning inclusion of this proposal in the final report of the Commission on Constitutional Review	**19%**
Priority ranking of this amendment as determined from response to the survey ballot. (This report contains seventy-seven amendment proposals. There are only sixty-two possible rank positions, however, due to various proposals receiving identical priority index ratings and priority rankings. A ranking of "1" indicates first priority, least priority is indicated by a ranking of "62.")	**54**
Priority index of this amendment as determined from response to the survey ballot. (Index numbers approximating "1.00" indicate high priority; index numbers approximating "5.00" indicate least priority.)	**3.35**

SUBCOMMITTEE ON BILL OF RIGHTS/ELECTIONS

AMENDMENT PROPOSAL NUMBER 40

PROPOSED AMENDMENT

Amend the Bill of Rights to add the following section:

"Material Witness. No person who may be a material witness in a criminal proceeding may be imprisoned on that ground, but such person may be detained for a reasonable period of time for questioning."

COMMISSION MEMBER SUPPORT: COMPILATION OF RESPONSES TO THE SURVEY BALLOT OF THE COMMISSION ON CONSTITUTIONAL REVIEW OF JULY 1987

Percentage of member responses favoring inclusion of this proposal in the final report of the Commission on Constitutional Review	57%
Percentage of member responses opposing inclusion of this proposal in the final report of the Commission on Constitutional Review	14%
Percentage of member responses indicating no opinion concerning inclusion of this proposal in the final report of the Commission on Constitutional Review	29%
Priority ranking of this amendment as determined from response to the survey ballot. (This report contains seventy-seven amendment proposals. There are only sixty-two possible rank positions, however, due to various proposals receiving identical priority index ratings and priority rankings. A ranking of "1" indicates first priority, least priority is indicated by a ranking of "62.")	40
Priority index of this amendment as determined from response to the survey ballot. (Index numbers approximating "1.00" indicate high priority; index numbers approximating "5.00" indicate least priority.)	2.92

SUBCOMMITTEE ON BILL OF RIGHTS/ELECTIONS

AMENDMENT PROPOSAL NUMBER 41

PROPOSED AMENDMENT

Amend the Bill of Rights to add the following section:

"Electronic Surveillance. The people shall be secure in their persons, houses, papers and possessions from interception of telegraphic, telephonic, and other electronic means of communication, and from interception of oral and other communications by electric, electronic or mechanical means."

COMMISSION MEMBER SUPPORT: COMPILATION OF RESPONSES TO THE SURVEY BALLOT OF THE COMMISSION ON CONSTITUTIONAL REVIEW OF JULY 1987

Percentage of member responses favoring inclusion of this proposal in the final report of the Commission on Constitutional Review	57%
Percentage of member responses opposing inclusion of this proposal in the final report of the Commission on Constitutional Review	33%
Percentage of member responses indicating no opinion concerning inclusion of this proposal in the final report of the Commission on Constitutional Review	10%
Priority ranking of this amendment as determined from response to the survey ballot. (This report contains seventy-seven amendment proposals. There are only sixty-two possible rank positions, however, due to various proposals receiving identical priority index ratings and priority rankings. A ranking of "1" indicates first priority, least priority is indicated by a ranking of "62.")	32
Priority index of this amendment as determined from response to the survey ballot. (Index numbers approximating "1.00" indicate high priority; index numbers approximating "5.00" indicate least priority.)	2.73

SUBCOMMITTEE ON BILL OF RIGHTS/ELECTIONS

AMENDMENT PROPOSAL NUMBER 42

PROPOSED AMENDMENT

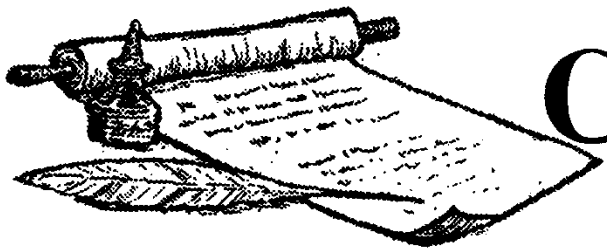
Repeal Section 12, which currently reads as follows:

Indictable offense not to be prosecuted by information; exceptions.

No person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of court for oppression or misdemeanor in office.

COMMISSION MEMBER SUPPORT: COMPILATION OF RESPONSES TO THE SURVEY BALLOT OF THE COMMISSION ON CONSTITUTIONAL REVIEW OF JULY 1987

Percentage of member responses favoring inclusion of this proposal in the final report of the Commission on Constitutional Review	**67%**
Percentage of member responses opposing inclusion of this proposal in the final report of the Commission on Constitutional Review	**5%**
Percentage of member responses indicating no opinion concerning inclusion of this proposal in the final report of the Commission on Constitutional Review	**28%**
Priority ranking of this amendment as determined from response to the survey ballot. (This report contains seventy-seven amendment proposals. There are only sixty-two possible rank positions, however, due to various proposals receiving identical priority index ratings and priority rankings. A ranking of "1" indicates first priority, least priority is indicated by a ranking of "62.")	**42**
Priority index of this amendment as determined from response to the survey ballot. (Index numbers approximating "1.00" indicate high priority; index numbers approximating "5.00" indicate least priority.)	**3.00**



CHAPTER 4

Constitution of the United States
Amendment I

Freedom of speech and press. Congress shall make no law prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.

Amendment IV

Rights of accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

Constitution of Kentucky
Section 8

Freedom of speech and the the press. Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.

"I'm writing a letter to the President."
"That movie is rated PG."
"WHEN'S PTA?"
"You have the right to remain silent."
"I'm old enough to vote."
"HAS THE PAPER COME YET?"
"THAT'S DISCRIMINATION!"
"It's unconstitutional."
"SHE'S A PUBLIC DEFENDER."
"I'll say what I want to say."
"I refuse to answer."
"I'LL SUE."
"WE HAVE ELECTION DAY OFF."
"Are you going to the meeting?"
"Equal Opportunity Employer."
"Do you have a search warrant?"
"Did you sign the petition?"
"Write your Congressman."
"NO TRESPASSING."
"!*@*#•!"
"I've got my rights!"
"I'M INNOCENT!"
"I bought it for the articles."
"I have jury duty."
"I can't believe I voted for him."
"IT'S A FREE COUNTRY!"
"A man's home is his castle."
"He's never stepping foot in my house."
"She took the fifth."
"THROW THE RASCALS OUT!"
"O.K. let's see some proof of your age."
"That's against the law."
"THE AYES HAVE IT."
"You can't hold me!"
"Vote 'YES' on Election Day!"
"What time is church?"
"You don't have to make a Federal Case out of it!"
"BAIL BONDS ANYWHERE ANYTIME!"
"WHEN I GROW UP I WANT TO BE PRESIDENT."
"THAT'S ART?"
"NO COMMENT!"
"I want a lawyer!"
"You'll have your day in court."
"Call out the National Guard!"
"I'll take it to the Supreme Court!"

EVERY DAY YOU USE THE BILL OF RIGHTS AND YOU DON'T EVEN KNOW IT.

For 200 years the Bill of Rights and subsequent amendments have secured our freedoms as Americans. In fact, these constitutional rights have become such a part of our everyday life that we tend to take them for granted, which is unfortunate because without them, you would not even have the freedom to read this ad, nor would we have the freedom to run it.

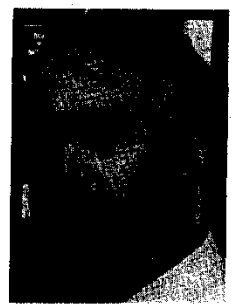
THE CONSTITUTION • THE WORDS WE LIVE BY.

THE COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION INVITES ALL AMERICANS TO CELEBRATE "THE BILL OF RIGHTS AND BEYOND" IN 1991.

FOR MORE INFORMATION WRITE: THE CONSTITUTION, WASHINGTON, D.C. 20006-3999.

Ad Council

THE FIRST AMENDMENT AND THE CRIMINAL JUSTICE SYSTEM



Roy Moore

Since the adoption of the *Bill of Rights* in 1791, the Sixth Amendment has guaranteed, among other rights, the right of a criminal *defendant* "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...." The U.S. Supreme Court has wrestled for more than two centuries with issues such as the criteria for an impartial jury[1] and the meaning of "speedy," but the Court never directly acknowledged a Constitutional right of public access to judicial proceedings until 1980 when the justices held 7-1 in *Richmond Newspapers v. Virginia*[2] that the First and 14th Amendments guarantee the press and the public the right to attend criminal trials. The right was not absolute, according to the Court, but "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."

One aspect of the decision that was troublesome for journalists was that, with six different opinions among the seven justices in the majority, there is no clear indication whether this is a First Amendment or a Sixth Amendment right. Chief Justice Warren Burger was joined by Justices Byron White and John Paul Stevens in the Court's holding that "... the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of speech and of the press could be eviscerated'" [citing *Branzburg v. Hayes* (1972)].[3] In separate opinions, Justices Byron White, John Paul Stevens and Harry Blackmun each concurred with the decision but not fully with the reasoning of the Court. Justice White criticized the Court for not having recognized this right under the Sixth Amendment one year earlier in *Gannett Co. v. DePasquale* (1979),[4] discussed shortly. Justice Stevens characterized the case as a "watershed case," but chided the Court for not recognizing a right of access in *Houchins v. KQED*[5] two years earlier. In his concurring opinion, Justice Blackmun stuck to his view earlier in *Gannett Co. v. DePasquale* that the right to a public trial could be found explicitly in the Sixth Amendment but that "the First Amendment must provide some measure of protection for public access to the trial."[6]

The lone dissenter, Justice William Rehnquist, said he could find no prohibition against closing a trial to the public and the press anywhere in the *Constitution*, including the First, Sixth, Ninth, or any other Amendments. Justice Rehnquist would instead defer to the states and to the people to make the judgment of whether trials should be open. He made no reference to the meaning of "public trial" under the Sixth Amendment, although he had joined the majority in *Gannett Co. v. DePasquale*, which held that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."[7]

The Court tackled three more major cases dealing with right of access to the judicial process after *Richmond Newspapers v. Virginia*, and in each case found a Constitutional right, but continued to quibble over the origins of the right. The result was confusion that is unlikely to dissipate for some time. The determination of whether the right arises from the Sixth Amendment or the First Amendment could prove very significant in the long run. Four of the justices who decided *Gannett v. DePasquale* still sit on the court — Chief Justice Rehnquist and Associate Justices Stevens, White and Blackmun. Justice Rehnquist found no Constitutional right of access in either *Gannett* or *Richmond Newspapers*, while Stevens found no Sixth Amendment right in *Gannett* but appeared to recognize a First Amendment right in *Richmond Newspapers*. Justices Blackmun and White believed that the Sixth Amendment applied through the 14th Amendment barred a state from closing the pretrial suppression hearing in *Gannett* even if approved by the defendant unless the court strongly considered the public interest in open proceedings. Both justices believed the First Amendment guaranteed an open criminal trial in *Richmond Newspapers*.

The Court is not the only body ambivalent about opening the judicial process to press and public scrutiny. Lawyers, judges and the public seem split on the issue as well. Some judges have little hesitation in closing criminal trials and pre-trial proceedings to the public and the press, while others take extraordinary measures to ensure public access while protecting the rights of the defendant. First Amendment attorneys generally favor open trials and open proceedings, while criminal defense lawyers are sometimes more comfortable with closed proceedings, especially in highly visible cases that are likely to attract media attention.

Why are courts so bothered by open proceedings? The most common fears are (1) a public trial can bias jurors and thus prevent a defendant from receiving a fair trial, (2) the presence of the news media will seriously affect the courtroom decorum and ultimately the judicial process, and (3) extensive publicity may adversely affect the defendant and other witnesses, including the victim.

Do public trials prevent jurors from rendering an impartial verdict, and, if so, would closing them ensure an unbiased decision? Some criminal trials attract so much pre-trial media attention that the courts *auotmatically* assume that extraordinary measures must be taken even during voir dire. Typical examples are the William Kennedy Smith rape trial in Palm Beach, Florida, and the Miami, Florida, trial of former Panama leader, Manuel Noriega, on drug trafficking charges, in 1991. In both cases, thousands of news stories appeared about each defendant, and hundreds of potential jurors were questioned during *voir dire* before a final panel was selected. Most individuals were dismissed as po-

tential jurors because they indicated they had been seen and heard some of the massive publicity and thus were presumably biased.

The principles laid down by the Court in *Near v. Minnesota* (1931) and Nebraska Press Association v. Judge Stuart (1976), however, effectively restrict judges from exercising control over pre-trial and during-trial publicity, although they can certainly control what takes place in the courtroom. In *Near*, the Court said that the government could impose prior restraint against the press only in exceptional circumstances such as obscene publications or a potential violation of national security, while in *Nebraska Press Association*, the Court unanimously held that a state trial court judge's restrictive order on the news media was unconstitutional because the judge had failed to exhaust other measures for ensuring a fair trial short of prior restraint. "We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact."[10]

In a recent law review article entitled "*Who is an Impartial Juror in an Age of Mass Media*?," Newton Minow and Fred Cate conclude:

> To think that jurors wholly unacquainted with the facts of a notorious case can be impaneled today is to dream. Anyone meeting that standard of ignorance should be suspect. The search for a jury is a chimera. It is also unnecessary. Knowledgeable jurors today, like 800 years ago, can form an impartial jury. In fact, the very diversity of views and experiences that they possess is the best guarantee of an impartial jury.[11]

The authors note that in 12th Century England where the jury system was invented an individual had to be familiar with the parties as well as the circumstances in the case before he was eligible. Strangers could not serve.[12]

In an indirect way, the U.S. Supreme Court has agreed with the premise that knowledgeable jurors can be impartial. In *Murphy v. Florida* (1975),[13] the Court held that Jack Roland Murphy, known as "Murph the Surf," was not denied a fair trial even though members of the jury that convicted him of the 1968 robbery of a Miami home had learned of the defendant's prior felony conviction and other facts from news stories. Murphy unsuccessfully argued that the extensive media coverage he received primarily because of his flamboyant life-style and his earlier conviction for stealing the Star of India sapphire prejudiced the jury. Murphy cited *Irvin v. Dowd*,[14] *Rideau v. Louisiana*,[15] *Estes v. Texas*[16] and *Sheppard v. Maxwell*[17] to support his contention that "persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced,"[18] In each of these cases, the Supreme Court reversed a criminal conviction in state court "obtained in a trial atmosphere that had been utterly corrupted by press coverage."[19]

In *Irvin v. Dowd* (1961), the Court held unanimously that "Mad Dog Irvin" (as he was known in the press) had been denied 14th Amendment due process and thus was entitled to a new trial. The Court pointed to the fact that eight of the 12 jurors in the case had indicated during voir dire that they thought he was guilty of the murder for which he was being tried. All eight of them said they were familiar with the facts and circumstances, including that Irvin had confessed to six other murders. They had acquired this information from the massive press coverage the story received, but all 12 told the judge that they could still be impartial and fair. As the Court noted:

> ... No doubt each juror was sincere when he said that he would be fair and impartial to petitioner [Irvin], but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you hear and see." With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed that so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt [citations omitted].[20]

In *Rideau v. Louisiana* (1963), the Court reversed the death penalty of Wilbert Rideau, convicted of armed robbery, kidnapping and murder. The Court held that his right to due process had been violated because the state trial court refused to grant a change of venue even though most people in Calcasieu Parish, including the jurors, had seen a film broadcast three times on television in which the defendant confessed, without benefit of an attorney, to the sheriff that he had committed the alleged crimes. The Court was concerned that three members of the jury said during *voir dire* that they had seen the televised confession at least once. Further, two members of the jury were deputy sheriffs of the parish in which the trial occurred.

The circumstances compelling the Supreme Court to overturn the swindling conviction of the petitioner in *Estes v. Texas* (1965) involved more than simply jury prejudice. The Court held that the 14th Amendment due process rights of financier Billy Sol Estes had been violated primarily because of the publicity associated with the pretrial hearing, which had been carried live on both television and radio. Some portions of the trial were also broadcast,[21] and news photography was permitted throughout the trial. The Court was clearly unhappy with the massive pretrial and during-trial publicity, but its greatest concern was the presence of cameras at the two-day pretrial hearing, which included at least 12 camerapersons continually snapping still pictures or recording motion pictures, cables and wires "snaked across the courtroom floor," three microphones on the judge's bench and others aimed at the jury box and the attorney's table. By the time of the trial, the judge had imposed rather severe restriction on press coverage, and the trial was moved about 500 miles away. The Supreme Court did hint that cameras would return someday to the courtrooms:

> It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.[22]

The facts indeed did change as the technology changed, leading the court to rule in *Chandler v. Florida*[23] 16 years later that a state could permit broadcast and still photography coverage of criminal proceedings because cameras and microphones in the courtroom were no longer an inherent violation of a defendant's 14th Amendment rights, contrary to the holding in *Estes v. Texas*. The majority opinion in *Estes* cited four major reasons for banning cameras from the courtroom — (1) the negative impact on jurors, especially in biasing the jury and in distracting its members, (2) impairment of the quality of the testimony of witnesses (the idea that witnesses may alter their testimony when cameras and mikes are present), (3) interference with the judge in doing her/his job, and (4) potential negative impact on the defendant, including harassment. As the Court noted:

> ... Trial by television is .. foreign to our

system... [T]elecasting may also deprive an accused of effective counsel. The distractions, intrusions into confidential attorney-client relationships and the temptation offered by television to play to the public office might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses [citation omitted].[24]

With nearly all states and even the federal courts now permitting television and radio coverage in the courtroom with only limited restrictions, those words seem rather hollow, but the technology and public attitudes have changed considerably. When the cable network, Court TV, debuted in mid-1991, there were no outcries of sensationalism nor complaints about lack of due process. Indeed, the network had a enormous variety of civil and criminal trials from which to choose to fill its 24-hour programming.

It is rather ironic that *Chandler v. Florida*, which recognized no Constitutional right of access but merely held that the *Constitution* does not bar states from allowing radio, television and photographic coverage of criminal proceedings, has probably had a greater impact on opening up the judicial process than *Richmond Newspapers v. Virginia*, which did indeed recognize a Constitutional right of access to criminal trials by the press and the public. Are there situations in which criminal proceedings, including trials, can be closed without violating the First Amendment? *Richmond Newspapers v. Virginia* provides at least a partial answer. According to the Court, the trial of a criminal case must be open to the public, "[a]bsent an overriding interest articulated in findings."[25] The Court, however, took no pains to explain "overriding interest," but did distinguish the case from *Gannett v. DePasquale* by noting that "both the majority [which upheld the closure of a criminal pretrial hearing as Constitutional]... and dissenting opinions ... agreed that open trials were part of the common law tradition."[26] Unfortunately, the justices did not overrule *Gannett v. DePasquale*, which led Justice Byron White to argue in his concurring opinion in *Richmond Newspapers v. Virginia* that the latter case "would have been unnecessary had *Gannett* ... construed the Sixth Amendment to forbid the public from excluding the public from criminal proceedings except in narrowly defined circumstances."[27]

Richmond Newspapers was a particularly appropriate case for testing this implicit right of access in the *Constitution* because it involved a defendant who had been tried three times before and who had specifically requested closure with no objection from the prosecution. The defendant's first conviction of second degree murder was reversed because improper evidence was introduced at trial, while the second and third trials ended in mistrials. Since the defendant asked that the trial be closed, he effectively waived his right to a public trial. Thus a First Amendment rationale was necessary if the trial were to remain open. One of the more puzzling aspects of the decision is that the majority opinion (written by then-Chief Justice Warren Burger) felt it was "not crucial" to characterize the decision as "right of access" or a "right to gather information." The Court did note that the "explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily."[28]

Although it was technically not an access case, *Sheppard v. Maxwell* (1966)[29] was a watershed decision involving the 14th Amendment rights of defendants, especially in highly publicized cases. It also played a major role in a movement by lower courts away from openness that began in the early 1990s. Indeed, the Court's decision served as a lightning rod for many state courts to close trials even though the justices clearly did not intend to send a message that press and public access should be restricted beyond the suggestions made for preventing a crowded courtroom.

The circumstances in the case are particularly important in understanding the Court's 8-1 decision. Samuel H. Sheppard, a prominent Ohio osteopath was tried and convicted by a jury of second degree murder after his wife, Marilyn, was bludgeoned to death in their Bay Village home in suburban Cleveland. The Supreme Court's opinion describes the case in considerable detail, but some highlights bear mentioning. Dr. Sheppard was a suspect in the murder from the beginning, especially because of contradictory information he and other witnesses provided about the circumstances in the matter. He claimed, for example, that he had fallen asleep on a couch the night his wife was murdered in her bedroom, but that he had heard her cry out in the early morning. When he ran upstairs to her bedroom, he saw a "form" standing over her bed and was then knocked unconscious when he struggled with the "form." When he regained consciousness, he checked his wife and believed she was dead after he could not get a pulse. He then checked on his son, found him unharmed and then chased the "form" out the door onto the lake shore, where he again lost consciousness.[30]

The publicity surrounding the case and the trial was unbelievable and on par with that in the 1934 trial of Bruno Hauptmann in the kidnap-murder of the 19-month-old son of famed aviator, Charles Lindberg. (The indiscretions of the press in that case led the American Bar Association three years later to adopt Canon 35 that effectively forbade broadcast coverage and still photos in the courtroom for more than 4 decades.) The case must be read in full to be appreciated, but a few examples can provide a sense of why the Court denounced the "carnival atmosphere at trial." The headlines, stories and editorials in the Cleveland newspapers were relentless and merciless in their accusations against the defendant. Some typical examples among the dozens cited by the Court:

1. At the coroner's request before the trial, Sheppard re-enacted the tragedy at his home, but he had to wait outside for the coroner to arrive since the house was placed in "protective custody" until after the trial. Since news reporters had apparently been invited on the tour by the coroner, they reported his performance in detail, complete with photographs.

2. When the defendant refused a lie detector test, front-page newspaper headlines screamed "Doctor Balks at Lie Test; Retells Story" and "Loved My Wife, She Loved Me,' Sheppard Tells News Reporter."

3. Later, front-page editorials claimed someone was "getting away with murder" and called on the coroner to do an inquest — "Why No Inquest? Do It Now, Dr. Gerber." When the hearing was conducted, it took place in a local school gymnasium, complete with live broadcast microphones, a swarm of photographers and reporters and several hundred spectators to witness Sheppard being questioned for five and a half hours about his actions on the night of the murder, an illicit affair and his married life. His attorneys were present but were not allowed to participate.

4. Later stories and editorials focused on evidence that was never introduced at trial and on his alleged extramarital affairs with numerous women, even though the evidence at trial included an affair with only one woman, Susan Hayes, who was the subject of dozens of news stories.

5. Sheppard was not formally charged until more than a month after the murder, and during that time the editorials and headlines ranged from "Why Isn't Sam Sheppard In Jail?" to "New Murder Evidence Is Found,

Police Say" and "Dr. Sam Faces Quiz At Jail On Marilyn's Fear Of Him."

6. The trial occurred two weeks before the November general election in which the chief prosecutor was a candidate for Common Pleas Judge and the trial judge was a candidate to succeed himself. All three Cleveland newspapers published the names and addresses of prospective jurors and during the trial the jurors became media celebrities themselves. During the trial, which was held in a small courtroom (26x48 feet), 20 newspaper and wire service reporters were seated within three feet of the jury box. A local radio station was even allowed to broadcast from a room next door to where the jurors recessed and later deliberated in the case. Each day, witnesses, the attorneys and the jurors were photographed as they entered and left the courtroom, and while photos were not permitted during the trial itself, they were permitted during the recesses. In fact, pictures of the jury appeared more than 40 times in the newspapers.

7. The jurors were never sequestered during the trial and were allowed to watch, hear and read all of the massive publicity during the trial that even included a national broadcast by the famous Walter Winchell in which he asserted that a woman under arrest for robbery in New York City said she was Sam Sheppard's mistress and had borne his child. The judge merely politely "admonished" the jurors not to allow such stories to affect their judgment.

As the Court noted, "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard."[31] As a result, Sheppard was denied a fair trial in violation of his 14th Amendment due process rights, according to the Court, which ordered a new trial. At the second trial, 12 years after the first, the physician was acquitted. In spite of the fact that Dr. Sheppard had been the subject of highly prejudicial, intense publicity, the Court recommended remedies short of prior restraint:

> Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen ... The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom ....
>
> Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony ...
>
> Thirdly, the judge should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information was inaccurate, leading to groundless rumors and confusion....[32]

The Court also suggested other remedies, including (1) continuance or postponing the case until prejudicial publicity subsides, (2) transferring to another county not permeated by the publicity, (3) sequestration of the jury to keep its members from being exposed to prejudicial publicity, and (4) ordering a new trial if publicity threatens a defendant's due process rights after the trial has begun. It is significant that the Court did not cite restrictive orders ("gag" orders) on the press as a judicial remedy but instead favored restricting the parties, witnesses and attorneys. Unfortunately, many courts interpreted the *Sheppard* holding as a license to impose restrictive orders on the press anyway, prodding the Court to eventually rule out such censorship under most circumstances in a series of rulings that culminated in the decision in *Nebraska Press Association v. Stuart* in 1976, in which the Court held that restrictive orders against the press are "presumptively unconstitutional" and cannot be issued except in rare circumstances and then only after other measures less restrictive of the First Amendment such as those just discussed are exhausted.

Until *Richmond Newspapers* the Supreme Court appeared to be moving toward severely restricting press access to the judicial process. While upholding closure of pretrial hearings, albeit in a 5-4 call, *Gannett v. DePasquale* represented only one section of the big picture. In *Pell v. Procunier* (1974)[33] and *William B. Saxbe v. The Washington Post Co.* (1974),[34] the Court decided 5-4 that journalists have no Constitutional right of access to prisons or their inmates beyond those enjoyed by the public. *Pell* upheld a California Department of Corrections regulation barring the news media from interviewing "specific individual inmates." Four prisoners and three journalists had challenged the rule as a violation of their First and 14th Amendment rights of free speech. According to the Court, "It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public. It is quite another thing to suggest that the *Constitution* imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."[35] The Court accepted the state's rationale that media interviews can turn certain inmates into celebrities and thus create disciplinary problems for these and other prisoners.

In *Saxbe*, issued on the same day as *Pell*, the Court upheld a federal rule similar to that of California that prohibited personal interviews by journalists with individually designated federal inmates in medium- and maximum-security prisons. The justices saw no major differences between the two regulations and noted that the federal rule "does not place the press in any less advantageous position than the public generally."[36] The *Washington Post* had filed suit after it was denied access to prisoners who had allegedly been punished for their involvement in strike negotiations at two federal facilities. In its reasoning, the Court relied heavily upon *Branzburg v. Hayes* (1972),[37] which held 5-4 that the First Amendment grants no special privileges to journalists against revealing confidential sources or confidential information to grand juries.

In a decision in 1978 that has had very limited impact on the press because of its rather unusual circumstances, the Court ruled 5-4 that no First Amendment rights were violated when the press was denied permission to copy, broadcast and sell to the public recordings of White House conversations that were played during one of the Watergate trials. *Richard Nixon v. Warner Communications*[38] was unusual in that Warner was requesting copies of tapes that had already been played at trial but were in the custody of the Administrator of General Services under authority granted by the Presidential Recordings Act approved by Congress. *Pell* and *Saxbe* were basically reaffirmed four years later in a plurality opinion in *Houchins v. KQED* (1978)[39] in which the Court held that a broadcaster's First and 14th Amendment rights were not violated when the station was denied access to the portion of a county jail where a suicide had occurred. According to the Court, "Neither the First Amendment nor Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. Under our holdings in [*Pell* and *Saxbe*], until the political branches decree otherwise, as they are free to do, the media has [sic] no special right of access to the Almedia County Jail [the facility in question] different from or greater than that accorded the public generally."[40] The station could use other sources, the

Court noted, such as inmate letters, former inmates, public officials and prisoner's attorneys to gain the information it sought about conditions at the facility.

As if to illustrate this point but in a different setting, exactly one year later the Court unanimously struck down as unconstitutional a West Virginia statute that provided criminal penalties for publication, without the written permission of the juvenile court, of truthful information that had been lawfully acquired concerning the identity of a juvenile offender. In *Robert K. Smith v. Daily Mail Publishing Co.* (1979),[41] the justices said that the asserted state interest of insuring the anonymity of juveniles involved in juvenile court proceedings was not sufficient to override the First Amendment's restrictions against prior restraint. The Charleston (West Virginia) *Daily Mail* and the Charleston *Gazette* published the name of a 14-year-old junior high student who had been charged with shooting a 15-year-old classmate to death at school. Reporters and photographers first heard about the shooting on a police radio and then were given the alleged assailant's name by several eyewitnesses, the police and an assistant prosecutor.After the name and photo of the teenage defendant appeared in the papers, a grand jury indicted both publications for violating the state statute, although no indictments were issued against three local radio stations who broadcast the name. (The statute applied only to newspapers, not to the electronic or other media, a deficiency duly noted by the Court in its decision.) The holding in the case was narrow, as then-Chief Justice Warren Burger indicated, because "[t]here is no issue before us of unlawful press access to confidential judicial proceedings [citations omitted]; there is no issue here of privacy or prejudicial pre-trial publicity."[42] Indeed, Justice Rehnquist, while concurring in the judgment of the Court, noted, " ... I think that a generally effective ban on publication that applied to all forms of mass communication, electronic and print media alike, would be constitutional."[43] The Court's opinion, representing the other seven justices voting in the case (Justice Powell took no part in the consideration or decision of the case.), held that a state statute punishing the publication of the name of a juvenile defendant would never serve a "state interest of the highest order," as required to justify prior restraint. The majority opinion cited, among other decisions, *Landmark Communications Inc. v. Virginia* (1978),[44] *Cox Broadcasting Corp. v. Cohn* (1975),[45] and *Oklahoma Publishing Co. v. District Court* (1977).[46]

In *Landmark*, the Supreme Court ruled 7-0 that a Virginia statute subjecting individuals, including newspapers, to criminal sanctions for disclosing information regarding proceedings before a state judicial review commission was a violation of the First Amendment. The case arose when the *Virginian Pilot* published an article accurately reporting details of an investigation of a state judge by the Virginia Judicial Inquiry and Review Commission. One month later, a state grand jury indicted the company that owned the newspaper for violating the statute by "unlawfully divulg[ing] the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing" by the commission. In a bench trial, Landmark was fined $500 and ordered to pay court costs. The company appealed and the Supreme Court held that the First Amendment does not allow "the criminal punishment of third persons who are strangers to the inquiry, including news media, for divulging or publishing truthful information regarding confidential proceedings" of the Judicial Inquiry and Review Commission.[47] The Court noted that the issue was narrow since the case was not concerned with application of the statute to someone who obtained the information illegally and then divulged it nor with the authority to keep such a commission's proceedings confidential. But it was, nevertheless, an important victory for newsgathering because it reinforced the principle that truthful information legally obtained enjoys First Amendment protection even when such information includes details of closed judicial proceedings. This protection is not absolute, of course, as the Court noted in both *Landmark* and *Smith*, but the state has a heavy burden in demonstrating that its interests outweigh those of the First Amendment. While admitting in *Landmark* that premature disclosure of the commission's proceedings could pose some risk of injury to the judge, to the judicial system or to the operation of the commission itself, the Court said "much of the risk can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings."[48]

In *Cox Broadcasting*, the U.S. Supreme Court declared a Georgia statute unconstitutional that made made the press criminally and civilly liable for publishing the name of a rape victim even when such information was obtained from public records.[49] Finally, the Court held in *Oklahoma Publishing Co.*that a state court injunction barring the press from publishing the identity or photograph of an 11-year-old boy on trial in juvenile court was unconstitutional prior restraint.[50] The Court struck down the judge's order because he had already allowed reporters and other members of the public to attend a hearing in the case in which the information was disclosed. Once truthful information is "publicly revealed" or "in the public domain," it cannot be banned, according to the Court. In 1982 the U.S. Supreme Court issued the first of three rulings that appeared to significantly broaden the holding in *Richmond Newspapers* (1980) that criminal trials were under the *Constitution* presumptively open to the press and the public. While the first decision, *Globe Newspaper Co. v. Norfolk County Superior Court* (1982)[51] did not deal directly with the scope of *Richmond Newspapers*, it still paved the way for the two subsequent cases that confronted this issue. In *Globe Newspaper*, the Court in a 6-3 opinion struck down as unconstitutional a Massachusetts statute that the state Supreme Judicial Court construed to require judges to exclude the press and the public in trials for certain sexual offenses involving a victim under the age of 18 during the time the victim is testifying. The key factor in the case was mandatory closure — the judge had no discretion. Liberally quoting its decision in *Richmond Newspapers*, the Court rejected the state's contentions that the statute was necessary to protect "minor victims of sex crimes from further trauma and embarrassment" and to encourage "such victims to come forward and testify in a truthful and credible manner." According to the majority opinion:

> Although the right of access to criminal trials is of a constitutional stature, it is not absolute. But the circumstances under which the press and the public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.[52]

The justices agreed that the first asserted state interest was compelling but that mandatory closure was not justified since "the circumstances of a particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim."[53] The Supreme Court was not convinced at all on the second asserted interest since the press and the public are allowed to see the transcript and to talk with court personnel and other individuals and thus ascertain the substance of the victim's testimony and even his or her identity. Thus the Court

left the door open for closure on a case-by-case basis, while clearly prohibiting mandatory closure as unconstitutional prior restraint.

Press Enterprise I (1984)[54] and *Press Enterprise II* (1986),[55] as they have become known, opened up voir dire and preliminary hearings, at least as they are conducted in California, respectively, to the press and the public. *Press Enterprise I* is particularly significant because the Court for the first time held that the jury selection process is part of the criminal trial itself and thus presumptively open under the First and 14th Amendments. The unanimous decision reiterated that the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[56] In *Press Enterprise* I, the newspaper was denied access to most of the voir dire in a trial for the rape and murder of a teenage girl. The judge allowed the press to attend the "general voir dire" but closed the courtroom when the attorneys questioned individual jurors. In all, only three days of the six weeks of voir dire were open, and the judge refused to allow a transcript of the process to be released to the public. The jury selection process could under some circumstances invoke a compelling government interest, but no such interest had been demonstrated in this case, according to the Court. An example cited by the justices of such a justified closure might be to protect an individual's privacy when a prospective juror had privately told the judge that she or a member of her family had been raped but had not prosecuted the offender because of the trauma and embarrassment from disclosure.

Finally, two years later in *Press Enterprise II*, the Supreme Court held 7-2 that the press and the public enjoyed a limited First Amendment right of access in criminal cases to preliminary hearings. The holding was quite narrow because the Court made emphasized that it applied only to such hearings "as they are conducted in California" where "[b]ecause of its extensive scope, the preliminary hearing is often the most important in the criminal proceeding."[57] The case began when the newspaper was denied access to a 41-day preliminary hearing for a nurse charged in the murder of 12 patients. The defendant requested closure, and the magistrate in the case not only granted the motion but also sealed the record. The prosecution moved to have the transcript released and the trial court agreed to do so when the defendant waived the right to a jury trial, but the California Supreme Court reversed the trial court decision. The U.S. Supreme Court reversed, holding that "California preliminary hearings are sufficiently like a trial" to warrant a First Amendment right of access unless the state can demonstrate an overriding interest sufficient to overcome the presumption of openness.

SUMMARY AND CONCLUSIONS

Since *Press Enterprise II* the U.S. Supreme Court has not considered whether other portions of the criminal judicial process, including preliminary hearings in states that do not follow the California model, fall under the holding in *Richmond Newspapers*. The composition of the Court has changed substantially since 1986 with William H. Rehnquist replacing Warren Burger as Chief Justice and Associate Justices William J. Brennan, Jr., Thurgood Marshall, and Lewis F. Powell, replaced by David Souter, Antonin Scalia, Anthony Kennedy and Clarence Thomas, but it appears likely that the Court will, if given the opportunity, continue to broaden, albeit in narrow increments, the scope of the limited First Amendment right of access to the criminal judicial process. The major question, however, is whether a majority of the justices will recognize a constitutional right of the press and the public to attend civil trials and related proceedings. Such a move would be a bold and unprecedented step toward truly opening the judicial system to the public, which it was designed to serve in the first place. Most civil trials are now routinely open in state and federal courts, although not necessarily to electronic media coverage, although even the federal courts are now permitting such access on an experimental basis for now. The U.S. Supreme Court has always opened its formal proceedings, although not its deliberations, to the public, including oral arguments and the reading of decisions, but the justices have thus far banned cameras in the courtroom itself, except for ceremonial occasions.

As the Court has indicated in each of its decisions dealing with access to the judicial process, the right of access is not absolute but the burden on the state to justify closure must necessarily be heavy. The trials of Dr. Sam Sheppard and Bruno Hauptmann were aberrations and should be viewed as such by the courts. Openness clearly promotes fairness and justice because it subjects the judicial system to press and public scrutiny, which is essential in an age in which the public appears to have lost some of its faith in the process, thanks to revelations that have brought the demise of several state and federal court judges.

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Footnotes

[1] *See*, for example, *Reynolds v. United States*, 98 U.S. 145, in which the Court, in affirming the constitutionality of a federal law making bigamy a crime in the territories, rejected a motion for a new trial on the ground that trial judge had allowed an individual to serve on the jury who, it was asserted "'believed' he had formed an opinion which he had never expressed, and which he did not think would influence his verdict on hearing the testimony."

[2] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973, 6 Med.L.Rptr. 1833 (1980).

[3] *Paul M. Branzburg v. John P. Hayes*, In the Matter of Paul Pappas, and *U.S. v. Earl Caldwell*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626, 1 Med.L.Rptr. 2617.

[4] *Gannett Co., Inc. v. Daniel A. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608, 5 Med.L.Rptr. 1337 (1979).

[5] *Thomas L. Houchins, Sheriff of the County of Alameda, Calif., v. KQED*, Inc., 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553, 3 Med.L.Rptr. 2521 (1978).

[6] *Gannett v. DePasquale*.

[7] *Id.*

[8] *J.M. Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357, 1 Med.L.Rptr. 1001 (1931)

[9] *Nebraska Press Association v. Judge Hugh Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683, 1 Med.L.Rptr. 1059 (1976).

[10] *Id.*

[11] Minow and Cates, Who Is an Impartial Juror in an Age of Mass Media?, 40 AM. U. L. REV. 631 (1991).

[12] *Id.*

[13] *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589, 1 Med.L.Rptr. 1232 (1975).

[14] *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751, 1 Med.L.Rptr. 1178 (1961)

[15] *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663, 1 Med.L.Rptr. (1963).

[16] *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d, 1 Med.L.Rptr. 1187 (1965).

[17] *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, 1 Med.L.Rptr. 1220 (1966).

[18] *Murphy v. Florida*.

[19] *Id.*

[20] *Irvin v. Dowd*.

[21] While the judge banned live broadcasting during most of the trial, the opening and closing arguments of the prosecutor, the return of the jury's verdict and the receipt of the verdict by the judge were broadcast live. Other portions of the trial were recorded by a camera behind a camouflaged booth and broadcast later as

clips during the local newscasts. News photographers were also restricted to the booth area.

[22] *Estes v. Texas.*

[23] *Noel Chandler and Robert Granger v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740, 7 Med.L.Rptr. 1041 (1981).

[24] *Estes v. Texas.*

[25] *Richmond Newspapers, Inc. v. Virginia.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Sheppard v. Maxwell.*

[30] The old network TV series, The Fugitive (starring the late David Jansen), which still lives in syndication on the Arts and Entertainment Cable Network was loosely based on the Sheppard Story.

[31] *Sheppard v. Maxwell.*

[32] *Id.*

[33] *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974).

[34] *William B. Saxbe v. The Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974).

[35] *Pell v. Procunier.*

[36] *William B. Saxbe v. The Washington Post Co.*

[37] *Branzburg v. Hayes.*

[38] *Richard Nixon v. Warner Communications*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570, 3 Med.L.Rptr. 2074 (1978).

[39] *Thomas L. Houchins v. KQED*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553, 3 Med.L.Rptr. 2521 (1977).

[40] *Id.*

[41] *Robert K. Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399, 5 Med.L.Rptr. 1305 (1979).

[42] *Id.*

[43] *Id.*

[44] *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1, 3 Med.L.Rptr. 2153 (1978).

[45] *Cox Broadcasting Corp. et al. v. Martin Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, 1 Med.L.Rptr. 1819 (1975).

[46] *Oklahoma Publishing Co. v. District Court in and for Oklahoma County*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355, 2 Med.L.Rptr. 1456 (1977).

[47] *Landmark Communications v. Virginia.*

[48] *Id.*

[49] *Cox Broadcasting v. Cohn.*

[50] *Oklahoma Publishing v. District Court.*

[51] *Globe Newspaper Co. v. Norfolk County Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248, 8 Med.L.Rptr. 1689 (1982).

[52] *Id.*

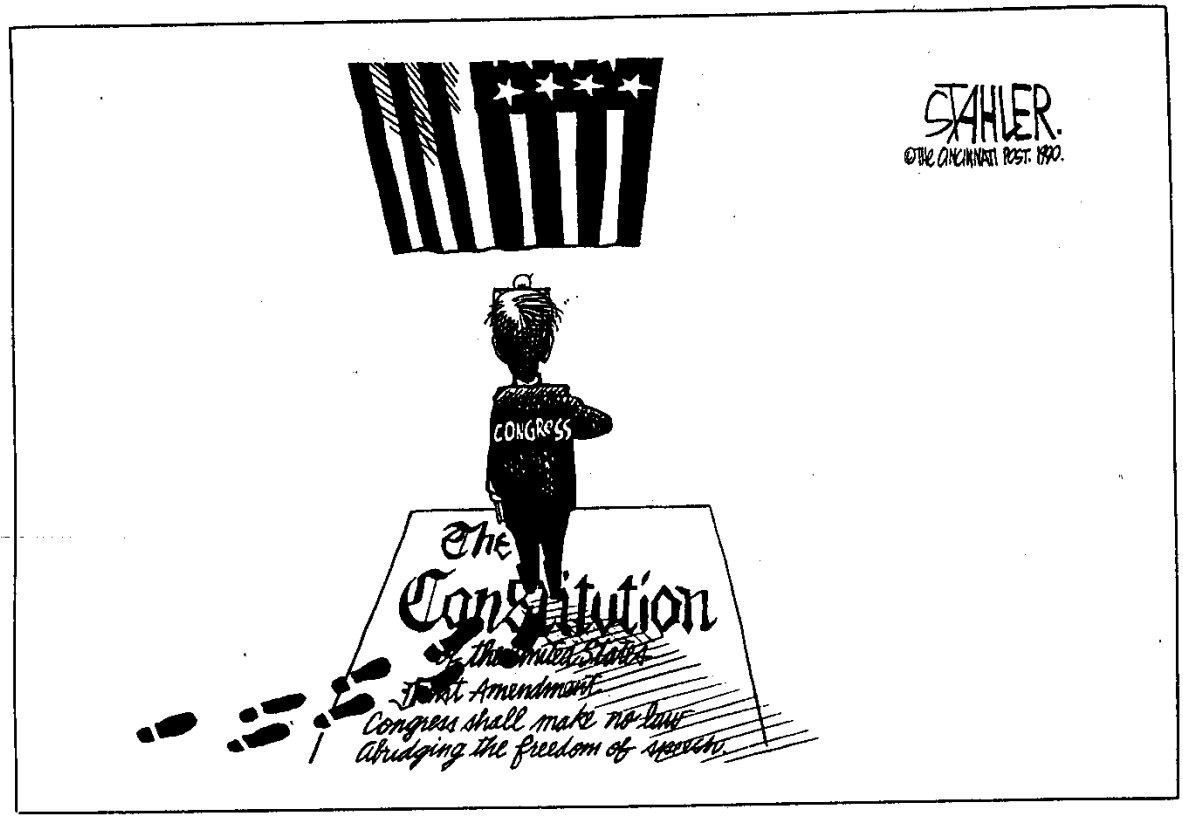
[53] *Id.*

[54] *Press Enterprise Co. v. Riverside County Superior Court* ("Press Enterprise I"), 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629, 10 Med.L.Rptr. 1161 (1984).

[55] *Press Enterprise Co. v. Riverside County Superior Court* ("Press Enterprise II"), 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1, 13 Med.L.Rptr. 1001 (1986).

[56] *Press Enterprise I.*

[57] *Press Enterprise II.*



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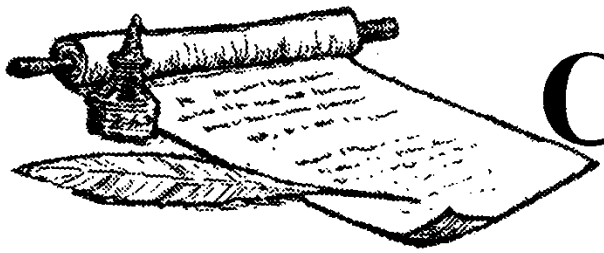

CHAPTER 5

Constitution of Kentucky
Section 11

Rights of accused in criminal prosecution. In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature an cause of the accusation against him...

These people believed in due process,

But their government had a much different idea of process!

In the summer of 1944, at Birkenau, deportees from Hungary arrived in Auschwitz. The railways would bring the trains to the very gates of the gas-chambers, only a few yards walk away. Selections were made with each arriving train from Hungary, and some men and women from each train were sent to the barracks, and others met their death.

The United States Constitution clearly eliminates any of these atrocities from ever happening in this country by the fourteenth amendment. It clearly states that no state shall "...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 also prevents prejudice against any race, creed, or nationality, and gives all walks of life the freedom of choice.

Brian Browne

Sullivan County Community College

THE RIGHT TO TESTIFY: THE *CONSTITUTION'S* NEWEST RIGHT

Timothy P. O'Neill

During the last few months, these pages have celebrated some basic American rights dating back two centuries. Yet the constitutional right of a criminal defendant to testify at his/her own trial is of a more recent vintage. Surprisingly, the United States Supreme Court did not directly recognize this right until 1987.[1] Thus, during the 1990s American courts must make crucial decisions establishing the exact nature of this newly declared right. *Teague v. Lane*[2] called it "unlikely" that any basic components of due process in criminal law have yet to emerge; however, the developing body of law on the "right to testify" may prove *Teague* wrong.

In order to understand why this apparently most basic of rights has been so late in developing, it is necessary to study the historical record.

THE EARLY ENGLISH CRIMINAL TRIAL

The criminal trial in early English common law bore little similarity to the contemporary American mode. First, the 17th century trial did not allow the defendant to have counsel.[3] Second, the law did not allow the defendant to call witnesses on his own behalf.[4] There was no esoteric rationale offered for these rules; rather, defense lawyers and defense witnesses were barred because it was held they were not needed.[5] Wigmore finds this statement from 1678 to epitomize the prevailing spirit of the age:

> The fouler the crime is, the clearer and the plainer ought the proof of it be. There is no other good reason can be given why the law refuseth to allow the prisoner at the bar counsel in matter of fact when his life is concerned, but only this, because the evidence by which he is condemned ought to be so very evident and so plain that all the counsel in the world should not be able to answer upon it."[6]

With no counsel and no witnesses, a defendant had to rely on his own skills of persuasion. A defendant was allowed free rein to plead his case orally before the jury, including both matters of fact and law. Yet the defendant did not actually "testify" or offer "evidence" *per se*.[7] Since a defendant could not be sworn, he was not a witness; consequently, nothing he said could constitute "evidence." Yet the jury certainly paid close attention to the defendant's presentation. James Fitzjames Stephen characterized the criminal trial of the period as "a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning."[8] Thus, the 16th century criminal trial lacked three items taken for granted in contemporary trials: defense counsel, defense witnesses, and sworn testimony from the defendant.

The first of these areas to change was that of defense witnesses. During the 17th century courts began to allow the defendant to call witnesses; by 1701 defendants had a statutory right to have such witnesses sworn in all felony cases.[9] It might be assumed that this trend would have naturally led to allowing the defendant to offer sworn testimony on his own behalf. This did not occur because of a civil doctrine which began to applied in criminal cases: the disqualification of witnesses based on interest in litigation.[10] This doctrine took root in the 16th century and held that parties to a civil action were incompetent as witnesses; by the first part of the 17th century, this rule was recognized in Star Chamber, the Chancery, and courts of common law.[11] Wigmore described the reason for the rule in this syllogism:

> Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; therefore such persons should be totally excluded.[12]

The doctrine gradually spread from parties in civil cases to witnesses in such cases.[13] By the end of the 17th century, the "disqualification for interest" rule was firmly ensconced in criminal law, affecting both the defendant and his choice of witnesses.

Thus, only the fear of perjury supplied the rationale for keeping the defendant off the witness stand, for a criminal defendant is clearly "par excellence an interested witness."[14]

THE AMERICAN EXPERIENCE

The disqualification of a criminal defendant from testifying carried over to the American Colonies. In 1762, a Pennsylvania court refused to swear a defendant to testify, stating that issues at trial "must be proved by indifferent witnesses."[15] At the time of the ratification of the *Constitution* it was clear that a criminal defendant had no right to testify.[16]

The real impetus for change in the area began in 1827 with the publication of Jeremy Bentham's *Rationale of Judicial Evidence*.[17] The gist of Bentham's argument against disqualification for interest was that a witness's motive for lying should go to the weight, not the admissibility, of testimony.[18] As Lord MaCaulay expressed it, "(A)ll evidence should be taken at what it may be worth, that no consideration which has a tendency to produce conviction in a rational mind should be excluded from the consideration of the tribunals."[19]

Bentham's work first came to fruition in England. Between 1843 and 1853, legislation in the country abolished the incompetency of interested witnesses in civil cases,[20] parties in civil cases,[21] and spouses of parties in civil cases.[22] This progress was mirrored in the United States. Wigmore notes that by the late 1850s most states had abolished disqualification based on interest in civil cases.[23] Yet this progress was not paralleled in the area of criminal law, for by the late 1850s not one American jurisdiction had abol-

ished disqualification based on interest for criminal defendants.

There were several reasons why jurists and writers did not believe that what was proper for the civil trial was necessarily proper for the criminal trial. Some believed that human nature would prevent a criminal defendant from testifying truthfully. As Stephen wrote:

> (T)he prisoner could never be a real witness; it is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion. It is a mockery to swear a man to speak the truth who is certain to disregard it....[24]

Another objection came from those who believed that allowing a defendant to take the stand would have the ironic effect of weakening both the privilege against self-incrimination and the presumption of innocence. As one court expressed it:

> (I)f we were to hold that a prisoner offering to make a statement must be sworn in the cause as a witness, it would be difficult to protect his constitutional rights in spite of every caution, and would often lay innocent parties under unjust suspicion where they were honestly silent, and embarrassed and overwhelmed by the shame of a false accusation...(It would result in)...the degradation of our criminal jurisprudence by converting it into an inquisitory system from which we have thus far been happily delivered.[25]

These arguments were countered by Chief Justice John Appleton of the Supreme Court of Maine. Judge Appleton was a Benthamite who tirelessly championed the cause of allowing parties in all cases, both civil and criminal, to testify.[26] He argued that it could just as easily be maintained that the accuser, rather than the accused, was lying. The answer was not to exclude one or the other from testifying, but rather to let the jury decide: "With equal means of knowledge, with equal power to instruct, with motives to truth dependent on their relative situations... both (the accuser and the defendant) should be heard and believed... until from comparison of their several statements, reasons for belief or disbelief shall be found."[27]

> Judge Appleton further contended that disqualifying a criminal defendant from testifying was squarely opposed to the presumption of innocence of the accused, for disqualifying the defendant implicitly showed that the law believed the defendant was guilty and that the accuser was truthful. He showed how this turned the presumption of innocence on its head: "But the common law (rule of disqualification of the defendant) selects. Whom? The accuser, presumed a perjurer (by the presumption of innocence), alone is heard. The accused, for whose benefit such favorable presumptions are nominally made; the accused-innocent, is rejected."[28]

His work was directly responsible for reform in his home state. In 1864, Maine became the first state - indeed the first jurisdiction in the English-speaking world[29] to adopt legislation finding criminal defendants to be competent witnesses.[30] Other states gradually followed Maine's lead, and by the end of the century all states but Georgia had abolished "disqualification for interest" for criminal defendants.[31] In 1878, a federal statute declaring criminal defendants competent to testify became law.[32]

The American experience in allowing criminal defendants to testify had a profound effect on other common law nations. Stephen, who previously supported the disqualification of criminal defendants,[33] changed his views and wrote in support of the competency of criminal defendants.[34] Gradually, common law nations followed America's example. By 1955, England, Australia, Canada, New Zealand, Northern Ireland, Ireland, and India had all extended to criminal defendants the opportunity to testify on their own behalf.[35]

FINDING THE RIGHT TO TESTIFY

The near unanimity with which American jurisdictions established a statutory basis for the right to testify may have hindered consideration of whether the opportunity to testify was constitutionally predicted.[36] As recently as 1986, the United States Supreme Court stated that the court had "never explicitly held that a criminal defendant has a due process right to testify in his own behalf."[37] The court did finally recognize such a constitutional right in *Rock v Arkansas* in 1987.[38] Before examining the court's holding in *Rock*, it is necessary to examine the state of American law on the issue at the time the case was decided.

THE RECORD BEFORE *ROCK*

There is no dearth of language in Supreme Court opinions suggesting that some kind of "right to be heard" is an essential component of due process. Thus, in 1897 the Court declared: "At common law no man was condemned without being afforded opportunity to be heard... Can it be doubted that due process of law signifies a right to be heard in one's defense?"[39] The following year, the Court said that the concept of due process included "certain immutable principles of justice... as that no man shall be condemned in his person or property without... an opportunity of being heard in his defense."[40] (This latter statement was cited approvingly by the Court in *Powell v. Alabama*).[41] In *dictum* in *In re Oliver*,[42] the Court provided details on just what this "right to be heard" entailed. The Court said it "include(d), as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."[43]

Again, in *Walder v. United States*, the Court alluded to a right to testify when it stated, "Of course, the *Constitution* guarantees a defendant the fullest opportunity to meet the accusation against him."[44]

In 1961 in *Ferguson v. Georgia*,[45] the United States Supreme Court considered a Georgia law which refused to allow an indicted defendant to testify, but instead provided him with the right to make an unsworn statement to the jury and to remain immune from cross-examination.[46] The Supreme Court held that Georgia violated Ferguson's right to due process by refusing to allow him to have his attorney aid him in making his unsworn statement.

Although *Ferguson* did not explicitly consider the constitutionality of the law making criminal defendants incompetent to testify, it certainly suggested that such a law was improper. As one commentator noted, "(I)f it is a denial of due process not to permit the defendant to be examined directly by his attorney, then surely it is an even greater denial of due process to refuse the defendant any opportunity to testify in his own behalf."[47] Moreover, in concurring opinions both Justices Clark and Frankfurter stated that they would have held the incompetency statute to be unconstitutional.[48]

For the next quarter of a century, the Supreme Court continued to scatter hints that the right to testify was constitutionally predicated. In *Harris v. New York* the Court stated that "(e)very criminal defendant is privileged to testify in his own defense, or to refuse to do so."[49] The next year in *Brooks v. Tennessee* the Court abandoned the "privilege" terminology by stating "(w)hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."[50] Although it had never been squarely held, the Court in 1975 wrote that "(I)t is now accepted...that an accused has a right...to testify on his own behalf."[51]

These references continued unabated during the decade leading up to *Rock*.[52] Yet, as previously discussed,[53] in 1986 the Court conceded in *Nix v. Whiteside*[54]

that it had "never explicitly held that a criminal defendant has a due process right to testify in his own behalf."[55] In his concurring opinion in *Nix*,[56] Justice Blackmun wrote that he was "somewhat puzzled" by the majority's assertion that the constitutionality of the defendant's right to testify remained an "open question", and cited *Jones v. Barnes*,[57] *Brooks v. Tennessee*,[58] and *Harris v. New York*[59] to illustrate its constitutional basis.

A STATUTORY MATTER

The Court's uncertainty about the constitutional nature of the right to testify, exhibited in the 1986 *Nix* opinion, was reflected in the decisions of both state and lower federal courts which had grappled with the issue. Although the trend in these courts was in the direction of finding a constitutional basis for the defendant's right to testify,[60] the record was hardly unanimous. A number of jurisdictions which examined the issue recognized no constitutional basis for the defendant's right to testify,[61] finding the right to be solely a statutory matter. This was the state of the law at the time the Supreme Court granted *certiorari* in *Rock v. Arkansas*.[62]

A *ROCK* FOUNDATION FOR THE RIGHT TO TESTIFY

In 1983, Vicki Lorene Rock was charged with manslaughter in the shooting death of her husband.[63] Because of her inability to remember the details surrounding the shooting, her attorney arranged two hypnosis sessions with a licensed neuropsychologist. Following the sessions, Mrs. Rock remembered certain exculpatory details.[64] In response to the state's motion to bar defendant's "hypnotically refreshed" testimony, the trial judge ordered that Mrs. Rock's testimony should be limited to "matters remembered and stated to the (hypnosis) examiner prior to being placed under hypnosis."[65] With this limitation on her testimony, Ms. Rock was convicted of manslaughter. On appeal, the Arkansas Supreme Court held as a matter of law that a witness's hypnotically refreshed testimony was inadmissible *per se*.[66]

The United States Supreme Court found such a *per se* rule as applied to a defendant to be unconstitutional.[67] Before reaching this decision, however, the Court first had to squarely confront the issue of whether a defendant has a constitutional right to testify in her own behalf. After briefly reviewing the historical transition from the defendant's incompetency to competency in common law jurisdictions, Justice Blackmun's opinion for the Court stated that the right of the defendant to testify "has sources in several provisions of the *Constitution*."[68] First, citing *Faretta v. California*,[69] *In re Oliver*,[70] and *Ferguson v. Georgia*,[71] the Court held that the right to testify was a fundamental part of the adversary system and was thus guaranteed by the due process clause of the Fourteenth Amendment.[72] Second, the Court found this right implicit in the compulsory process clause of the Sixth Amendment.[73] Relying on *Washington v. Texas*[74] and *United States v. Valenzuela-Bernal*,[75] the Court reasoned that, if the clause supported the right of a defendant to present witnesses who will provide material and favorable evidence on his behalf, then it would *a fortiori* support the defendant's choice to offer such testimony himself.[76] Indeed, the Court noted that often "the most important witness for the defense in...criminal cases is the defendant himself."[77]

Thirdly, the Court found yet another way in which the right to testify is guaranteed under the Sixth Amendment. The Court pointed out that *Faretta v. California* held that the Sixth Amendment supported the right of a defendant to waive the assistance of counsel and represent himself at trial, if he so desires, because so many of the rights in the Amendment accrue personally to the defendant.[78] *Rock* then concluded that even more basic than the right to represent oneself would be a defendant's right to actually testify in his own words concerning the events in question.[79]

Finally, *Rock* found yet a fourth constitutional basis for the defendant's right to testify embodied in the Fifth Amendment. The court held that the right of a defendant not to be compelled to be a witness against himself necessarily included the right to testify on one's behalf if one so desires.[80]

Although *Rock* has established once and for all that a defendant indeed possesses a federal constitutional right to testify, the full contours of this right have yet to emerge. Courts in the 1990s will face two crucial issues. First, it must be decided whether the defendant or his/her attorney should have the final decision on whether the defendant testifies. Second, in those cases in which the right to testify is waived, courts must establish the procedures for accepting such a waiver.

WHOSE RIGHT IS IT ANYWAY?

Constitutional rights possessed by criminal defendants can generally be divided into two categories: those which can be waived through the actions of defendant's counsel and those which can be waived only by the defendant. In the former category lies a myriad of trial decisions made by counsel as a defendant's agent which implicate important rights: which witnesses should be called; what questions should be asked on direct and cross examination; what stipulations should be made; what objections should be lodged; and which pre-trial motions should be made.[81] On the other hand, certain rights have been deemed so "fundamental" that they require a personal waiver by the defendant. For example, a jury trial can be waived only with a criminal defendant's "express, intelligent consent."[82] A guilty plea cannot be taken without the defendant's personal agreement.[83] The decision whether or not to appeal a conviction is one for the defendant, not his attorney, to make.[84]

In *Rock*, the Supreme Court did not have to decide whether the right to testify likewise required a personal decision of the defendant. Yet, *Rock* characterized the right to testify as "fundamental,"[85] the same word the Court used in *Johnson v. Zerbst*[86] when it formulated its test for personal waiver of constitutional rights.[87] *Rock* also cited a quotation from *Jones v. Barnes*[88] that the defendant has the "ultimate authority to make certain fundamental decisions regarding the case, (such as) whether to...testify in his or her own behalf."[89]

These intimations from the Supreme Court have not been lost on lower courts. Since *Rock* was decided, four federal circuits have faced the issue of whether the decision to testify is fundamental and personal to the defendant. All four have held that it is, and that it cannot be waived by counsel against the defendant's will.[90]

The more vexing question, however, is what is required to show that a defendant has indeed personally waived the right to testify.

A "KNOWING AND INTELLIGENT" WAIVER?

Since *Rock*, two circuits have squarely confronted the issue of what constitutes a proper waiver of the right to testify.

In *United States v. Martinez*,[91] the defendant contended that his right to testify was violated when his attorney refused to allow him to take the stand. At a hearing on defendant's motion for a new trial, the defense attorney testified that "(Mr. Martinez) expressed to me the desire to testify; and I said no way, that I thought it was suicidal.... I just made the decision he was not going to testify, I refused to call him, and that was the way it went down."[92]

The Ninth Circuit first held that the right to testify was both fundamental and personal and that it could be waived only by the defendant.[93] It then held that the de-

fendant's waiver must be "knowing" and "intentional".[94] Applying these concepts to the case at bar, the court held that the fact the defendant did not actually testify provided a sufficient basis to infer that he had waived his right to testify. Over a vigorous dissent,[95] the Ninth Circuit both refused to require the trial court to advise the defendant of his right to testify and refused to demand an on-the-record waiver from the defendant.

Like the Ninth Circuit, the Eleventh Circuit in *United States v. Teague*[96] faced a defendant claiming a violation of his right to testify arising from the refusal of his attorney to allow him to take the stand. Like the Ninth Circuit, the Eleventh Circuit also found the right to testify to be both fundamental and personal.[97] Yet unlike the Ninth Circuit, the Eleventh Circuit refused to infer waiver from the mere fact the defendant did not testify. Rather, in reversing the conviction, the court relied on testimony presented at a hearing on defendant's motion for a new trial that the defendant had expressed an "unwavering desire" to testify to his attorney throughout trial and that the attorney had rested the defense case without consulting with the defendant.[98] However, the court refused to suggest any mechanism for guaranteeing proper waivers in the future, stating only that whether a proper waiver occurs will depend on the "particular circumstances of each case."[99]

Thus, despite their different outcomes, both *Martinez* and *Teague* hold that a defendant's right to testify is personal and fundamental, yet each fails to establish a mechanism for communicating this to the defendant.

The *Martinez* court put forth several reasons why it believed the trial judge should not inject himself/herself in any way into the defendant's decision whether or not to testify.[100] The Court noted that along with the right *to* testify there is a converse right *not to* testify. The Ninth Circuit feared that by advising the defendant of his right *to* testify, the trial court might threaten the exercise of the converse right. It questioned whether such a colloquy might interfere both with defense strategy and with the attorney-client relationship. Finally, it cited the difficulty a trial judge would have in knowing when to initiate such a colloquy; a trial judge would not positively know that a defendant would not testify until the defense rested, which might be an awkward time to raise the issue.

These reasons were countered by Judge Reinhardt in his *Martinez* dissent.[101] He challenged the contention that informing a defendant of his right to testify might interfere with the opposite right. He contended that clearly providing a defendant with all his constitutional options could only enhance values of fairness and dignity. The "defense strategy" in this area concerns a decision belonging to the defendant personally. Therefore, informing the defendant of this fact cannot interfere with the attorney/client relationship. Finally, the time when the defense rests would be an entirely appropriate time to guarantee that the defendant understands his right.

THE FUTURE

The judicial reaction to *Rock* is only beginning. The holdings in *Martinez* and *Teague* seem paradoxical: "The right to testify is personal and fundamental, but whatever you do, don't tell the defendant!" The resolution of this paradox - that is, defining the role the trial court should play in a defendant's decision whether to testify - promises to be one of the key criminal procedure issues of the 1990s.

Courts have three basic options. They can choose to keep the trial judge out of the decision and to presume that the defense attorney will guarantee that the defendant will personally decide whether or not to testify. Under this system, failure of the defendant either to testify or to notify the trial court of his desire to testify will be construed as a waiver.[102]

A second option is to require the trial judge to *sua sponte* inform the defendant of his right to testify and to accept an on-the-record waiver from a defendant who does not testify. This system - suggested by the dissent in *Martinez*[103] - is followed in West Virginia and Colorado.[104]

A third option might be to combine these two systems by requiring the defense attorney to have the non-testifying defendant make an on-the-record waiver outside the presence of the jury. The defense attorney would ask all questions of the defendant to establish the waiver, while the trial judge would generally play no role other than accepting the waiver.[105]

The importance of this issue cannot be underestimated. If it is determined that the right to testify is indeed such a personal, fundamental right that its waiver cannot be presumed from a silent record, it could be argued that this might constitute one of the "watershed" rules concerning "bedrock procedural elements" which would constitute one of the *Teague v. Lane* "new rule" exceptions.[106] Its effect on habeas corpus would be dramatic.

This coming decade could be the most important in the entire history of the right of a criminal defendant to testify. *Rock v. Arkansas* once and for all acknowledged the right. It is now time for American courts to construct mechanisms to turn this right into a reality.

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NOTES

[1] *Rock v. Arkansas*, 483 U.S. 44 (1987).

[2] 489 U.S. 288 (1789).

[3] Popper, *"History and Development of the Accused's Right To Testify,"* 1962 Wash. U.L.Q. 454-55. This rule was changed by statute for treason in 1695 and for felonies in general in 1836. J. Wigmore. Evidence & 575, at 809 (Chadbourn rev. ed. 1979).

[4] Popper, *supra* note 3 at 455.

[5] J. Wigmore, *supra* note 3 & 575.

[6] *Id.* & 575, at 809 n. 44 (quoting L.H. Steward Finch, in *Lord Cornwallis' Trial.* 7 How. St. Tr. 143, 149 (1678)).

[7] *Id.* & 575.

[8] J. Stephen, *History of the Criminal Law of England* 350, 440 (1883), *quoted in* Popper, *supra* note 3, at 455.

[9] 7 Will. 3, ch. 3: Anne. st. ch. 9, cited in *Ferguson v. Georgia*, 365 U.S. 570, 574 (1961).

[10] Popper, *supra* note 3, at 456.

[11] W. Holdsworth, *A History of English Law* 194 (1926).

[12] J. Wigmore, *supra* note 3, & 576, 810.

[13] Popper, *supra* note 3, at 456.

[14] *Ferguson v. Georgia*, 365 U.S. 570, 574 (1961).

[15] *Rex v. Lukens*, U.S. (1 Dall.) 5,6 (1762) *quoted in Ferguson*, 365 U.S. at 575.

[16] *McGautha v. California*, 402 U.S. 183, 214 (1971).

[17] J. Bentham, *Rationale of Judicial Evidence* (D. Berkowitz & S. Thome ed. 1978) (London 1827).

[18] *See* J. Wigmore, *supra* note 3, & 576 at 811-15 (discussing J. Bentham, *supra* note 24).

[19] Lord McCaulay's *Legislative Minutes* 214 (C. Dharker ed. 1946) (1835).

[20] Popper, *supra* note 3, at 458.

[21] *Id.*

[22] *Id.*

[23] J. Wigmore, *supra* note 3, & 576, at 817.

[24] J. Stephen, *A General View of the Criminal Law of England* 201-02 (1863) *quoted in* Popper,

supra note 3, at 458-59.

[25] *People v. Thomas*, 9 Mich. 314, 320-21 (1864) (concurring opinion), quoted in *Ferguson v. Georgia*, 365 U.S. 570, 578-79 (1961).

[26] For a discussion of Appelton's influence, see Popper, *supra* note 3, at 460-63.

[27] Popper, *supra* note 3, at 461 (*quoting* J. Appleton, *Evidence* 123-24 (1860)).

[28] *Id.*

[29] *See Ferguson v. Georgia*, 365 U.S. 570, 577 (1961).

[30] 1864 Me. Laws 280.

[31] *Ferguson*, 365 U.S. at 577-78.

[32] Bradley, *Havens, Jenkins and Salvucci and the Defendant's "Right" to Testify*, 18 Am. Crim. L. Rev. 419, 420 n. 17 (1981).

[33] *See supra* note 24 and accompanying text.

[34] I am convinced by much experience that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it.... A poor and ill-advised man...is always liable to misapprehend the true nature of his defense, and might in many cases be saved from the consequences of his own ignorance or misfortune by being questioned as a witness. J. Stephen, *supra* note 8, at 444, *quoted in Ferguson*, 365 U.S. at 582.

[35] *Ferguson*, 365 U.S. at 577-78.

[36] *See Alicea v. Gagnon*, 675 F.2d 913, 920-23 (1982) (finding constitutional right to testify under Fifth, Sixth, and Fourteenth Amendments).

[37] *Nix v. Whiteside*, 475 U.S. 157, 164 (1986).

[38] 483 U.S. 44 (1987). For a discussion of *Rock*, *see infra* notes and accompanying text.

[39] *Hovey v. Elliott*, 167 U.S. 409, 415, 417 (1897).

[40] *Holden v. Hardy*, 169 U.S. 366, 389-90 (1898).

[41] 287 U.S. 45, 68 (1932).

[42] 333 U.S. 257 (1948).

[43] *Id.* at 273 (emphasis added).

[44] 347 U.S. 62, 65 (1954).

[45] 365 U.S. 570 (1961).

[46] *See* GA. Code Ann. &38-415 (1933). In 1973, Georgia abandoned the policy of only allowing a criminal defendant the opportunity to make an unsworn statement, and now through statute guarantees the right of the defendant to testify at her own trial. See GA. CODE ANN. 17-7-28 and 24-9-20 (1982).

[47] Note, *Due Process v. Defense Counsel's Unilateral Waiver of the Defendant's Right to Testify*, 3 Hastings Const. L.Q. 517, 523-24 (1976).

[48] Ferguson, 365 U.S. at 601 (Frankfurter, J. concurring); *Id.* at 602 (Clark, J. concurring).

[49] 401 U.S. 222, 225 (1971).

[50] 406 U.S. 605, 612 (1972).

[51] *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (citing *Harris v. New York*, 401 U.S. 222, 225 (1971)).

[52] *See, e.g. United States v. Grayson*, 438 U.S. 41, 56 n.2 (1978) (Stewart, J., dissenting) (contending that right to testify is found in the Sixth and Fourteenth Amendments); *United States v. Salvucci*, 448 U.S. 83, 96 (1980) (Marshall, J., dissenting) ("constitutional" right to testify); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (defendant's decision to testify is fundamental).

[53] *See supra* note 44 and accompanying text.

[54] 475 U.S. 157 (1986).

[55] *Id.* at 164.

[56] *Id.* at 186 n.5 (Blackmun, J. concurring).

[57] 463 U.S. 745 (1983).

[58] 406 U.S. 605 (1971).

[59] 401 U.S. 222 (1971).

[60] *See e.g., United States v. Systems Architects, Inc.* 757 F.2d 373, 375-76 (1st Cir.) (*dictum*) (due process clause of fifth amendment may grant accused right to testify), *cert. denied*, 474 U.S. 847 (1985); *United States v. Bifield* 702 F.2d 342, 349 (2d Cir.) (right to testify derived from Fifth and Sixth Amendments). *cert. denied.* 461 U.S. 931 (1983); *Alicea v. Gagnon*, 675 F.2d 913, 923 (7th Cir. 1982) (Fifth, Sixth and Fourteenth Amendments give rise to right to testify); *Ashe v. North Carolina*, 586 F.2d 334, 336 (4th Cir. 1978) (due process requires defendant be given opportunity to speak if he so requests), *cert. denied*, 441 U.S. 966 (1979); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115 (3rd Cir. 1977) (right to fair trial includes right to testify); *United States v. McCord*, 420 F.2d 255 (D.C. Cir. 1969); *United States v. Butts*, 630 F. Supp. 1145, 1148 (D. Me. 1986) (right to testify basic to a fair trial); *Carter v. State*, 424 So. 2d 1336, 1340 (Ala. Crim. App. 1982) (state constitution); *Hughes v. State*, 513 P.2d 1115 (Alaska 1973); *State v. Noble*, 109 Ariz. 539, 514 P.2d 460 (1973); *Figeroa v. State*, 244 Ark. 457, 425 S.W.2d 516 (1968); *People v. Mosqueda*, 5 Ca. App. 3d 540, 85 Cal. Rptr. 346 (1970); *People v. Curtis*, 681 P.2d 504 (Colo. 1984), see *supra* note 7; *Hall v. Oakley*, 409 So. 2d 93 (Fla. 1982) (state constitution); *People v. Knox*, 58 Ill. App. 3d 761, 374 N.E.2d 957, 959-60 (1978) (defendant's right to testify is of "constitutional dimension"); *Schertz v. State*, 380 N.W.2d 404, 413 (Iowa 1985); *Commonwealth v. Hennessey*, 23 Mass. App. Ct. 384, 502 N.E.2d 943 (1987); *People v. Farrar*, 36 Mich. App. 294, 193 N.W.2d 363, 369 (1971); *State v. Rosillo*, 281 N.W.2d 877 (Minn. 1979); *Ingle v. State*, 92 Nev. 104, 546 P.2d 598 (1976); *State v. Douglas*, 292 Or. 516, 641 P.2d 561, 567 (1982) (Lent J., concurring); *Campbell v. State*, 4 Tenn. Crim. App. 100, 469 S.W.2d 506, 509 (1971); *State v. Hardy*, 37 Wash. App. 463, 681 P.2d 852, 854 (1984); *State v. Albright*, 96 Wisc. 2d 122, 291 N.W.2d 487, 490 *cert. denied.* 449 U.S. 957 (1980).

[61] *See e.g., Young v. Ricketts*, 242 Ga. 559, 250 S.E.2d 404, 405-06 (1978) (right to testify not a guaranteed personal right), cert. denied, 442 U.S. 934 (1979); *State v. McKenzie*, 17 Md. App. 563, 303, A.2d 406, 413 (1973) (right to testify is statutory, not constitutional); *State v. Hutchinson*, 458 S.W.2d 553, 554 (Mo. 1970).

[62] 479 U.S. 947 (1986) (granting *certiorari*).

[63] *Rock v. Arkansas*, 483 U.S. 44, (1987).

[64] *Id.* at 46-47. For example, she recalled that her fingers had never been on the trigger, thus supporting a claim that the gun discharged accidentally.

[65] *Id.* at 47.

[66] *Rock v. State*, 288 Ark. 566, 708 S.W.2d 78, 81 (1986).

[67] *Rock*, 483 U.S. at 62.

[68] *Id.* at 51.

[69] 422 U.S. 806 (1975).

[70] 333 U.S. 257 (1948).

[71] 365 U.S. 570 (1961).

[72] *Rock*, 483 U.S. at 51.

[73] *Id.* at 52.

[74] 388 U.S. 14 (1967).

[75] 458 U.S. 858 (1982).

[76] *Rock, 483 U.S. at 52.*

[77] *Id.*

[78] As the *Rock* court expressed it:

(I)n *Faretta*. . . the Court recognized that the Sixth Amendment "grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" (Emphasis added).

[79] *Id.* at 52.

[80] *Id.* at 52-53 (*citing Harris v. New York*, 401 U.S. 222 (1971) and *Malloy v. Hogan*, 378 U.S. 1 (1964)).

[81] *See, e.g.,* Standards for Criminal Justice, Standard 4-5.2 (2d ed. Supp. 1986) (hereinafter Criminal Justice.)

[82] *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 277 (1942), *accord Patton v. United States*, 281 U.S. 276 (1930).

[83] *Boykin v. Alabama*, 395 U.S. 238 (1969).

[84] *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (*dictum*).

[85] *Rock v. Arkansas*, 483 U.S. 44, 53 n.10 (1987).

[86] 304 U.S. 458 (1938).

[87] *Id.* at 464.

[88] 463 U.S. 745 (1983).

[89] *Rock*, 483 U.S. 44, 53 n. 10 (1987) (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983). *Jones* cited two sources for this dictum: Justice Burger's concurrence in *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring) and Standard 4-5.2 of the American Bar Association - Standard for Criminal Justice. *See* A.B.A. Project Standards for Criminal Justice, The Prosecution Function and Defense Function, 25, 2, pp. 237-238 (App. Draft 1971).

[90] *Rogers-Bey v. Lane*, 896 F.2d. 279, 283 (7th Cir. 1990); *United States v. Long*, 857 F.2d 436, 447 n. 9 (8th Cir. 1988); *United States v. Martinez*, 883 F.2d 750, 756 (9th Cir. 1989), *petition for cert. filed*, No. 89-7539 (May 17, 1990); *United States v. Teague*, 908 F.2d 752, 757 (11th Cir. 1990). *See also United States ex. rel Wilcox v. Johnson*, 555 F.2d. 115, 118-19 (3d Cir. 1977) and *United States v. Butts*, 630 F. Supp. 1145, 1147 (D. Me. 1986).

[91] 883 F.2d 750 (9th Cir. 1989), *petition for cert. filed*, No. 89-7539 (May 17, 1990).

[92] 883 F.2d at 752.

[93] 883 F.2d 756.

[94] *Id., citing Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

[95] *Id.* at 761-774 (Reinhardt, J., dissenting).

[96] 908 F.2d 752 (11th Cir. 1990).

[97] *Id.* at 757.

[98] *Id.* at 760.

[99] *Id.*

[100] 883 F.2d at 759-760.

[101] *Id.* at 766-767 (Reinhardt, J., dissenting).

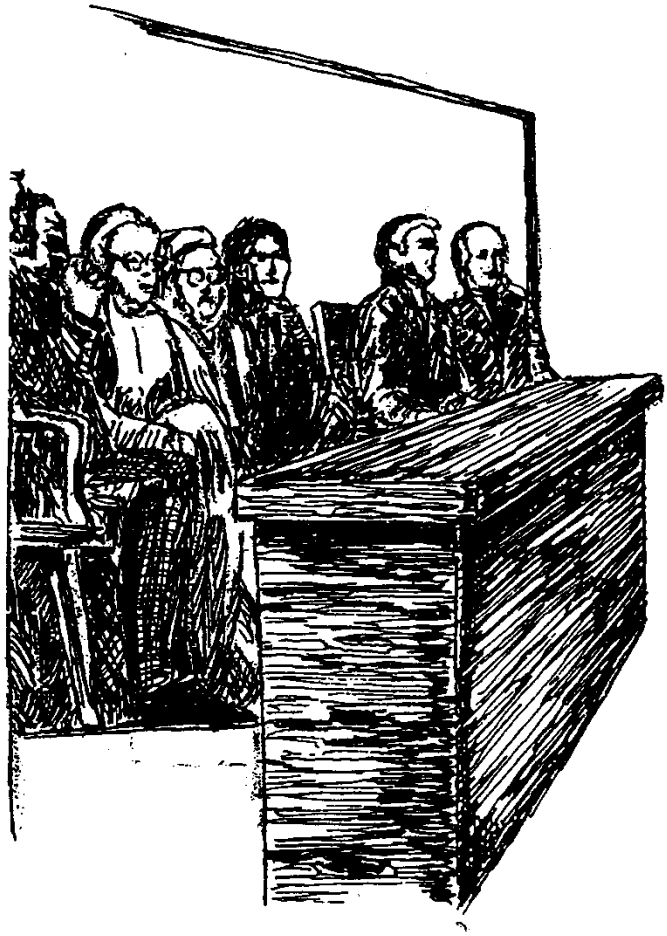
[102] *See Martinez,* 883 F.2d at 760 for a list of courts taking this position.

[103] 833 F.2d at 764, n. 11 (Reinhardt, J., dissenting).

[104] *See State v. Neuman,* 371 S.E.2d 77, 81-82 (W.Va. 1988); *People v. Curtis,* 681 P.2d 504 (Colo. 1984). *See also Culbertson v. State,* 412 So.2d 1184, 1186-87 (Miss. 1982) (suggested but possibly not required).

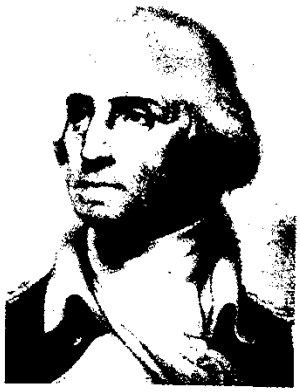
[105] *See* O'Neill, *Vindicating The Defendant's Constitutional Right To Testify At a Criminal Trial: The Need For An On-The-Record Waiver,* 51 U.Pitt. L.R. (1990). 809

[106] 109 S. Ct. 1060 (1989).



In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....

Amendment VI

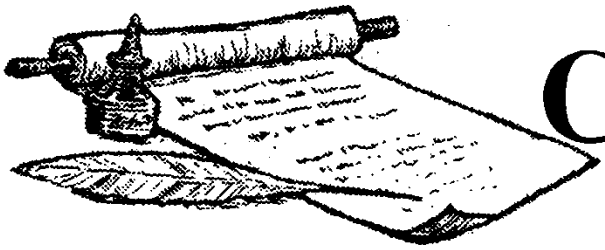


"I sincerely believe it is the best that could be obtained... and with a constitutional door opened for amendment hereafter, the adoption of it... is in my opinion desirable."

G. Washington

A PLEDGE OF RIGHTS

I pledge allegiance to our individual liberties embodied in our *Bill of Rights*;
the first, fourth, fifth, sixth, eighth,
and fourteenth amendments,
and to the values which they protect,
one nation of diverse people,
with liberty and justice for all.



CHAPTER 6

Constitution of The United States
Amendment V

In all criminal prosecutions, the accused shall have compulsory process for obtaining witnesses in his favor.

Constitution of Kentucky
Section 11

Rights of accused in criminal prosecution; change of venue to have compulsory process for obtaining witnesses in his favor.

Amendment VI: The Compulsory Process Clause

Edward J. Imwinkelried

> The history of compulsory process is the story of the development of the adversary process and the demise of the inquisitorial method.[1]

The sad truth is that in many countries around the world, criminal-defendants are routinely convicted without an opportunity to present a defense.[2] Even when the defendant is present at the trial, he may not be accorded any right to introduce exculpatory evidence on his own behalf.[3] The "trial" is largely a charade.[4] One of the distinguishing features of tyrannical government is the accused's lack of a right to present an effective defense.

THE RECOGNITION OF THE RIGHT TO PRESENT A DEFENSE IN ENGLAND

In contrast, the birthplace of the common law, England, recognizes an accused's right to present a defense at trial. In England, the recognition of the right was the product of a long process of historical development.

In the medieval period, trial by jury was one of the methods of deciding a criminal case.[5] When charges were brought by the King, an alternative method was trial by physical ordeal.[6] If the charges were brought by private parties, the case could also be decided by physical combat or compurgation, in which each party produced witnesses swearing to his trustworthiness.[7]

By the middle of the medieval period, the petit jury had become the primary method of deciding criminal charges.[8] However, the medieval petit jury bore little resemblance to a modern jury. There were no independent witnesses.[9] The jurors themselves were the primary witnesses.[10] They were chosen in part because of their part personal knowledge of the events and persons involved in the litigation.[11] They resided in the neighborhood were the alleged crime occurred, and they functioned as a sworn body of inquest to determine the defendant's guilt or innocence.[12] There were no formal rules of evidence to govern their deliberations.[13]

Early in the 15th century, the jury began to change. The jury was transformed from a group of witnesses into a group of judges.[14] As communities grew, it became more and more difficult to find 12 residents with firsthand knowledge of the facts. There was increasing reliance on independent witnesses.[15] Although jurors had earlier served as witnesses and triers of fact, during this period they became solely triers of the evidence presented to them.[16]

During this period the prosecution enjoyed a marked advantaged in both preparing its case for trial and presenting its case at trial.[17] The criminal trial was marked by an "imbalance of advantage between the state and accused."[18] For example, the prosecution could summon witnesses to testify at trial and place its witnesses under oath at trial.[19] The accused's rights were virtually non-existent. The accused had no right to personally confront adverse witnesses, subpoena favorable witnesses, or even to present witnesses who were willing to testify—much less to do so under oath.[20] The accused could make only an unsworn statement to the jury.[21] In effect, the trial was a one-sided prosecutorial inquisition.[22]

Near the end of the 16th century, Parliament began to correct the imbalance in criminal trials.[23] In 1589 and 1606, Parliament adopted statues granting an accused a right in some cases to present witnesses in his favor.[24] By the middle of the 17th century as a matter of course courts permitted defense witnesses to give unsworn testimony.[25] Gradually the courts began allowing sworn testimony as well.[26] In a statute settling a conflict between England and Scotland, the Parliament gave certain defendants the right to subpoena witnesses and place them under oath.[27] "by 1702 that limited exception would finally be the rule in England in all criminal cases."[28] The trial was no longer a prosecution inquisition; it had evolved into a truly adversary proceeding.

The Recognition of the Right to Present a Defense in America

It was to be expected that America would follow England's example and adopt an adversary model for its criminal trials.[29] Royal charters created the original English settlements in America. Those charters purported to guarantee colonists all the rights and liberties of English citizens.[30]

Moreover, before migrating to America, many of the colonists had personally experienced the injustice of the earlier English inquisitorial procedures.[31] William Penn is a case in point.[32] In 1670, he had been arrested for delivering a speech to an unlawful assembly of Quakers.[33] He was tried on the charge at the Old Bailey. When he attempted to defend himself at trial, the court interrupted him and ordered him forcibly moved to a walled-off corner of the courtroom.[34] For all practical purposes, he was then tried *in absentia*.[35] The royal charter Penn later received tried *in absentia*.[35] The royal charter Penn later received authorized him to promulgate laws for his colony.[36] He exercised that authority to issue the *Frame of Government* in 1682 and the *Charter of Liberties* in 1701.[37] Those documents specifically provided for an accused's right "to put on a defense."[38] Indeed, by English standards, he was ahead of the time; in the *Frame of Government* he guaranteed the accused the right to present sworn testimony.[39] He promulgated these documents well before the English courts recognized that general right.[40]

After the colonies became states and declared their independence from what they regarded as an oppressive English regime, they were understandably even more concerned about protecting the individual citizen's liberties. The new states expressed that concern in their bills of rights.[41] Nine state constitutions in-

cluding bills specifically recognizing an accused's right to produce defense witnesses.[42] In three states, the bills granted the accused the right "to call for evidence in his favor."[43] Two state constitutions, those of Massachusetts and New Hampshire, expressly guaranteed the right to present defense evidence.[44]

The Elevation of the Right to Constitutional Status

Many of the original state constitutions included bills of rights enumerating and protecting such civil liberties as the right to present defense evidence.[45] However, the original national *Constitution* lacked a bill of rights.[46] Pressure for a national bill of rights began to mount immediately.[47] Several states proposed amendments to the *Constitution* to add a bill of rights.[48] North Carolina refused to ratify the *Constitution* until a bill of rights was approved.[49] In their recommendations, four states, including Virginia, specifically proposed securing the accused's right to present witnesses in his favor.[50] The North Carolina proposal guaranteed the accused the right "to call for evidence... in his favor."[51] Most state recommendations "referred generally to the defendant's right to present evidence on an equal basis with the prosecution."[52]

James Madison drafted the *Bill of Rights*, including the sixth amendment guarantee of compulsory process.[53] In drafting the sixth amendment, Madison relied primarily on the Virginia recommendations .[54] The original Virginia recommendation included the language, the right "to call for evidence.[55] However, Madison substituted the present wording, the "right...to have compulsory process for obtaining witnesses in his favor."[56]

During the deliberations over the proposed *Bill of Rights*, there was little debate related to the compulsory process provision.[57] Although other provisions of the proposed Bill provoked heated debate, "the framers adopted ... Madison's draft of the sixth amendment... almost without debate and largely as proposed."[58] During the discussions, no one even suggested that Madison's compulsory process language was too restrictive.[59] The leading commentators, Professors Westen[60] and Clinton,[61] agree that the most reasonable inference is that the state representatives assumed that this compulsory process language "was implicitly as broad as their comparable state provisions."[62] They apparently presumed that the excess guarantee of a subpoena right implicitly included the other features of the right to present an effective defense.[63]

Professor Clinton adds that at the time of the adoption of the *Bill of Rights*, there was little felt need to guarantee a right to override evidentiary rules.[64] At that time there were few evidentiary rules;[65] trials were conducted in a relatively free form fashion.[66] The great formalization of evidentiary rules occurred after the adoption of the *Bill of Rights*.[67] The sixth amendment swept away the existing, significant obstacles to the effective presentation of a defense, such as the denials of an accused's rights to compulsory process and counsel in English practice.[68] By doing so, the Founding Fathers thought that they had adequately protected the accused's right to present a defense.[69] They did not address the subject of a right to override specific evidentiary rules for the simple reason that evidentiary rules were not yet perceived as a major impediment to the presentation of an effective defense.[70]

Although the compulsory process clauses attracted little attention during the debates over the *Bill of Rights*, the clause soon became a centerpiece of celebrated litigation. Colonel Aaron Burr was charged with treason and misdemeanor. General James Wilkinson sent President Jefferson a letter indicating that Burr was planning to invade Mexico and establish a separate government under his control.[71] The trial judge was none other than Chief Justice Marshall.[72]

During the litigation, the Chief Justice authored two opinions discussing the compulsory process clause.[73] In both opinions, he gave the clause "a sweeping construction."[74] He issued the first opinion when Burr sought a *subpoena duces tecum* to require the President to produce the original letter from General Wilkinson. Chief Justice Marshall held that Burr could obtain a subpoena for the President even before an indictment was returned in the case.[75] The Chief Justice relied on the compulsory process clause as authority and asserted that the clause "must be so construed as to be something more than a dead letter."[76] Quite to the contrary, the clause "must be deemed sacred by the courts."[77] The catalyst for the second opinion was the President's failure to surrender the letter in response to the subpoena.[78] Burr then moved to continue the trial until the President complied with the subpoena.[79] Chief Justice Marshall emphasized that it would be "a very serious thing" to withhold "material" evidence from the accused.[80]

After Burr, however, the Chief Justice's worst fear was realized: The compulsory process clause became a "dead letter."[81] The clause was dormant[82] for roughly a century and a half.[83] "Until 1967 the Supreme Court addressed it only five times, twice in dictum and three times while declining to construe it."[84] During this period, most courts conceived of the clause as merely a guarantee of the right to subpoena witnesses.[85] Dean Wigmore took the position that the clause left the courts and legislatures free to fashion evidentiary rules; the only guarantee under the clause was the right to compel witnesses' attendance.[86]

In 1967, the Supreme Court finally broke its long silence on the compulsory process clause. In that same year, the Supreme Court rendered its decision in the landmark case of *Washington v. Texas*.[87] In that case, the Court dealt with the constitutionality of two Texas statutes providing that an accused could not call as a defense witness any person charged or previously convicted as a principal accomplice, or accessory in the same crime.[88] The statutes rendered such persons incompetent as defense witnesses; the statutes altogether precluded the accused from calling them as witness at trial.

The accused, Jackie Washington, was charged with murder. Washington attempted to call Charles Fuller as a witness. Fuller had already been convicted of murder in the same shooting incident. Citing the two Texas statutes, the prosecutor objected to Fuller's testimony; the trial judge sustained the objection. Without the benefit of Fuller's exculpatory testimony, Washington was convicted. The Supreme Court reversed the conviction. In doing so, the Court issued two significant rulings.

First, writing for the majority, Chief Justice Warren held that the compulsory process guarantee is so fundamental that it is incorporated in the due process provision of the fourteenth amendment. The guarantee is therefore enforceable directly against the states.

Second and even more importantly, the Court held that the Texas statues violated the guarantee. Texas had argued that it had not denied Washington compulsory process; it allowed him to subpoena Fuller—it merely precluded him from calling Fuller as a witness. Writing for the Court, Chief Justice Warren asserted that "[t]he Framers of the *Constitution* did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witness whose testimony he has no right to use."[89] The Chief Justice declared:

> This Court had occasion in *In re Oliver*, 333 U.S. 257(1948), to describe...the most basic ingredients of due process of law: "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to

examine the witnesses against him [and]to offer testimony."

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[90]

Based on this reasoning, the Court granted the accused a general "right to put on the stand a witness who [is] physically and mentally capable of testifying to events that he [has] personally observed, and whose testimony would have been relevant and material to the defense."[91]

Like most landmark Supreme Court decisions, *Washington* left many questions unanswered. One pivotal question was whether the *Washington* doctrine applied only to broad incompetency rules which completely barred persons from appearing as defense witnesses.[92] Suppose that the jurisdiction's evidentiary rules permitted the person to take the stand, but restricted the content of their testimony. Assume, for example, that the jurisdiction's hearsay rule prevented a defense witness from testifying to critical exculpatory facts. Could the defense invoke *Washington* to override the rule? Many courts thought that the answer was no. *People v. Scott*[93] is illustrative. In *Scott*, the trial judge excluded defense hearsay testimony. In addition to arguing that the testimony fell within a hearsay exception recognized under Illinois law, the accused contended that *Washington* required the admission of the testimony. The court rejected the contention. The court stated flatly that "[t]here is no suggestion in *Washington* that the admission of otherwise inadmissable hearsay is constitutionally required."[94]

The Supreme Court ultimately proved the *Scott* court wrong. In 1973, the Court decided *Chambers v. Mississippi*.[95] One of the alleged constitutional errors in that case was the trial judge's exclusion of critical exculpatory hearsay evidence.[96] The Court powerfully reaffirmed *Washington*.[97] Citing *Washington*, Justice Powell found that the trial judge's ruling violated the accused's "right to present witnesses in his own defense."[98] The Court thus refused to apply the right to competency rules altogether barring a witness's testimony. The Court extended the right to evidentiary rules which have the more limited effect of preventing a witness from giving particular testimony in question was not only critical to Chamber's defense, but also "bore persuasive assurances of trustworthiness."[99] Coupled with another erroneous ruling, the exclusion of the hearsay evidence "denied [Chambers] a trial in accord with...due process."[100]

The Importance of the Elevation of the Right to Constitutional Status

Important direct and indirect consequences flow from the constitutionalization of the accused's right to present defense evidence.

The direct consequence is that defense counsel now have a constitutional argument for overriding exclusionary rules in the form of statutes, common law decision, or court rules. In our legal hierarchy, a constitutional rule takes precedence over statutes, the common law, and court rules. A constitutional provision is of higher dignity than a statute of common law rule.[101] In the event of a conflict between a constitutional provision and either a statute or common law rule, the constitutional provision prevails.[102] Hence, when an exclusionary rule in any of those three forms blocks the admission of important defense evidence, the defense can argue that the constitutional right to present defense evidence preempts the rule.[103]

Although the Supreme Court's decisions in *Washington* and *Chambers* had the potential to revolutionize criminal evidence law,[104] in the years immediately following their rendition they had little impact. In 1983, one commentator surveyed the state and lower federal court cases applying *Washington* and *Chambers*.[105] That commentator concluded that the state and lower federal courts had given *Washington* and *Chambers* "an ambivalent reception."[106] The commentator characterized the state of the case law as "clearly mixed."[107] Many courts had rejected defense arguments based on *Washington* and *Chambers*.[108] As a general proposition, the courts seemed to slight the importance of *Washington* and *Chambers*."[109]

However, it is now evident that there is a trend toward applying the defense right to present evidence more expansively. For its part, the Supreme Court has consistently protected this right[110] and has invoked this right to override exclusionary rules—ranging from the hearsay doctrine[111] to rules limiting impeachment[112] to privileges.[113] During the Warren Court era, defense attorneys were accustomed to using the provisions of the *Bill of Rights* as a shield.[114] They resorted to the exclusionary rules applicable to evidence seized in violation of the fourth amendment, involuntary and unwarned confessions obtained in violation of the fifth amendment, and identification evidence secured in violation of the sixth amendment.[115] The effect of these rules are essentially negative; their operative impact is to exclude relevant prosecution evidence. However, the Burger and Rehnquist Courts have placed far more stress on constitutional guarantees related to the search for truth.[116] Although the Burger and Rehnquist Courts have retreated from many of the Warren Court's liberal positions on the scope of the fourth, fifth, and sixth amendment exclusionary rules, they have not abandoned the constitutional right to present defense evidence that Chief Justice Warren himself announced in *Washington*. Decisions by both the Burger[117] and Rehnquist[118] Courts have upheld the right and relied on the right as the premise for overriding exclusionary rules of evidence, The Supreme Court case law on the scope of the right"greatly favor[s] the accused"[119] and "broadly protects" the accused's constitutional right to present evidence.[120] On two occasions, the Court has mandated the admission of defense evidence in the face of exclusionary rules which at the time represented majority views among American courts.[121] By recognizing this new constitutional right, the Court has given defense attorneys a sword they can use as an offensive weapon.[122]

Many state and lower federal courts are likewise enforcing this constitutional right vigorously. The trend is particularly pronounced in cases in which defense counsel have employed the right to override privileges blocking the admission of relevant defense evidence. Those cases display"a strong trend"[123] toward upholding the right at the expense of invalidating the privilege. A "substantial number" of courts have accepted defense arguments that the accused's constitutional right outweighed the conflicting privilege.[124] Indeed, one commentator asserts that the defense has prevailed in "most cases" presenting that conflict.[125] By way of example, to date there have been four cases adjudicating conflicts between the defense right and privileges for statements by victims to rape crisis counselors.[126] Three of the four cases have resolved the conflict in favor of the defense.[127]

The lower courts have even gone to the length of extending this constitutional right to information which is ordinarily not considered formal evidence, namely, the accused's demeanor.[128] Suppose, for example, that the accused has raised an insanity defense. May the state insist that the accused be sedated at trial? The ac-

cused's unsedated demeanor in the courtroom might be highly probative of his insanity.[129] Some courts have refused to grant the accused an absolute right to appear in court in a drug-free state; these courts reason that the accused's rights are sufficiently protected if the jury is informed that the accused has been medicated.[130] However, other courts(at least in *dicta*) have recognized the accused's right to present his unsedated demeanor[131] or have squarely held that the accused has a constitutional right to present "evidence" of his unsedated demeanor to the jury.[132] In the words of the Court of Appeals of *Washington*,"[w]hen mental competence is at issue, the right to offer testimony involves more than mere verbalization."[133] Citing *Washington v. Texas* and *Chambers v. Mississippi*, the Supreme Judicial Court of Massachusetts has similarly held that the accused's constitutional right to present evidence"includes the defendant's right to offer his demeanor in an unmedicated state."[134]

Although the direct effects of the constitutionalization of the right to present defense evidence have attracted more scholarly commentary, there is also an important indirect effect. It is a well recognized maxim of statutory interpretation that when two statutory constructions are possible and one raises serious questions about the statute's constitutionality, the other interpretation is preferred.[135] Most American jurisdictions now have evidence codes. In 1975, the Federal Rules of Evidence became effective.[136] Thirty-four states have adopted evidence codes patterned after the rules.[137] Suppose that the defense offers an item of evidence under an ambiguous statutory provision. Under one interpretation, the evidence is admissible; but under the competing construction, the judge should bar the evidence. Given *Washington* and *Chambers*, the defense can now argue that the former interpretation is preferable, because it moots the question of whether the application of the statute to bar the evidence would violate the accused's constitutional right. That argument succeeded in a federal case, *United States v. Pohlot*.[138] In that case, the defense attempted to introduce psychiatric testimony. The prosecution argued that the testimony was inadmissable under the Insanity Defense Reform Act of 1984. The defense countered that a narrow interpretation of the Act, barring the testimony, would run afoul of the defense's constitutional right to present exculpatory evidence.[139] The court agreed with the defense that a narrow interpretation would raise"sufficiently substantial" constitutional questions.[140] On that ground, the court construed the Act as allowing the admission of the defense testimony.

A state court used the same constructional technique in *Commonwealth v. Joyce*.[141] In that case, the accused was charged with rape. The accused sought to introduce evidence of the alleged victim's prior sexual activity. The prosecutor objected on the ground that the state rape shield statute barred the evidence. The court refused to adopt the prosecutor's proposed interpretation of the statute. The defense had argued that as construed by the prosecutor, the statute abridged the accused's constitutional right to present evidence.[142] The court found the defense argument persuasive. The court emphasized that in that jurisdiction, it was well settled that "a statute must be construed, if fairly possible so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[143]

Conclusion

The United States has long prided itself on its adversarial criminal justice system.[144] Of course, if there is to be an adversary clash between the sides at an evidentiary hearing, at the bare minimum each side must be assured the right to present to present evidence at the hearing. Thus, the right to present evidence is arguably the most fundamental procedural guarantee in an adversary system of justice. In that light, it is even more remarkable that the Supreme Court waited until 1967 to constitutionalize the accused's right to present evidence. It is even more remarkable that when the Court finally chose to confer constitutional status on that right, the Court decided to derive the right from the compulsory process clause—a clause which had been neglected for so long that it had been dismissed as a "dead letter."[145]

The compulsory process guarantee can no longer be slighted. The guarantee has become the most important constitutional bulwark for the adversary system. Although the Warren Court fashioned the right and the subsequent Courts have dismantled many of the other procedural safeguards created by the Warren Court, the Burger and Rehnquist Courts have enforced this right with surprising vigor. To paraphrase the Psalm, the constitutional guarantee which was once rejected has become a cornerstone.[146]

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Notes

[1] Western, *The Compulsory Process Clause*, 73 Mich. l. Rev. 71, 177 (1974).

[2] Amnesty International, Amnesty International Report, 1975-76 (1976); Western, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567(1978).

[3] *Id.*

[4] *Hackett v. Mulcahy*, 493 F. Supp. 1329, 1335 (D.N.J.1980).

[5] Western, *supra* note 1, at 79.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 80.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 81.

[15] *Id.* at 80.

[16] *Id.* at 81.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 82.

[20] *Id.*

[21] *Id.*;Clinton, *The Right to Prevent a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L.Rev. 711, 721(1976).

[22] Western, *supra* note 1, at 81-82.

[23] *Id.* at 84.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 87.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 91.

[30] *Id.* at 91.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34]*Id.* at 91-92.

[35]*Id.* at 92.

[36]*Id.*

[37]*Id.*

[38]*Id.*

[39]*Id.*

[40]*Id.*

[41]*Id.* at 94.

[42]*Id.*

[43]*Id.*

[44]Clinton, *supra* note 21, at 730.

[45]See E. Imwinkelried, *Exculpatory Evidence:The Accused's Constitutional Right to Present Favorable Evidence* 1-1(1990)

[46]Western,*supra* note 1, at 95.

[47]*Id.* at 96.

[48]*Id.*

[49]*Id.*

[50]*Id.*

[51]*Id.* See Rule 214(a), Model Code of Evidence 214(a).

[52]*See also Pettijohn v. Hall,* 599 F.2d 476, 481(1st Cir.1979) ("A core purpose of the sixth amendment is that the defendant has the same rights to introduce evidence as the prosecution") Western, *supra* note 1, at 96.

[54]*Id.* at 97.

[55]*Id.*

[56]*Id.*

[57]*Id.* at 98.

[58]*Id.* at 77

[59]*Id.* at 100. *See Commonwealth v. Elder,* 452 N.E.2d 1104, 1109-10 (Mass. 1983)("Since the defendant was able to establish bias without the proffered evidence, this case differs markedly from...*Davis v. Alaska*....In [that] case, the introduction of the prior pending prosecutions or prior records was essential, since there was no other way in which the bias of [the] witness could be elicited").

[60]*Id.* at 99.

[61]Clinton, *supra* note 21, at 736.

[62]Western, *supra* note 1, at 100.

[63]*Id.* at 99.

[64]Clinton, *supra* note 21, at 717, 727-28.

[65]*Id.* at 717, 728.

[66]*Id.* at 717.

[67]*Id.* at 728.

[68]*Id.* at 727.

[69]*Id.*

[70]*Id.*

[71]*Pennsylvania v. Ritchie,* 480 U.S. 39, 55n.11. (1987).

[72]*Id.*

[73]*United States v. Burr* , 25F.Cas. 30 (C.C.D.Va.1807) (No. 14,692d); *United States v. Burr*,25F.Cas. 187(C.C.D.Va. 1807)(No. 14,694).

[74]Western, *supra* note 1, at 101.

[75]*Burr,supra* note 73, 25F.Cas. 30.

[76]*Id.* at 33.

[77]*Id.*

[78]*Burr, supra* note 73,25F.Cas.187.

[79]*Id.* at 190,192.

[80]*Id.* at 192. "by the time Jefferson's response arrived, Burr had decided to drop his request and proceed with the trial. The jury acquitted him a few days later." *Id.* at 107.

[81]Western, *Compulsory Process II*,74 Mich. L. Rev. 191,193(1975).

[82]*Id.* at 195.

[83]Western, *supra* note 1, at 75.

[84]*Id.* at 108(citing the five opinions).

[85]*Id.* at 74.

[86] 8J. Wigmore, *Evidence Section* 2191, at 68-69(J. Mc Naughtonrev. ed. 1961); Western *Confrontation and Compulsory Process: A Unified Theory for Criminal Cases,* 91 Harv. L. Rev. 567, 591(1978).

[87]*Washington v. Texas,*388 U.S. 14(1967).

[88]*Id.* at 16-17 n.4.

[89]*Id.* at 14.

[90]*Id.* at 18-19.

[91]*Id.* at 14.

[92]Imwinkelried, *Chambers v. Mississippi,* 40 U.S. 284 (1973): *The Constitutional Right to Present Defense Evidence,* 62 Mil. L. Rev. 225, 241(1973).

[93]*People v. Scott,* 52 Ill.2d. 432, 288 N.E.2d 478(1972).

[94]*Id.* at 439, 288 N.E.2d 482.

[95]*Chambers v. Mississippi,* 410 U.S. 284(1973).

[96]*Id.* at 302.

[97]*Id.*

[98]*Id.*

[99]*Id.*

[100]*Id.*

[101] 16 Am. Jur.2d *Constitutional Law Section* 3(1964).

[102] 16 C.J.S. *Constitutional Law Sections* 86-87,94,107-08(1984).

[103] Churchwell,*The Constitutional Right to Present Evidence: Progeny of Chambers v. Mississippi,*19 Crim. L. Bull. 131,132(1983).

[104]*Imwinkelried, supra* note 92,at 241.

[105]*Churchwell supra* note 103, at 132.

[106]*Id.* at 137.

[107]*Id.* at 138.

[108]*Id.* at 144. *See United States v. Anderson,* 872 F.2d 1508(11th Cir.1989).

[109]Churchwell, *supra* note 103.

[110]Clinton, *supra* note 21, at 756.

[111] *See* E. Imwinkelried, *supra* note 45, at ch.14.

[112] *See Id.* at ch.8.

[113] *See Id.* at chs. 10-12.

[114]Imwinkelried, *supra* note 92, at 226.

[115]*Id.*

[116]C. Whitebread & C. Slobogin, *Criminal Procedure: An Analysis of Cases and Concepts* 4 (2d ed. 1986); Clinton, supra note 21, at 857.

[117]*Davis v. Alaska,*415 U.S. 308(1974) (Chief Justice Burger himself wrote the lead opinion).

[118]*Olden v. Kentucky,* 109 S.Ct.480(1988).

[119]Western, *supra* note 81, at 306.

[120]Note, *Rock v. Arkansas: Hypnotically"Refreshed" Testimony or Hypnotically "Manufactured" Testimony?,* 74 Corn. L. Rev.136(1988).

[121]In *Chambers v. Mississippi,* 410 U.S. 284(1973), the Court held that the right entitled an accused to introduce technically inadmissible hearsay evidence. In the trial court, the defense had argued that the judge should admit the evidence under the declaration against interest exception to the hearsay rule. However, the state trial judge noted that under state hearsay law, to qualify as a declaration against interest the statement must have been contrary to pecuniary or proprietary interest; penal interest did not suffice. In the lead opinion, Justice Powell frankly acknowledged that"[t]his materialistic limitation on the declaration-against-interest hearsay exception appears to be accepted by most States in their criminal trial process." *Id.* at 299.

In *Rock v. Arkansas,* 483 U.S. 44(1987)), the Court held that a defendant had a right to testify even though he had to have his memory hypnotically enhanced to revive her memory of the details of the shooting incident in question. The case arose in a jurisdiction which followed a per se rule barring the admission of hypnotically refreshed testimony. Casenote, *The Admissibility of Hypnotically Refreshed Testimony: Rock v. Arkansas,* 30 B.C.L. Rev.573, 574(1989). At the time of the Supreme Court's decision, the per se rule may have been the majority view in the United States. *Id.* at 594.

[122]Imwinkelried, *Constitutional and Statutory Theories for the Admissibility of Defense Evidence, in 1 Seventeenth Annual Defending Criminal Cases: A Practical Look at Current Developments in Criminal Law* 419, 422(P.L.I. 1979).

[123] Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges,* 30 Stan. L. Rev. 1173, 1195(1980).

[124]Hill, *Testimonial Privilege and Fair Trial,* 80 Colum. L. Rev. 1173, 1195(1980).

[125]Western, *supra* note 86, at 626.

[126]Note, *The Constitutionality of an Absolute Privilege for Rape Crisis Counseling: A Criminal Defendant's Sixth Amendment Rights Versus a Rape Victim's Right to Confidential Therapeutic Counseling,* 30B.C.L. Rev. 411, 447-

55(1989).

[127] *Id.*

[128] Imwinkelried, *Demeanor Impeachment: Law and Tactics*, 9 Am. J. Trial Ad. 183, 189-92(1985).

[129] *People v. Hardesty*, 362N.W.2d. 787,795(Mich.App. 1984).

[130] *Id.*

[131] *In re Pray*,336 A.2d 174, 177(Vt.1975) ("In fact, it may well have been necessary, in view of the critical nature of the issue, to expose the jury to the undrugged, unsedated Gary Pray.").

[132] *Commonwealth v. Louraine*, 453 N.E. 2d 437(Mass. 1983); State v. Maryott, 492 P.2d 239(Wash. App.1971).

[133] *Id.* at 132, 492P.2d at 242.

[134] *Lourine*, *supra* note 132, at 442.

[135] *Gun South, Inc. v. Brady*,711 F. Supp. 1054(N.D. Ala.1989);*S.E.C. v. Pacific Bell*, 704F. Supp.11(D.D.C.1989).

[136] R. Carlson, E. Imwinkelried & E. Kionka, *Materials for the Study of Evidence* 23(2d ed. 1986).

[137] *Id.* at 23-24.

[138] *United States v. Pohlot*, 827 F. 2d 889,900(3d Cir. 1987).

[139] *Id.*

[140] *Id. See also United States v. Benvensite*, 564 F. 2d 335,340-42(9th Cir. 1977).

[141] *Commonwealth v. Joyce*, 415 N.E.2d 181(Mass.1981).

[142] *Id.* at 184.

[143] *Id.* at 185n.5.

[144] *See generally* S. Landsman, *Readings on Adversarial Justice: The American Approach to Adjudication* ch.1(1988).

[145] Western,*supra* note 81, at 195.

[146] Psalms, CXVIII, 22("The stone which the builders refused is become the headstone of the corner.").

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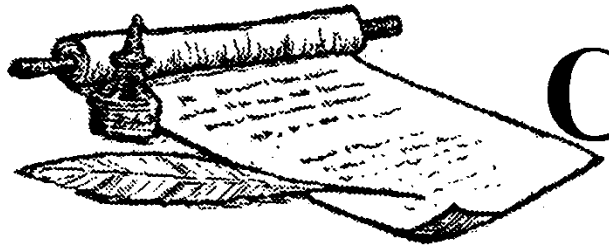

CHAPTER 7

Constitution of The United States
Amendment V

Nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb.

Constitution of Kentucky
Section 13

Double jeopardy; No person shall, for the same offense, be twice put in jeopardy of life or limb.

DOUBLE JEOPARDY

Rob Sexton

The United States *Constitution* and the Kentucky *Constitution* both contain guarantees protecting citizens from being twice placed by the government, for the same offense, in jeopardy of life and limb.[1] Both of these Double Jeopardy provisions protect citizens from being reprosecuted for an offense after prior conviction or acquittal for the same offense; and both prohibit multiple punishments for the same offense.[2] Both provisions, moreover, are rooted in protections which existed at common law, and both provisions have developed rather slowly from their common law beginnings.

However, in the past few months, something of a revolution has been brewing in Double Jeopardy jurisprudence, with both Federal and Kentucky Courts making new developments in this one small area of the law. The purpose of this article is to examine these new developments of Double Jeopardy law by the Federal and Kentucky courts, and to illustrate the contrasts between Federal and Kentucky Double Jeopardy law. To place these new developments in context, certain aspects of already-established Double Jeopardy law first will be set forth.

I. FEDERAL DOUBLE JEOPARDY LAW

A) THE HISTORICAL BACKGROUND

The English common law, as it existed at the time of the adoption of the *Constitution*, prohibited the reprosecution of a defendant for the same offense after a prior conviction or acquittal; and if the Crown attempted such a reprosecution, the defendant could terminate the proceedings by a plea of *auterfoits acquit* or *auterfoits* convict.[3] These pleas protected against reprosecution for prior *offenses* already adjudicated, and did not bar prosecution for all separate charges arising from the same factual course of conduct.[4] Although development has been made from this common law background, the protection once provided by the common law pleas of *auterfoits* acquit and *auterfoits* convict remains the foundation of the protection which the Court is now willing to discover in the Federal Double Jeopardy Clause.

B) FEDERAL PROTECTIONS AGAINST MULTIPLE PUNISHMENTS IN THE SAME PROCEEDING

The pleas of auterfoits acquit and auterfoits convict only protected against reprosecution for already adjudicated offenses. One way in which Federal law goes farther than the common law pleas did is the recognition by federal law of the defendant's right not to receive multiple punishments for the same offense in the same proceeding.[5] The protection of this policy is the purpose of the famous *Blockburger*[6] rule, designed by the Court to determine whether 2 charges actually represent the same offense under the law.[7]

The *Blockburger* rule is simply stated, and is not unduly difficult to apply. The rule requires that each statute under which the defendant is charged must require proof of a fact that the other does not.[8] If this test is satisfied, then, as a general rule, no objection under the Double Jeopardy Clause will lie, even when there is substantial overlap in the proof offered to establish both crimes.[9]

For example, in Kentucky, the elements of criminal trespass in the first degree are established by proof that the defendant knowingly entered or remained unlawfully in a building.[10] Burglary in the third degree requires proof that the defendant knowingly entered or remained unlawfully in a building *with intent to commit a crime.*[11] Proof of burglary therefore requires the prosecution to show a fact not required in a prosecution for criminal trespass, namely the intent to commit a crime. But proof of criminal trespass does not require the prosecution to show proof of a fact not required in a prosecution for burglary. Therefore burglary and criminal trespass are the "same" offense under *Blockburger*, and the two charges may not be brought against one defendant.

The elements of theft by unlawful taking, however, require proof that the defendant unlawfully took or exercised control over the property of another with intent to deprive the true owner thereof.[12] Theft requires the proof of several facts not required in a prosecution for burglary. Therefore, under *Blockburger*, a defendant may be prosecuted for both theft and burglary.

Despite the *Blockburger* rule's clarity and ease of application, the rule may fairly be criticized as wooden and inflexible. However, this criticism can be leveled against any rule clear enough to produce predictable results. A more serious criticism of the *Blockburger* rule is that it is unduly deferential of the legislature.

It has even been held that the Double Jeopardy Clause does no more than prevent the sentencing court from imposing greater punishment than the legislature intended.[13] This view of the Double Jeopardy Clause reduces the constitutional guarantee to a mere rule of statutory construction. It places a right perpetually inherent in the people at the mercy of a political branch of government, and it allows the state to make even the most banal transactions heinous by the application of clever draftsmanship to the penal code.

In sum, the federal protection against multiple punishments in the same proceeding has traditionally been only as strong as Congress and the General Assembly have wanted it to be. Countless thousands in our jails and prisons will be happy to assure the curious inquirer that neither legislature has decided the protection against multiple punishments to be very strong at all.

C) FEDERAL PROTECTIONS AGAINST REPROSECUTION FOR A PRIOR OFFENSE

The guarantee against reprosecution after a prior determination of guilt or innocence is the aspect of Federal Double Jeopardy law with the strongest historical roots, and it is the aspect which has received the most stress by the Court. There is much sense to this focus beyond a mere attachment to history, because of the dangers inherent in allowing multiple prosecutions.

There are at least two major policies which the prohibition against multiple prosecutions is designed to foster. The first is the policy against allowing the Government, with all its resources and power, to subject a citizen to the expense, anxiety, insecurity and ordeal of a criminal proceeding more times than one.[14] The other policy is grounded in a concern for truth, and reflects the realization that if the Government were allowed to rehearse its presentation of proof over the course of successive prosecutions, the chances of reaching an unjust result would be greatly increased.[15]

1) THE *HARRIS* EXCEPTION

Because of the grave dangers of injustice in the area of multiple prosecutions, the Court has relaxed the *Blockburger* rule in determining the scope of protection the Double Jeopardy Clause provides in this area. For example, in a situation where conviction of a greater crime requires proof of a lesser, underlying crime, the Federal Double Jeopardy Clause bars reprosecution for the lesser crime after conviction of the greater.[16] In *Harris v. Oklahoma*, a companion of the defendant shot and killed a liquor store clerk while the 2 men were robbing the store.[17] The defendant was tried and convicted of felony-murder, which required proof of the underlying robbery. However, at his first trial, the defendant was *not* charged with robbery.

Nevertheless, a second information was later brought against the defendant for the same robbery used to establish the defendant's guilt for the prior charge of felony-murder. The defendant was convicted in this second proceeding, and the Oklahoma Court of Criminal Appeals affirmed. The Court, in a brief *per curiam* opinion, reversed, holding that the defendant's second conviction was barred by the Double Jeopardy Clause.

2) COLLATERAL ESTOPPEL

The *Blockburger* rule has also been relaxed in situations covered by the rule of collateral estoppel. *Collateral estoppel* prevents the relitigation of issues resolved in the defendant's favor in an earlier criminal proceeding.[18] For example, in *Ashe v. Swenson*, 6 poker players were robbed by 3 or 4 masked men.[19] The defendant was found not guilty of the robbery of 1 of the players. Six weeks later, the defendant was convicted of the robbery of another player. The Supreme Court of Missouri affirmed. The Court reversed, reasoning that the first trial resolved the issue of whether the defendant had been present at the robbery, and that, having been once resolved, this issue could not be relitigated. It is important to note, however, that the rule of *Ashe* will only apply when it is clear why the jury in the first proceeding acquitted the defendant. Because criminal trials end in a general verdict, such situations will be rare.

3) THE RULE OF *GRADY*

The Court has recently discovered another area in which the *Blockburger* rule must be relaxed; holding that a subsequent prosecution is barred, if, to establish an element of the offense charged, the Government will prove conduct for which the defendant had already been prosecuted.[20] For example, in *Grady v. Corbin*, an intoxicated motorist caused an accident in which 1 person was killed.[21] Fourteen days later, the defendant pleaded guilty to DUI, and the presiding judge accepted the plea. Unbeknownst to the judge, the local prosecutor's office was planning to charge the defendant with homicide, because of the death caused by the accident.

Despite the defendant's prior plea to the offense of DUI, the prosecutor went ahead and obtained a negligent homicide indictment against the defendant. The prosecutor later filed a Bill of Particulars stating that he would prove the defendant's negligence by demonstrating that the defendant was driving while intoxicated.

The defendant moved to dismiss, claiming that the homicide indictment was barred by the federal Double Jeopardy Clause. The motion was overruled, and the defendant sought the Writ of Prohibition from the Supreme Court of New York, Appellate Division. The Writ was denied. The defendant then appealed the denial of the Writ of the New York Court of Appeals, which reversed.[22] The state then sought *certiorari*, which was granted, and the Court affirmed the Court of Appeals.

The Court's opinion in *Grady* is clearly a compromise. The opinion discusses at length what the rule of *Grady* does not mean, to the extent that the Bench and Bar are left with little guidance as to what *Grady does* mean. This excessive subtlety of *Grady* is its major flaw. The rights of the people must be forcefully stated, and not, as here, couched in terms as obscure as a *Zen Koan*. But let us adopt the method of the Court, and first focus on what *Grady* does not mean.

First of all, *Grady* does not mean that the *Blockburger* test has been abandoned in the successive prosecutions field. To the contrary, a second prosecution of a defendant remains barred if the second charge fails the *Blockburger* test.[23] *Grady*, however, requires a second analytical step beyond *Blockburger*. The difficulty lies in reducing that second step to words.

For *Grady* also does not adopt a "same evidence" test, which would bar the state from using evidence in a second prosecution which had already been used against the defendant in a former prosecution.[24] The Court points out that the touchstone of *Grady* is the conduct to be proven at the second prosecution, not the evidence to be used to prove the conduct.[25] So may we then assume that *Grady* adopts a "same transaction" test, which mandates joinder of all charges based on a single transaction? No, we may not.[26] Rather, the holding of *Grady* appears to be this: when the State has once punished a defendant for negligently driving a car, the State can never thereafter use the same negligent *conduct* as a basis for the punishment of the same defendant.

The Court's rejection of the "same evidence" test notwithstanding, the Court's holding in *Grady* has an obvious impact in the field of evidence; for the only way in which the state can "use" a defendant's already adjudicated conduct against him at a second proceeding is by introducing evidence of that conduct against him. Therefore, it is difficult to imagine any evidence which would be relevant in a first proceeding which would be admissible against the defendant at a second proceeding. But the rule of *Grady* appears to go farther than the "same evidence" test. For if the government uses only some of its evidence of the defendant's conduct against him at the first trial, the government still may not use its fresh evidence of the same conduct against the defendant at a second trial.

The Court's rejection of the "same transaction" test, although not surprising,[27] is similarly confusing. *Grady* clearly does not mandate that all charges against the defendant based on one transaction be joined in one proceeding. Severance is allowed if proof of the charges in the second proceeding will not involve proof of the same conduct treated in the first proceeding. But what, after all, is "conduct?" Negligently driving a car? Negligently driving a car while possessing co-

caine? Negligently driving a car with a suspended operator's license?

The answer to the above-mentioned hypotheticals appear to be that, in a second proceeding for possession of cocaine, the state may not use evidence of the defendant's negligently driving a car. Either such evidence would be irrelevant, or it would be barred by the rule of *Grady*. [A subsequent procution for driving on a suspended license would appear, on the other hand, to be completely barred by the rule of *Grady*.]

Thus, 3 points need to be remembered. The rule of *Grady* will make severance unattractive to prosecutors, because it can restrict the type of evidence utilized against the defendant in subsequent proceedings. Thus, the rule of *Grady* also severely restricts the type of charges which can be brought in subsequent proceedings. Finally, the rule of *Grady* makes "conduct" a term of art with a rather imprecise definition. Therefore, nearly every time the prosecution elects severance, the defendant is presented with a potential issue for appeal.

D) SUMMARY

When all charges against the defendant are joined in one proceeding, the Federal Double Jeopardy Clause requires only that the defendant not receive multiple punishments for the same offense. This right of the defendant is deemed fully satisfied if the charges against the defendant meet the *Blockburger* test.

When the charges against the defendant are severed into different proceedings, the *Blockburger* test must still be satisfied, or subsequent prosecutions will be barred. But even when the *Blockburger* test is satisfied, the *Grady* test must still be met. *Grady* technically allows severance, but it makes severance, in the typical case, unattractive to the government, because it limits the conduct which may be proven at second proceedings, and it makes the scope of the term "conduct" an issue for the defendant to appeal.

Even when the *Blockburger* and *Grady* tests are both met, the advocate should inquire if a supplemental principle of federal double jeopardy law, such as collateral estoppel, will apply to the case at hand. Having fully applied federal law to the case, the advocate should next turn to Kentucky double jeopardy law to see if its quite different mandates are being met.

II. KENTUCKY DOUBLE JEOPARDY LAW

A) KENTUCKY PROTECTION AGAINST MULTIPLE PUNISHMENT FOR THE SAME OFFENSE

Federal double jeopardy law applies to the states through the Fourteenth Amendment.[28] Therefore, states may not provide their citizens less double jeopardy protection than is provided by federal law. At any rate, much federal double jeopardy law has been adopted in Kentucky by statute.[29] However, the double jeopardy protection provided by state constitutions may freely exceed the scope of the protection provided by federal law. Thanks to a recent opinion of the Kentucky Supreme Court, which was announced by Justice Combs, Kentucky has joined that number of states which has indeed exceeded the scope of federal double jeopardy protection.[30]

As pointed out above, in a situation where all charges against a defendant are joined in one proceeding, the concern of federal law is simply that the defendant not receive multiple punishments for the same offense. The scrutiny of the federal courts will be fully satisfied in such a situation as long as all the charges pass the *Blockburger* test. However, the advocate must remember that, in the joinder situation, the *Blockburger* test is no longer sufficient to satisfy the scrutiny of the Kentucky courts.

For example, in *Ingram v. Commonwealth*, the defendant was charged with selling marijuana to a minor and with trafficking within 1,000 feet of a school.[31] The charges were joined in 1 proceeding and resulted in the defendant's conviction on both charges. The Supreme Court reversed the conviction, reasoning that, although the *Blockburger* test was satisfied by the charges, the *Blockburger* test itself was insufficient to protect the rights guaranteed by Section 13 of the Kentucky *Constitution*.

When a defendant is charged with several offenses in 1 proceeding, the *Blockburger* test must still be met.[32] However, the Court now supplements the *Blockburger* test with a "single impulse" test. This test provides that, when a single impulse and single act of the defendant produce but a single set of consequences, the defendant has committed only 1 offense, even if his conduct technically violates several criminal statutes.[33]

B) APPLICATIONS OF *INGRAM*

1) *WALDEN V. COMMONWEALTH*

Walden v. Commonwealth is an appeal from a judgement of the Madison Circuit court convicting the appellant both of wanton murder and of DUI. One of the points of error raised on appeal was that this dual conviction violated the rights granted the accused by Section 13 of the Kentucky Constitution.

The Supreme Court, citing *Ingram*, agreed, and reversed the appellant's conviction for DUI in a *per curiam* opinion. The Court reasoned that, had the Commonwealth attempted to prosecute Walden for murder and DUI in successive prosecutions, the second prosecution would have been barred under *Grady v. Corbin*. But to allow the Commonwealth to obtain by one proceeding that which it could not obtain by two would be to make the rights of the people dependant upon prosecutorial discretion.[35] Such a result would be absurd.

Accordingly, the Court held that Section 13 of the Kentucky Constitution not only incorporated the rule of *Grady v. Corbin*, but the accused are joined in one proceeding.[36] Because, in the case at bar, the prosecution proved the defendant's driving under the influence in order to establish the elements of wanton murder, the prosecution was therefore precluded from using proof of the same conduct to obtain a conviction for DUI.[37]

2) *MARSHALL V. COMMONWEALTH*

Marshall v. Commonwealth concerns the conviction of the appellant for all of the following crimes: complicity to commit arson in the second degree, complicity to commit burglary in the third degree, complicity to commit theft by unlawful taking, and complicity to commit criminal mischief in the first degree.[38] On appeal, the appellant raised the point that his conviction for complicity to arson and complicity to criminal mischief violated his rights not to be placed in double jeopardy.

The Court agreed, and reversed, reasoning that the conduct conviciting the accused of arson was exactly the same as that used to obtain his conviction for criminal mischief. To make this determination, the Court looked to the instructions the trial court delivered to the jury. Having discovered that the two convictions rested on proof of the same conduct, the Court then held that the case fell within the scope of the *Ingram* rule, which barred prosecution for two technically distinct offenses bases on the same

impulse, act and consequences.

3) *MAHONEY V. COMMONWEALTH*

This case involves an appeal of a judgement conviction the accused of 27 counts of second degree manslaughter, 12 counts of first degree assault, 27 counts of first degree wanton endangerment, 14 counts of second degree wanton endangerment and one count of driving under the influence of alcohol.[39]

On appeal, the accused argued that *Grady v. Corbin* required that his DUI convicton be reversed, because the accused's driving under the influence was convicted. The Court of Appeals disagreed, but reversed anyway.

The court correctly reasoned that *Grady v. Corbin* does not apply to situations, like the case before it, where all charges are joined in one proceeding. Accordingly, the court held that *Grady* did not control.

However, the court went on to conclude that *Ingram* also did not control. This conclusion, so obviously erroneous, was based on the court's disinclination to receive *Ingram* as mandatory precedent "pending further guidance by the Supreme Court." The court then went further into the realm of unreason by claiming that the Supreme Court's opinion in *Walden v. Commonwealth, supra.*, was based on reasoning similar to that used in *Burnette v. Commonwealth.*[40]

In truth, it is difficult to imagine two cases having less in common than *Burnette* and *Walden*. In *Burnette*, the accused, having first plead guilty to DUI, was then conviced of assault in a separate prosecution based on the same facts; and he urged on appeal that this result violated the double jeopardy clause. The High Court *disagreed*, but reversed the judgment on other grounds. It goes without saying that a contrary result on the double jeopardy claim would today be required by *Grady v. Corbin*, which, as already noted, did not control the case at bar in *Mahoney*.

But the Court of Appeals used *Burnette*, although it is off point and no longer states good law, as support for the proposition that a test like that of *Blockburger* should be used to decide the case before it. It then incorrectly applied the *Blockburger* rule, by holding that the rule required reversal of the appellant's DUI conviction. The result in *Mahoney* is quite correct, but the reasoning used to reach it is most unconvincing.

4) SUMMARY

It appears that Kentucky Double Jeopardy jurisprudence under *Ingram* is identical to federal law under *Grady*, with the exception that Kentucky applies to the *Grady* rule both to multiple prosecution of the same defendant are joined in one proceeding. The fact that the *Grady/Ingram* standard blurs the bright line test set forth in *Blockburger* appears certain to confuse the lower courts as has already been seen in *Mahoney v. Commonwealth.*

The *Grady/Ingram* standard is based partly on *Blockburger's* mechanical calculus, but it requires courts to go further and make a sensitive evaluation of the facts of the particular case. This required more of judges, and also requires more of the bar. For the now standard is a call for passionate advocacy, which is always to be preferred to a bland application of highly technical legal rules.

C) SEPARATE SOVEREIGNS

The United States *Constitution* allows the states to prosecute a defendant after a prosecution by the federal government or another state for the exact same act of the defendant.[41] It is important, however, to remember that Kentucky is under no *obligation* to allow reprosecution for a crime already prosecuted by federal or separate state authority; and, in fact, Kentucky law limited the applicability of the dual sovereignty doctrine.[42]

Kentucky currently bars reprosecution when a former prosecution by the federal government or another state results in an acquittal, a conviction not set aside, or a dismissal for insufficient evidence, when a subsequent Kentucky prosecution would be for conduct already prosecuted.[43] The 2 exceptions to this general rule are: 1) when the offenses involved in the 2 prosecutions are distinct under the *Blockburger* test; and 2) when the offense involved in the subsequent Kentucky prosecution was not consummated when the former prosecution began.[44]

Kentucky also bars relitigation when another sovereign has made a factual determination inconsistent with any fact necessary to a conviction in a subsequent Kentucky prosecution.[45] In short, Kentucky applies the doctrine of collateral estoppel to bar litigation of issues decided in another forum.[46]

One wonders if even these traces of the dual sovereignty doctrine will remain in Kentucky after *Ingram v. Commonwealth.*[47] *Ingram*, as noted above, only is binding in a situation where all charges against a defendant are joined in a single indictment. But the rule of *Ingram*, which forbids multiple charges being brought for the same impulse, act and consequences, could usefully be extended by analogy to finish off what remains in Kentucky of the dual sovereignty doctrine. The advocate should, therefore, be alert to the possibility of making an argument based on *Ingram* in a dual sovereignty situation.

D) POINTS OF GROWTH

The most obvious way in which Kentucky double jeopardy law is likely to grow in the near future is the application of the *Ingram* rule both to the dual sovereignty situation. Beyond that, it is entirely rational to hope that Kentucky will move to a clear adoption of the "same transaction" view of double jeopardy, and furthermore will dispense with the dual sovereignty doctrine altogether. It is certain, that after 2 centuries of slow growth from their common law roots, the Federal and Kentucky double jeopardy protections are finally beginning to come into their own. Advocates for the accused now have the opportunity to help this process along.

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FOOTNOTES

[1]United States Const. Amend 5; Kentucky *Constitution* Section 13.

[2]*North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Jordan v. Commonwealth*, 703 S.W.2d 870 (1986).

[3]For a discussion, *see Grady v. Corbin*, 495 U.S. ___, 110 S.Ct. 362, 109 L.Ed.2d 548, 568 (1990) (SCALIA, J., DISSENTING).

[4]*Id.*

[5]*See Gaviers v. United States*, 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911). Note that in *Gilbert v. Commonwealth*, 29 Ky. 184 (1831), it was held that the legislature did have the power to prescribe multiple punishments for the same offense.

[6]*Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

[7]*Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

[8]*Iannelli v. United States*, 420 U.S. 770, 785, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975).

[9] *Id.*

[10] KRS 511.060.

[11]KRS 511.040.

[12]KRS 511.030.

[13]*Missouri v. Hunter*, 495 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

[14]*Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

[15] *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

[16] *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977).

[17] *Id.*

[18] *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

[19] *Id.*

[20] *Grady v. Corbin*, 495 U.S. ____, 110 S.Ct. 362, 109 L.Ed.2d 548 (1990).

[21] *Id.*

[22] *Corbin v. Hillary*, 74 N.Y.2d 279, 543 N.E.2d 714 (1989).

[23] 109 L.Ed.2d at 563.

[24] 109 L.Ed.2d at 564.

[25] *Id.*

[26] 109 L.Ed.2d at 566, n.15.

[27] *Id.*, n.15.

[28] *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

[29] *See* KRS 505.020 *et seq.*

[30] *Ingram v. Commonwealth, Ky.*, 801 S.W.2d 321 (1990).

[31] *Id. See also* KRS 218A.990(5) and KRS 218A.990(16).

[32] Note that the *Blockburger* test is codified at KRS 505.020.

[33] 801 S.W.2d at 324.

[34] *Walden v. Commonwealth*, Ky., 805 S.W.2d. 102 (1991).

[35] 805 S.W.2d at 106.

[36] 805 S,W,2d at 106-107.

[37] 805 S,W,2d at 107.

[38] *Marshall v. Commonwealth*, Ky. ___ S.W.2d ___ (1992) (No. 90-SC- 185- MR, TO BE PUBLISHED).

[39] *Mahoney v. Commonwealth*, Ky., App., ___ S.W.2d ___ (1992) (No. 90- CA- 545- MR, TO BE PUBLISHED).

[40] *Burnette v. Commonwealth*, Ky., 284 S.W.2d 654 (1955).

[41] *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); but note that the vitality of the dual sovereignty doctrine is questionable after *Grady v. Corbin*, although it does appear to have survived *Benton v. Maryland*, n.25, *supra*.

[42] KRS 505.050.

[43] KRS 505.050(1).

[44] *Id.*

[45] KRS 505.050(2).

[46] *Smith v. Lowe, Ky.*, 792 S.W.2d 371 (1990). Note that the *Smith* Court applied the doctrine of collateral estoppel even though it is unclear exactly why the federal jury acquitted the defendant.

[47] 801 S.W.2d at 321.

"We should consider that we are providing a Constitution for future generations and not merely for the circumstance of the moment."

James Wilson

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment X

USING THE KENTUCKY CONSTITUTION

Read and study your *Constitution*, simply because the United States Supreme Court has said "this is the Law," *if it clearly violates the law* or the *Constitution, raise the question.*

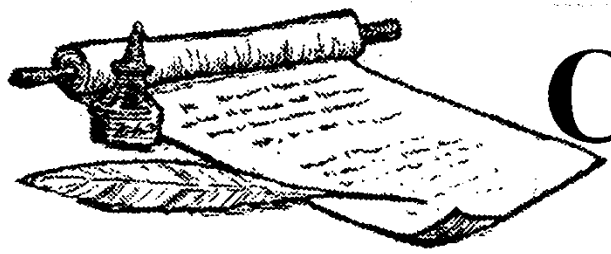
Maybe someday, a Judge will say, "Wait a minute. I have no right to do this. My rights and duties are spelled out in the *Constitution*, and nowhere can I find it."

So whether an appellate or trial lawyer, constantly remind the Judiciary of their function, because if Judges don't stop it, Lord knows where it is going to go.

We're the ones entrusted with the preservation of the *Constitution*. True, all the other officials have to take a similar oath, but we're spelled out twice in the *Constitution*, and it's up to us to make sure that we, as the Judiciary Branch make the Legislative Branch stay within the parameters of the *Constitution*. This is the law we constitute.

I challenge you to resort to these documents, the Federalist papers, the *Constitution*, and the writings from the philosophers from whence the Founding Fathers drew, to show *any basis* for the rule that what our Supreme Court says is the Law, *even if*, it is in conflict with our *Constitution*. I submit to you it doesn't.

DAN JACK COMBS, Kentucky Supreme Court Justice, then Court of Appeals Judge, at the October 20, 1986 Appellate Seminar Luncheon.



CHAPTER 8

Constitution of The United States

Rights of Accused: In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

Constitution of Kentucky

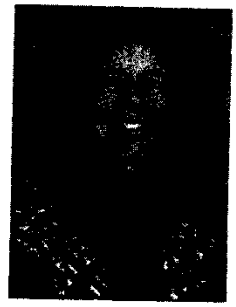
Section 7

Right of Trial by Jury: The acient 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.

Section 9

Truth may be given in evidence in prosecution for publishing matters proper for public information; jury to try law and facts in libel prosecutions. In prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; an in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

"Take It To The Box" or The Right To Trial By Jury



Rebecca DiLoreto

> Our Civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity.
>
> -CHESTERTON, Gilbert K., *Tremendous Trifles: The Twelve Men*, (New York: Dodd, Mead and Company, 1922), pp. 86-87.

One of the truest tests of our skills as public defenders arises when our clients tell us "I want to take it to the box." That box being one which holds twelve (or in district court - six) jurors.

The right to trial by jury is an integral component of American jurisprudence. The Stamp Act Congress of October 19, 1765, passed a resolution which stated "that trial by jury is the inherent and invaluable right of every British subject in these colonies."

In our *Declaration of Independence* the founders objected to the King "depriving us in many cases, of the benefits of Trial by Jury."

Article III, Section Two of the United States *Constitution* states that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."

Then, we are readily familiar with the right to trial by jury recognized in the Sixth and Fourteenth Amendments to the United States *Constitution* and in Sections Seven and Eleven of our state's constitution.

It was in *Duncan v. State of Louisiana*, where the U.S. Supreme Court held that citizens in state criminal proceedings were entitled to a jury trial. "The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States." *Duncan v. State of Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491, reh.den. 392 U.S. 947, 88 S.Ct. 2270, 202 L.Ed.2d 1412 (1968). The Supreme Court went on to explain that "The guarantees of jury trial in the Federal and State *Constitutions* reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.... Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or over zealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. State of Louisiana, supra*, 88 S. Ct. at 1451. That safeguard is perhaps most evident in cases of jury nullification.

This right of the jury to nullify dates back in Anglo-Saxon common-law to William Penn, the Quaker tried for causing a riot by preaching in public after his church had been closed by the Conventicle Act. *The Trial of William Penn*, 6 How. St. Tr. 951 (1670). The judge in Penn's case, following customary practice, fined the jurors for their incorrect verdict. Four jurors who refused to pay were incarcerated. They sued for illegal imprisonment. They won in *Bushnell's Case*, 124 Eng. Rep. 1006 (C.P. 1670).

In the more recent case of *United States v. Doughertz*, 473 F.2d 1113, 1132 (U.S. Court of App., Dis. of Columbia Cir., 1972) the majority of that Court recognized that "the existence of an unreviewable and unreversible power in the jury, to acquit in disregard of the instructions on the law given by the trial judge, has for many years co-existed with legal practice and precedent upholding instructions to the jury that they are required to follow the instructions of the court on all matters of law." The majority in *Doughertz* went on to hold that the defense had no right to inform jurors of their power to nullify. *Id.*, 1130-1137.

> And it seemeth to me, that the law in this case delighteth herselfe in the number of 12; for there must not onely be 12 jurors for the tryall of matters of fact, but 12 judges of ancient time for tryall of matters of law in the Exchequer Chamber. Also for matters of state there were in ancient time twelve Counsellors of State. He that wageth his law must have eleven others with him, which thinke he says true. And that number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc.
>
> -COKE, I *The First Part of the Institute of the Laws of England; A Commentary Upon Littleton* (Philadelphia: Robert H. Small, 1853), p. 155a.

In a dissenting opinion Chief Judge Bazelon disagreed with the majority," "The doctrine [of nullification] permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice. The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is 'unlawful' but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence. It is the jury - as spokesman for the community's sense of values - that must explore that subtle and elusive boundary." *United States v. Doughertz, supra*, at 1142. Thus, jury nullification allows the jury to act as the conscience of the community.

The same scholarly works and political beliefs that influenced the thinking of the framers of our federal constitution also influenced those who created and who later interpreted our state constitutional right to a jury trial.

Our state constitutional right to a trial by jury was initially embodied in Article XII, Section Six of the 1792 First *Constitution* of Kentucky; "That trial by jury

shall be as heretofore, and the right thereof remain inviolate." The language was changed slightly in the 1799 Kentucky *Constitution* in Article X, Section Six, "that the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate." The *Bill of Rights* of the 1850 *Constitution*, Article XIII, Section Eight added the condition "subject to such modifications as may be authorized by this *Constitution*." Our present Section Seven contains the same wording as the 1850 version.

The right to a jury trial in a criminal prosecution contained in Section Eleven of our present constitution was present, with the same language in Article X, Section Ten of the 1799 Kentucky *Constitution* and in Article Thirteen, Section 12 of the 1850 Kentucky *Constitution*.

The "ancient mode of trial by jury" was interpreted to mean a trial according to the course of the common law, and thus secures the right only in cases where a jury trial would have been customarily used at common law. *Carder et al. v. Weisengburt*, 95 Ky. 135, 23 S.W. 964 (1893).

In felony cases the essential features of that trial included that the citizen accused "be put upon his trial in a court of justice, presided over by a judge, and that he be tried by a jury of the vicinage composed of 12 men all of whom must agree upon a verdict. *Branham v. Commonwealth*, 209 Ky. 734, 273 S.W. 489 (1925). The Court in *Branham* went on to cite Blackstone's *Commentaries*, Vol. 2, p. 350; Hales's *Pleas of the Crown*, Vol. 1, p. 33; and Cooley's *Constitutional Limitations* 391. All of these commentators influenced the significance our state and federal courts place on the right to trial by jury.

In contrast, there is no constitutional or unqualified statutory right to be tried by a judge without a jury. RCr 9.26; *Hayes v. Commonwealth*, Ky.App., 470 S.W.2d 601. "In view of the many constitutional guarantees of the right to trial by jury, and in light of the universal acceptance of trial by jury as a due process requirement, a criminal defendant cannot be heard to complain that he received a trial by jury when he wanted a trial by the judge instead." *Hayes v. Commonwealth, supra.* However, defendants may waive their right to a jury trial and receive a trial before the judge upon agreement by the court and the Commonwealth.

Following *Hayes, supra*, the Kentucky Supreme Court enacted RCr 9.26. Subsection one of the rule reads "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Commonwealth." With crowded dockets and busy defense attorneys many district courts routinely resolve traffic and misdemeanor cases with bench trials.

As the defendant in *Hayes* must have believed, sometimes the choice of a bench trial is to our client's advantage. However, despite the generally heavy caseload of public defenders and the court's interest in moving the docket along, we, as carriers of the "torch of the *Bill of Rights*" (see Judge Johnstone's article which follows) have an ancient, awesome duty to protect our client's right to a trial by jury.

Sometimes, we as professionals don't put as much trust in the jury system as do our clients. Perhaps we need to remember that the reason our client has chosen to be tried by 12 common people, not "specialists" not lawyers, but people who know "no more law" (probably less law) than does our client, is because of the hope that those 12 can feel as s/he feels, believe as s/he believes and arrive at a resolution that approximates justice.

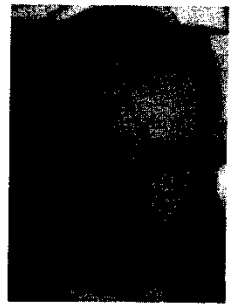
REBECCA DILORETO
Assistant Public Advocate
Appellate Branch
Frankfort

"I consent, Sir, to this Constitution because I expect no better and because I am not sure that it is not the best."

B Franklin

"WE THE PEOPLE" IN JURY ASSEMBLED:

THE DEFENSE APPEAL TO HIGHER LAW



William A. Pangman

"Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off... This gives me comfort — that, as long as I have existence, my neighbor will protect me."

- Patrick Henry
3 Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 545, 546

I. INTRODUCTION

Centuries ago in England, when the penalty for even the most minimal crime was death, sympathetic juries refused to apply the instructed law and acquitted defendants before them, even though the letter of the law itself may have been violated. The jury deserved the high position it held in the esteem of Englishmen. The role of the jury throughout history has been to serve as a check against "the manipulation of the law as an instrument of royal despotism . . . ." [1] Over the course of time, the jury was to lose much of its vitality in the country in which it was nourished. The Englishmen who were at that very time settling in American colonies, however, carried with them the jury as a guarantor of liberty. On this continent, the jury was to gain new life and new meaning.[2]

Alexander Hamilton reflected the sentiment of the Framers in this regard when faced with objections to a draft of the Federal *Constitution* which failed to safeguard jury trial, he observed:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury. Or if there is any difference between them, it consists in this; the former regarded it as a valuable safeguard to liberty, the latter represented it as the very palladium of free government.[3]

The reason the jury was perceived in such high esteem was twofold: (1) there existed a general distrust of governmental power and any superficial checks "legal experts" might impose upon the government; and (2) there was a general faith in the judgment of the common man.[4] Our faith in the jury prevailed in America through the early to mid-nineteenth century.[5] Nevertheless, being held in such high regard did not guarantee that the jury did not have its detractors. Those who would remove the right to decide the justice of the law from the jury's prerogative most often sat not more than fifteen feet from the jury box. Over the course of approximately sixty years in the nineteenth century, trial and appellate courts issued decisions which held that the prerogative to decide questions of law fell solely to the bench. These decisions, however, failed to examine the framer's intent and failed to consider fundamental principles of natural law from which the jury's legitimate power emanates.

Alexis de Tocqueville, in the early 1800's, recognized the integral role the jury is a political institution as well as a judicial one: "[I]t places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government."[6]

In our own era we have witnessed the development of disturbing trends which remind us to resort to the security of our neighbors in limiting the excesses of government: the War on Drugs has led to compromises upon due process; our freedoms are under constant attack by factions within society and those in government who want a more "organized and homogenized" society; a system once constrained by the mandate of justice is now a processing mill which churns out convictions in the face of once sacred constitutional safeguards. Very simply, the government established to be our servant has become our master, at the expense of the rule of law save for the ultimate vestige of sovereignty — the jury's right to correct injustice through its power to render an irreversible, general verdict of "not guilty." This right to say whether the law is just as applied in a given circumstance is known, in the trial process, as jury nullification. Nullification is always an available and appropriate defense in any criminal prosection in which principles of justice are violated. Jury nullification is not an anachronistic prerogative; jurors today may still, with absolute impunity, engage in nullifying laws they feel are unjust.[7]

This proposition is always true so long as the jury has the power to return a general verdict. The term "general verdict" is defined as "one by which the jury pronounce at the same time on the facts and the law, either in favor of the plaintiff or defendant. The jury may find such a verdict whenever they think fit to do so."[8] The Fourth Circuit Court of Appeals acknowledged the importance of this safeguard to liberty in *United States v. Moylan:*

> We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge, and contrary to the evidence. This is a power which *must exist* as long as we adhere to the *general verdict* in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they judge. If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.[9]

Even without concurrence of any fellow jurors in a criminal trial, a single vote of not guilty can nullify or invalidate any law which in that particular case, for one reason or another, should not be enforced in the way in which the government seeks by its prosecution. A single vote of not guilty must be respected by all members of the jury, for a juror is not there merely to agree with the majority, nor is a juror there to be a rubber stamp, merely to do the bidding of the judge or the prosecutor. A conscientious juror will vote in accord-

ance with his or her individual opinion, from the standpoint of preventing or averting injustice in the particular case in which he or she serves.[10]

Unfortunately judges today have lost sight of the historical importance of this defense and are more concerned with stressing the law-fact dichotomy than preserving the jury in its time-honored role in the service of the interests of justice. While the right may have been lying dormant since the turn of the century, it is slowly being reawakened. Grass roots organizations like Montana's Fully Informed Jury Amendment Organization have heightened public awareness of the jury's right.[11] State legislators have introduced bills to amend their constitutions to require that instructions be given to the jury on their right to decide both the facts and the law. Selected groups, which have been the target of government prosecution, like the NRA, NORML and abortion activists have risen to be counted among the supporters of the jury's right to nullify. Media coverage of these movements has markedly increased over the last few years.

The common rallying cry of these groups is that the preservation of individual liberty depends upon Americans exercising their prerogative to judge the justice of any criminal prosecution. While these groups lead the way, those of us who are sworn to uphold the *Constitution* should not fall too far behind. For under Kentucky's state *Constitution* in particular, we need not delay for the promulgation of new constitutional provisions. The same remedy awaits rediscovery under the dust and cobwebs which cover the existing parchments. The Framers of our constitutions understood the orgins and functon of the jury when "we the people" so assemble. We must urge recurrence to this fundamental design.

II. JURY NULLIFICATION IS A FUNDAMENTAL RIGHT

A. *Nullification is a Right*

It has long been acknowledged that the role of the jury is to provide "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[12] For more than six hundred years - that is, since the *Magna Carta*, in 1215 - there has been no clearer principle of English or American law in criminal cases than that it is not only the power and duty of juries to judge what are the facts, but also it is the province of the jury to scrutinize the moral intent of the accused. It is their paramount duty to judge the justice of the law which governs the outcome of the trial, and to hold all laws to be applied in a particular case invalid if they are unjust or oppressive, and to hold all persons guiltless of violating or resisting the execution of such laws.[13] This has been a "basic and long-recognized principle of criminal law and procedure throughout the United States."[14]

Whatever its history it is claimed that this doctrine of jury nullification may be "founded on a confusion between the ideas of power and right."[15] One commentator has answered:

> "The power of a jury to pronounce a nullification of a proceeding before it is more than a power; it is a right. Like other rights, it becomes meaninglessly diluted when its holder is unaware of his or her authority."[16]

Yet there are those persons who argue that nullification is only a power the jury possesses as a result of historical accident. Whatever distinction such persons will try to draw between the power and the right, "whatever may be its value in ethics, in law it is very shadowy and unsubstantial. He who has the legal power to do anything has the legal right."[17] To square with principles of natural law, however, the exercise of any power must be consistent with higher notions of 'justice' in order to deserve the status of 'right.'

An understanding of the distinction between a "*malum prohibitum*" and a *malum in se*," or a thing which is wrong because it is prohibited from a thing which is a wrong in itself, provides additional explanation for the proposition that nullification is a right. Those acts which are *malum in se* are illegal by their very nature based upon principles of natural law.[18] These principles are themselves "accessible to the ordinary man, [and] invite each juror to inquire for himself whether a particular rule of law [is] consistent with the principles of higher law."[19] Against the latter, the jury has little choice but to determine only the facts because a crime *malum in se* derives from natural law. But against the former laws of men, the jury trial provides the ultimate right of recourse — a direct appeal to the source of the law, the people. To say that the people have no right to pass judgment in this regard denies effect to the principle which actuated the Founders — that we would be a government "of, by, and for the people."

B. *The Kentucky Constitution Acknowledges Nullification is a Right*

Section 7 of the Kentucky *Constitution* provides: "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*." Webster's New World Dictionary of the American language defines "inviolate" as: "Not violated; kept sacred or unbroken." Courts today have lost sight of this mandate. But even a century of apathy cannot dilute the least of its privileges. Unlike other states, Kentucky's *Constitution* provides absolute protection of the "ancient mode" of trial by jury, not constrained by recent innovations of the latter nineteenth century. It is the position of this article that the history and language of the document itself makes clear, the bench is not permitted to usurp the jury's timehonored prerogative to decide whether the law is just as applied under the Kentucky *Constitution*.

The purpose of securing the jury trial as inviolate was to maintain that right as a dynamic check on government, capable of performing its intended political function. There is no way to maintain this role for the jury unless counsel can argue the law to the jury, or unless the jury can be instructed on their right to decide the law as well as the facts when justice so requires. "Inviolate," as the Kentucky framers must have understood it, meant that the court could not impair any aspect of the historical right. Certainly, impairment of the jury's prerogatives occurs where a court refuses to countenance the free discussion of the jury's recognized function. Respect for the jury's historical role, meant to be protected by sections 7 and 9 of the Kentucky *Constitution*, is impaired and, in fact, violated when the twelve citizens are not informed of their power to nullify. The framers could not have intended to tolerate this compromising of the jury's role when they selected the absolute words used in drafting the Kentucky *Constitution* — "*shall* be held sacred and ...remain *inviolate*." Inevitably, the framers of the Kentucky *Constitution* appreciated the historical role of the jury in its fullest function, reminding the state who is sovereign: government of, by and for the people. Support for this historical interpretation of the jury right can be found in the fact that the framers of the Kentucky *Constitution* saw fit to codify the principles of the *Zenger*[20] case in section 9 of the Kentucky *Constitution:*

> In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, **as in other cases.** (Emphasis supplied)

While the contours of the jury right under the Kentucky *Constitution* have not yet been fully explored in appellate decisions, some argue they have been fully explored and have met with limitation under the Federal *Constitution*. *Sparf & Hansen v. United States*[21] has been cited for the proposition that the Federal *Constitution* does not encompass a "right" of nullification. Despite this holding, state courts are not bound by the federal minimums, especially when the plain language of those state instruments preserve the "ancient mode of trial by jury." The *Sparf* Court arrived at the conclusion no federal right existed because the Federal *Constitution* did not expressly secure a jury right to "remain inviolate."[22] The silence of the framer's of the Federal *Constitution* was not similarly exercised by the representatives who attended the Kentucky Constitutional Convention and drafted that instrument in an atmosphere of burgeoning Jacksonian Democracy. Any constitution like Kentucky's, which is not constrained by the false logic of *Sparf*, can provide protection for the jury's right. At the proper time, *Sparf* itself should be assailed for its unprincipled sophistry, such as the High Court's questioning the veracity of historical reports of the jury's prerogative, its mere assertion to become law that the function of the jury was "to respond as to the facts;" and its fear that society would be left "without a *Constitution*" if the jury had the right to decide questions of law. The *Sparf* decision should be challenge despite one hundred years of complacency, for as Professor Colley observed:

> Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the *Constitution* and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long peroid n violation of the constitutional prohibition without the mischief which the being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the *Constitution*.[23]

It is difficult to escape the absoluteness of sections 7 and 9 of the Kentucky *Constitution*. Research of the proceedings of Kentucky's Constitutional Convention and that of other state constitutional conventions which emerged with very similar provisions, together with early decisions on the meaning of these provisions, should be fruitful sources of favorable analysis. Likewise, research regarding the language of the documents themselves, together with other state constitutions proceeding Kentucky's and similarly protecting the jury right should provide defense counsel's argument with a nexus between the Kintucky Constitutional provisions and our heritage in the jury trial as an expression of Locke's principles of natural law. The defense must not allow the Kentucky *Constitution* to be interpreted in a vacuum — it should be interpreted in light of the circumstances and intentions which surrounded its drafting.[24] The Kentucky Court of Appeals has already acknowledged the fundamental role natural law plays in the preservation of a free society:

> Man in his natural state has a right to do whatever he chooses and has the power to do. When he becomes a members of organized society, under governmental regulation, he surrenders, of necessity, all of his natural rights, the exercise of which is, or may be, injurious to his fellow citizens. This is the price that he pays for governmental protection, but it is not within the competency of a free government to invade the sanctity of the absolute rights of the citizen any further than the direct protection of society requires.[25]

III. NULLIFICATION IS ANCHORED IN PRINCIPLES OF NATURAL LAW,

PROCEDURAL AND SUBSTANTIVE DUE PROCESS

A. *Natural Law*

To the founding fathers of both the Federal and Kentucky *Constitutions*, it was a self-evident truth that there is a law of nature whereby all men are endowed with certain immutable, inalienable rights, possessed apart from and transcendent to government.[26] At the Constitutional Convention, Madison observed, consistent with theories of natural law, that the people are "the fountain of all power" - this was the law of nature."[27] Since natural law grows out of human existence, it is not dependent upon any enacted law, system of government, or body politic.[28] The English philosopher John Locke, who most prominently expounded these principles, wrote in 1690:

> [E]very man hath the right to be . . . the executioner of the law of nature."[29]

What flowed from Locke's philosophy was the idea that legislative acts are not absolute merely because they are promulgated by a political body, rather they are limited by the natural law which is derived from the only sovereign party to the social contract — the individual. Because the individual is the primary source of the law which is intended to guide society, he alone, can pass judgement on the ultimate justice of the law.

Lockean thought was the dominant political theory at the time of the *Constitution's* adoption.[30] According to Locke, the state does not become an end in itself, but rather it becomes a means to the fulfillment of individuals as they define their own ends. In so doing individuals do not erect some common superior with whom they must thereafter negotiate the terms of their future existence. Rather, they create an instrument for carrying out the terms which, as sovereign individuals themselves, they have previously negotiated. In short, government is not a party to the social compact but the result of it.

Writing as rough contemporaries in the seventeenth century, John Locke and Thomas Hobbes found different answers to questions on the nature of liberty and sovereignty. Hobbes, the defender of absolute sovereign power, regarded humans as uniformly selfish in a world without external authority to restrain their passions. Life in this condition was "solitary, poore, nasty, brutish and short."[31] To acquire security and order, Hobbes would exact a price consisting of the surrender of liberty and property to an absolute sovereign. While the individuals in this Hobbesian social contract would be somewhat better off, the big winner from this exchange would no doubt be the state. Being a legal monopolist, the sovereign state would exact monopoly rents—most of the benefits of political union would be expropriated by and for the State.

Locke, by contrast, sought to devise a set of institutional arrangements which would allow individuals to escape the perils of social disorder without having to surrender their entire stock of individual rights. His goal was to vest the individuals composing the society with all the benefits created by political union. Secured among the rights in this society was the right to trial by jury. By interposing sovereign individuals between the state and the accused, government was prevented from expropriating the benefits of the social contract. Thus, the state itself had no claim to new and independent prerogatives as against the persons under its control. The police power attribute of sovereignty insures that the state can effectively provide peace and order to the individual members of the society but, critically, the powers' theoretical outer limits are the limits of what sovereign parties to the social compact were entitled in a state of nature. The state cannot prohibit what could not legitimately be resisted or prohibited by private action prior to the Lockean compact.

Acting on the principles expounded by John Locke, and fearing Hobbes' Levia-

than, the Framers of our *Constitutions* intended to make certain that since it is man which is the source of government and government is responsible to man, it is within the province of the jury to insure that the conviction of an accused does not violate the principles of higher law.[32] The right to interpret the higher law remained exclusively with 'we the people'. Were it otherwise, the government would possess ultimate sovereignty — a notion the Framers feared and would not admit for posterity. These natural law principles were anchored as a matter of constitutional significance at section 1 of the Kentucky *Constitution* which guarantees that "[a]ll men are, by nature, free and equal, and have certain inherent and inalienable rights...."

Procedural Rights and the Right to Present a Defense

As a necessary component of due process, the right to a trial by jury represents a fundamental ideal in our constitutional scheme. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and limits the power the state may exercise. Unlike some legal rules, due process is not a technical concept with a fixed content unrelated to time, place and circumstance. "Due Process" is a dynamic, rather than a static, concept. Its scope should be determined by a process of judicial inclusion and exclusion,but consistently recurring to the fundamental principles of justice reserved in the Federal and Kentucky *Constitution*. Because due process is not a technical concept with a fixed content, fundamental fairness is the overall test.

Thus, the fifth and fourteenth amendments, as well as the fair trial guarantees in the sixth amendment, and the Kentuky constitutional corollaries, are additional sources of authority for the position Kentucky counsel should advance for justifying a nullification argument. These provisions provide constitutional protection for the accused's right to fair and due process.

> In view of its historical setting in the wrongs which called it into being, the due process provision of the fourteenth amendment - just as that in the fifth -has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime both those holding positions of power and authority.[33]

Under the procedural provisions of both the Federal and Kentucky *Constitutions* an accused is guaranteed the right to a fair trial. A fair trial is a trial undominated by a potentially overzealous prosecutor, a biased judge, unjust or immoral laws. What is at the heart of procedural due process then is understood to embody the requirement of a meaningful opportunity to be heard before the deprivation of an individual's liberty takes place.[34] The right to present a defense, therefore, is fundamental to due process. [35] It should be axiomatic that the most elemental principles of due process are violated when an accused is prevented from presenting a defense which appeals to justice.[36]

As we have observed, while juries, acting as the community's conscience, have historically possessed the power to disregard the requirements of the law where it finds that those requirements cannot be justly applied in a particular case, very few juries are, in fact, instructed by the trial judge that they possess this power,. If both proponents and opponents of nullification agree that there are instances where acts of nullification are in the best interests of justice and are therefore praiseworthy,[37] then there should also be agreement that the jury should, at minimum, be informed of this power, whether by the judge or counsel. Most jurors are led to believe that they may only determine issues of fact. "I see no justification for, and considerable harm in, this deliberate lack of candor."[38] The procedural guarantee to a trial by an impartial jury is vitiated under the thumb of a dominating judge who, by refusing to acknowledge the defendant's right to present this defense, emasculates the jury's function. This right is impermissibly compromised if the jury is left unaware of the prerogatives of its full power.

In *United States v. Dougherty*[39], Judge Leventhal argued that failure to inform a jury of its nullification power would not result in an ignominious end to the jury's power because the people will know of their prerogative from the "total culture."[40] Thus it is said that the jury knows well enough that it is not limited to the choices articulated in the form of instructions by the court; that there is information communicated from the total culture — literature, current comment, conversation, and history — the totality of which adequately conveys the idea the jury has the freedom in an occasional case to depart from what the judge says.[41] Realistically, however, in the society of today, in which Health and Hygiene classes replace history for social studies credits, Judge Leventhal's faith in our culture rings somewhat hollow. No longer are citizens alert to the vitality of their heritage and duty. At no time in our history has it been more important to notify potential jurors of their powers, prerogatives, and rights. Unfortunately, this notification is almost always withheld from instructions to the jurors once they are selected. A free society cannot not long rely upon haphazard oral tradition.

Likewise, except for each juror's prerogative to rule on the interpretation of the law and the justice of the law, juries would be no real protection whatsoever to an accused person because they would no longer function as the "necessary counter to case hardened judges and arbitrary prosecutors."[42] Unless jurors have the power to hold laws invalid that are unjust or oppressive, then instead of juries being a "palladium of liberty" — a barrier against the oppression of government — they become mere tools in its hands, instruments for carrying into execution any injustice and oppression that the government may desire to have executed. Such a trial would, in reality, be a trial by the government and not a trial by jury.

2. Substantive Rights

A. Introduction to Substantive Due Process

Whe presenting a nullification argument to the court, not only should the defense make reference to procedural protections which are implicated, but the substantive rights involved also must be addressed. All fundamental rights do not flow directly from those enumerated in the Constitution, but instead, rights are fundamental if they are "explicitly *or implicitly* guaranteed by the *Constitution*."[43] Substantive due process presents limitations which extend beyond the mere methods or procedure involved in governmental action, and rather, concern the substance or content of that action.[44] Under the substantive aspect of fourteenth amendment due process, some deprivations of life, liberty, or property are thus deemed "illegitimate no matter what the process."[45] This species of due process prohibits state denials of fundamental liberties unless there is a compelling governmental interest to justify the infringement. In its contemporary form, substantive due process involves judicial enforcement of rights which, although not found in any specific textural provision of the *Bill of Rights*, are deemed to have a "value so essential to individual liberty in our society" that only the most compelling state interest will warrant any abridgement.[46]

There are many cognizable liberty interests implicated in any court's decision not to allow a defendant to appeal to justice, or to allow the jury to be informed of its full prerogatives. If the jury has the substantive right to ventilate its sovereignty and exercise the panoply of its

powers without fear of punishment for its verdict, then that fundamental liberty is certainly suppressed by imposing a stringent law-fact dichotomy upon those twelve peers. Moreover, if the defendant has the right to the unimpaired individual judgment of his peers, that too is impinged if those same jurors are misinformed and intimidated to the point where they do not perform their traditional function.

The court's usurpation of the jury's role cannot be said to rest upon any "compelling interest" whatsoever. Certainly, it cannot be argued that any safeguards exist to protect the accused from an unjust deprivation of liberty when no person or group of persons in the courtroom has the power to pass judgment on the law other than the government represented in the person of the prosecutor and judge. In short, the jury has long had the right to "overrule" the judge on matters of the law, and it cannot be deprived of that right without the state first advancing a compelling interest as its justification.

B. Sources of the Substantive Right

If the jury is not the ultimate judge of the law, then individuals become subordinated to the power of the state, and the state moves one step closer to overriding sovereignty. Both the Federal and Kentucky *Constitutions* evidence the Framers' concerns to keep the coercive power of the state in check. Because our republican form of government must guarantee the rights of the individual against the state, nullification is but a facet of that guarantee.[47] Even though the power to nullify was not specifically enumerated in the first eight amendments, it was impliedly secured within the depth of the retained rights of the ninth amendment, and those powers reserved to the people by the tenth amendment.

Unlike the other and better known amendments which merely reflect the popular grievances of the time, the ninth amendment defines the most fundamental of all relationships between constituted authority and individuals: sovereignty.

> The structural role played in the ninth amendment is often conveniently overlooked. It is a counterweight to the vast momentum generated by governmental power. This is an important, even vital, structural role that is only partially filled by other constitutional guarantees and prohibitions. Indeed, by its terms, the amendment is the final counterweight, to be used against governmental intrusion upon the people when all else fails.[48]

Considered by many to be redundant, the ninth amendment provided that simply because a right had not been enumerated in the first eight amendments, did not mean that it did not exist, rather it was understood to be *retained* by the people. The ninth amendment, in its very essence, is *about* rather than *of* the *Constitution*. It addressed the primacy and structural meaning of the *Constitution* itself. Indeed, the introduction to the *Constitution* of a written *Bill of Rights* was a serious risk to the very principles of natural law and social compact from which the *Constitution* was derivative. The ninth amendment was a remedy against such a risk. Justice Goldberg, in his concurring opinion in *Griswold v. Connecticut*,[49] acknowledged the scope of these retained rights when he declared:

> The language and history of the ninth amendment revealed that the framers of the *Constitution* believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.[50]

The importance in the minds of the framers, of protecting natural rights was further evinced by the fact that they gave it double emphasis by a second affirmation in the tenth amendment:

> [T]he powers not delegated to the United States by the *Constitution*, nor prohibited by it to the states, are reserved to the states respectively, *or to the people*. (emphasis added)."

With its final clause viewed in conjunction with the ninth amendment, the tenth amendment is properly conceived as delineating powers possessed by neither the federal government nor the states, but by the people.[51] This tenth amendment reservation of powers to the people supports the substantive interpretation of the ninth amendment and particularly establishes that judicial usurpation of the jury's prerogative would constitute a taking of the powers reserved to the people. In this sense, nullification must be linked to both the procedural and substantive due process rights of the accused in order to give effect to the philosophical underpinnings of higher law which actuated the founding of this republic.

Given the benefits and dangers of any possible system of justice, it is the worthy attitude in America that, because the jury is fairly representative of the community, the sovereign power of judgment ought to be vested directly in this community cross-section. As Thomas Jefferson has noted:

> Were I called upon to decide whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them.[52]

The observation of de Tocqueville on this point is as true today as when it was written in the 1830's:

> He who punishes infractions of the law is therefore the real master of society. Now, the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society.[53]

A court's failure to inform a jury of its power to disregard the law and evidence is tantamount to a denial of the right to trial by jury. The Framers of our *Constitution* surely did not contemplate guaranteeing the inalienable right to trial by an ignoring or desiccated jury. Specifically, they did not intend that a jury should remain uninformed of its power to disregard the law in a particular case.[54] The concept of a trial by jury of one's peers is utterly undermined by denying to the juror and to the accused the juror's right to act on a basis of personal morality in delivering a general verdict of "not guilty."

IV. CONCLUSION

The power of the jury to nullify has long served as an integral safeguard in our system of checks and balances. Doubtless, the principle of nullification is as much a part of our democratic heritage as are the principles of fairness and due process which find security in its embrace. The power of the jury to nullify must thus be admitted because it serves well as a device in the republican system of checks and balances. When government seeks to prosecute the individual for an alleged violation of its law, the jury provides necessary assurance that government does not unfairly wage an unjust or immoral law against the accused.

Throughout history, where the jury has been informed of its power, via the judge's instruction or via the arguments of counsel, it has acted as perhaps the greatest guarantee of liberty human foresight could devise. As one commentator has noted: "So far as justice was done throughout the centuries, it was done by jurors and in spite of savage laws."[55] According to this view, juries were a force for moderation in the application of the criminal law, regularly overriding

harsh legal codes to protect defendants from punishments that were seen as excessively severe.

Perhaps more significantly, nullification is also to be acknowledged as a right. The first principle of natural law, that individuals are sovereign, could find no clearer expression than in the jury's prerogative to judge whether the laws of men are just when applied. The individual, by the measure of this principle, is the only party to the social compact for whom the higher law is accessible. Governments possess no general competency to discern the higher law. This principle was well understood by the Framers when they interposed those "twelve good men and true" between the government as prosecutor and the government as lawmaker.

In the modern era, however, the jury faces its greatest challenge: the devitalization of this power and the undermined appreciation of the jury as a right. Certainly all legal scholars and jurists alike agree that the jury has the power to nullify,[56] yet suppression of knowledge concerning the prerogative consistently infringes the jury right in violation of the Kentucky *Constitution* and both express and implied Federal Constitutional guarantees.

> Is the relinquishment of trial by jury... necessary to your liberty? Will the abandonment of your most sacred rights tend to anyone's security? Libery- the greatest of all earthly blesssings- gives us that precious jewel and you may take everything else... suspect everyone who approaches that jewel.
> **—Patrick Henry.**

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[1] R. Pound, *Criminal Justice in America* 115 (2d ed. 1945). One of the most famous examples occurred in 1670, in a case where William Penn, eventual founder of Pennsylvania and leader of the Quakers, was on trial for violating an act making the Curch of England the only official church. This act was essentially struck down by the heroic Not Guilty votes of the jury. Four separate times the verdict of the jurors was rejected by the court and the jury was ordered to return to deliberations with the following treat:

> Gentlemen., you shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire and tobacco; we shall have a verdict, by the help of God, or you shall starve for it.
>
> Before the jurors left the courtroom, Penn exhorted them with these words:
>
> "You are Englighmen, mind your privilege, give not away your right."
>
> Edward Bushell, one of the most prominent jurors, responded along with his fellow jurors:
>
> "Nor will we ever do it."

Moore, *The Jury: Tool of Kings, Palladium of Liberty*, 49, 88 (W.H.Anderson1973).

Had the jurors yielded to the guilty verdict sought by the judge and the prosecution, William Penn most likely would have been executed, as he clearly broke the law. The jurors endured torture in prison, without food or water, soaked in urine,and barely able to stand, yet they would not give in to the judge and return the guilty verdict sought by the Crown. The jurours defiantly shook their fists in the fact of the constituted authority, were ultimately fined for their verdict of Not Guilty, and imprisoned until the large fines would be paid. Edward Bushell was said to have adamantly declared "my liberty is not for sale." He appealed to a higher court, and nine weeks later he was freed, in a decision establishing that the power of the people residing in the jury would ultimately be stronger than that of government. Never after were juried to be punished for not finding in accordance with the court's instruction. Bushell's Case, 124 Eng. Rep. 1006 (C.P. 11670). The moment is marked for posterity by a plaque hanging in Old Bailey (famous English criminal courthouse) and inscribed as follows:

Near the Site

William Penn and William Mead were tried in 1670 for preaching to an unlawful assembly in Grace-Church Street This tablet Commemorates

The courage and endurance of the Jury Thomas Vere, Edward Bushell and ten others who refused to give a Verdict against them, although locked up with food for two nights and were fined for their final Berdict of Not Guilty.

The cade of these Jurymen was reviewed on a *Writ of Habeas Corpus* and Chief Justice Vaughann delivered the opinion of the Court which establish The Right of Juries' to give their Verdict according to their Convictions.

[2] One of the most notable cades to elevaluate the power of the jury in America was the trial of John Peter Zenger. Prior to the revolution, Zenger was the only printer in New York City who would publish material without the authorization of the British mayor. Lacking the required permission amounted to the criminal sedition. *See* Sxheflin and Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 Law And Contemp. Prob. 51,57 (1980). Unfortunately for Zenger, throughout the colonies at this time, truth was not a defense to libel or sedition. *Id.*

Needless to say, the colonists' sentiments for their former homeland were less than amiable, and Zenger's "seditious" acts seemed heroic to an over-taxed and oppressed British colony. At Zenger's trial, his lawyer, Alexander Hamilton, informed the jurors that they "had the right beyond all dispute to determine both the law and the facts[s]."*Id.*, *citing* J. Alexander, *A Brief Narration of The Case And Trial Of John Peter Zenger* 78 (1963). The jury acquitted Zenger.

[3] *The Federalist*, No. 83, at 456 (A. Hamilton) (Scott ed. 1894).

[4] R.Pound, *supra* note 1,at 128-130(1930).

[5] *See, e.g.*, How, *Juries as Judges of Criminal Law*, 52 Harv.L. Rev. 582(1939). One of the earliest instructions givento a jury to inform them of their fullest power was that given by Mr. Chief Justice Jay in *Georgia v. Brailsford*, 3 U.S. 1(1794), to a special jury:

> It may not be amiss here, gentlemen, to remind you of the good old rule, that o questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. *But it must be observed that by the same law which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.* On this, and every other occasion, however, we have no doubt you will pay that respect which is due to the opinion of the court; for, as on the one hand, it is presumed that juries are the best judgesof facts, it is, on the other hand, presumable that the courts are the best judges of law. *But still both objects are lawfully within your power of decision.* (Emphasis added).

[6] A. de Tocqueville, *Democracy in America* 291, 293 (Vintage Books ed. 1945).

[7] *People v. Dillon*, 34 Cal. 3d 441, 490,668 p.2d 697,728 (1983).

[8] Bouviers's Law Dictonary 3392 (Rawle's rev., 8th ed. 1914).

[9] *United States v. Moylan*, 417 f.2d 1002, 1006 (4th Cir. 1969).

[10] Omitted

[11] FIJA proposes that the following Bill of Jury Rights amend each State's *Constitution:*

1. IN ALL TRIALS BY JURY:

a. a jury of at least twelve persons must be seated unless declined by the defendant.
b. jurors must be selected randomly, from the widest possible base.
c. jurors may not be disqualified from service except by reason of conflict of interest.
d. no evidence which either side wishes to present to the jury may be withheld, provided it was lawfully obtained.
e. jurors may take notes in the courtroom, have questions posed to withnesses, and take reference materials into the jury room.
f. during selection, jurors may refuse to answer questions which they believe isolated their right to privacy, without prejudice.

2 IN CRIMINAL TRIALS BY JURY:

a. the court must inform the jury of its right to judge both law and fact in reaching a verdict, and failure to so inform the jury is grounds for mistrial and another trial by jury. The jurors must acknowledge by oath that they understand this right, no party to the trial may be prevented from serving on a jury because he expresses a willingness to judge the law or its application, or to vote according to conscience.
b. the jury must be told that it is not required to reach a unanimous verdict, but the failure to do so will produce a hung jury, and a retrial will be possible.
c. a unanimous voter of the jury is required in order for it to render a verdict of guilty or innocent,
d. the jury must be informed of the range and type of punishments which can be aministered if the defendant is found guilty, and what, if any, exceptions to that range may be available to the convict.
e. the court may grant no motions which limit the individual rights of the defendant, most particularly his right to have the jury hear whatever justifications for his actions the defense may wish to present.

3. IN CIVIL TRIALS BY JURY:

a. the court must also inform civil trial jurors of their right to judge the law whenever the government or any agent of the government is a party to the trial.
b. agreement by the three-quarters of the jury constitutes a verdict.
c no judge may overturn the verdict of the jury. Appeals may be made only to another jury, and if these juries disagree, the case shall be decided by a third jury.

[12] *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

[13] Spooner, *An Essay on the Trial By Jury* (1952).

[14] *Sparf v. United States*, 156 U.S. 51,88 (1895).

[15] *People v. Gottman*, 64 Caal. App. 3d. 775, 779, 134 Cal. Rptr. 834, 838 (1976)

[16] B. Bwcker, *Jury Nullification: Can a Jury Be Trusted?*, 16 Trial 41, 42; see *Miranda v. Arizona*, 384 U.S. 436, 468(1966).

[17] *Kane v. Commonwealth*, 89 Pa. 522, 525(1979); State v. Koch, 33 Mont. 490,497-98, 85 P. 272, 274 (1906); see also *United States v. Byrum*, 408 U.S. 125, 136(1972).

[18] *See generally* La Fave & Scott, *Criminal Law* 29-33 (Hornback Series 1972) ("an offense *malum in se is* properly defined as one which is naturally evil as judged by the sense of a civilized community,....").

[19] Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L.Rev. 170, 172 (1964).

[20] *See* footnote 9, *infra*.

[21] 156 U.S. 51 (1895).

[22] *See generally* the state's constitutional prerogative to maintain the sovereignty of the people over the government in section 2:

[23] T. Coolely, *Constitutional Limitations*, 150(8th ed. 1927).

[24] *See generally* T. Cooley, *Constitutional Limititations*(8th ed. 1927).

[25] *Commonwealth v. Campbell*, 117 S.W. 383 (Ky. 1909).

[26] While the term "natural law" is not used in the United States *Constitution*, it is clear that natural law is long established in American Jurisprudence and is the foundation of our government scheme. *See* W. Friedman, Legal Theory, 136-51 (5th ed. 1967). *See also* the opinion of Chase, J., in *Calder v. Bull*, 3 U.S. (2Dall.) 386 (1798), or the argument of former Justice Campbell in *Slaughter-House* cases, 83 U.S. (16Wall.) 36 (1872); and the opinion of Miller, J.,in *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1874). ("Implied reservations of individual rights , without which the social compact could not exist, and which are respected by all governments entitled to the name." *Id.* at 663. *E.G. Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guld Colorado and Santa Fe Railroad v. Ellis*, 165 U.S. 150 (1987); *Kent v. Dulles*, 357 U.S. 116 (1958). See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819). *See generally, Massey, supra* at 329-30, n.19, 129 and 134. ("If fundamental rights have any philosophical foundation, it is upon the rock of natural law which has actuated so much of American legal thought.") *Id.*, at n. 134; Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 25 Notre Dame Law 258 (1950); Corwin, *The "Higher Law" Background of American Constitutional Law* (Pt. 1), 42Harv. L. Rev. 149, 153 (1928) (Prof. Corwin argues that the ninth amendment illustrates natural law theories and contends that the *Constitution* would not be "regarded as complete" without recognition of transcendental rights."; *See also*, Towe, *Natural Law in the Ninth Amendment*, 2 Pepperdine L. Rev. 270 (1975); Van Loan *Natural Rights in the Ninth Amendment*, Bobbs-Merrill Co., INc., Indianapolis, IN (1955). (Patterson's thesis is that the ninth amendment protects"the inherent natural rights of the individual." *Id*, at 19).

[27] *The Records Of The Federal Constitution Of 1787*, at 476(M.Farrand ed. 1937).

[28] *See City of Dallas v. Mitchell*, 254 S.W. 944 (Tex. 1922),"The people's rights are not derived from the government, but the government's authority comes from the people." *Id.* at 945-46.

[29] J. Locke, *Second Treatise of Government*, sec. 8-10(C. Macpherson, ed. 1980).

[30] "The conveyance of natural law ideas into American constitutional theory was the work preeminently...of John Locke...." Corwin, *The "Higher Law" Background of American Constitutional Law*, 61-89 (1955). Lockean theory was generally accepted by such esteemed commentators as Blackstone. *See* 1 W. Blackstone, *Commentaries* 42-44, 121-22. Not only did Blackstone adopt Locke's theory of the state, but the constitutional framework of limited and seperated powers provides evidence of intent to disable the sovereign from seizing the benefits of political union. See R. Epstein, *Takings: Private Property And The Power Of Eminent Domain* 16 (1985).

[31] T. Hobbes, *Leviathan* ch. 13 (1651).

[32] *See generally* R. Pound, *Criminal Justice In America* (2d ed. 1945). Consider the following from the United States Su-

preme Court, in which the Court indulged in a bit of political theory":

> There are ... rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism...There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which respected by all governments entitled to the name.

This Lockean passage is found in *Loan v. Topeka*, 20 U.S. (Wall.) 655, 63-66 (1875). See also *Calder v. Bull*, U.S. (S.Dall.) 386. 388-89 (1798).

[33] *Chambers v. Florida*, U.S. 236, 277 (1940).

[34] *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306; *Fuentes v. Shevin*, 407 U.S. 67; *Boddie v. Connecticut*, 401 U.S. 371.

[35] See *Rock v. Arkansas*, 43 U.S. 44 (1987).

[36] See *Rock v. Arkansas*, 43 U.S. 44 (1987).

[37] See *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969).

[38] *Dougherty*, 473 F.2d at 1139 (Bazelton, C.J., concurring and dissenting).

[39] 473 F.2d.1112 (1972).

[40] *Id.* at 1155.

[41] *See Id.* at 1135.

[42] *Id.* at 1136. n. 52, 1139 n. 1, *quoting Fortas, Follow Up/The Jury* , Central Magazine, 61 (July 1970).

[43] *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1962) (emphasis supplied).

[44] *See e.g., Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Doe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *see* also Dickson, *The New Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U.L. Rev. 43.

[45] K. Lieberman, *The Enduring Constitution: A Bicentennial Prospective* 263-64 (1987).

[46] J. Nowak, R. Rotunda & J. Young, *Handbook On Constitutional Law* 457 (2d ed. 1983); see also *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

[47] *See* Kentucky *Constitution* sec. 2.

[48] Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 Hastings L.J. 305, 315 (1987).

[49] 381 U.S. 479 (1965).

[50] *Griswold*, 381 U.S. at 488.

[51] *See generally*, Massey, *supra*, note 43 at 322-23.

[52] Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582, 582 (1939), *quoting 3 Works Of Thomas Jefferson* 81, 82 (wash. ed. 1854).

[53] G. Allard, *de Tocqueville* note at 282 (3d American ed. 1839).

[54] Becker, *Jury Nullification: Can A Jury Be Trusted?*, 16 Trial 41, 44 (October 1980).

[55] S. Milsom, *Historical Foundations Of The Common Law* 403 (1981).

[56] *See supra* note 10.

Classroom Celebration of *The Bill of Rights* and Beyond

Following are some suggested ways in which the *Constitution* and the *Bill of Rights* can be introduced to students of all ages:

Begin by having students discuss the meaning of the word "*rights*." Read through and discuss the *Bill of Rights* and the other amendments.

Have students read stories and write biographical sketches of James Madison, George Mason, and other figures associated with the *Bill of Rights*.

Assign students to write reports on topics related to the *Bill of Rights* that are of historical, current, or personal interest. For example, issues concerning the Right to Privacy, Freedom of Speech, Rights of the Accused, and the Right to Bear Arms would be appropriate.

Take advantage of special days or months in the school calendar to stage special events and learning activities on the *Bill of Rights* (*e.g.* Law Day, Black History Month).

Work with students to create classroom posters, maps, or murals illustrating the history of the *Bill of Rights* and the adoption of subsequent amendments.

Assign each student to design a poster focusing on rights enjoyed by American citizens.

Through the use of plays and dramatic readings, have students dramatize the meaning of the *Bill of Rights and Beyond*. Assist students in writing original scripts of their own on the *Bill of Rights*.

Be sure to make use of the many audio visual materials available on the *Bill of Rights*, including movies, filmstrips, videos, records, *etc.*

Be sure to make use of the many audio visual materials available on the *Bill of Rights*, including movies, filmstrips, videos, records. *etc.*

Work with students to create a visual timeline tracing the history of the *Bill of Rights* and its amendments.

Plan a Bicentennial *Bill of Rights* bookshelf display; encourage students to refer to the many books available on the *Bill of Rights*.

Declare an "International *Bill of Rights*" day in school. Ask students to research the country of their choice and to be prepared to discuss the issue of rights as it relates to that country.

Assign students to research political practices related to *Bill of Rights* issues in other lands and times.

Design field trips with a *Bill of Rights* focus.

Invite speakers to address the classroom or an assembly, presenting information on the *Bill of Rights* and subsequent amendments such as the Civil War amendments (13, 14, 15) or the suffrage amendments(19, 24, 26).

Have students participate in mock trial presentations of landmark Supreme Court cases specifically concerned with *Bill of Rights* issues.

Throughout the school and community, sponsor art, essay, and photography contests with a *Bill of Rights* theme.

A NATURAL HISTORY OF THE FULLY INFORMED JURY ASSOCIATION

Don Doig

If patterns of history can be said to have elements which are in some sense cyclical it may be because there are strong countervailing forces which are always present. In particular, there is a never-ending struggle between the power of the State and its client institutions and the freedom of individuals to simply be left alone to pursue their own dreams. Time and again, the people gain some measure of individual liberty, power, and dignity at the expense of the power of central government authority. But the temptations of power are strong, and inevitably the ambitious and greedy among us find ways to subvert the gains made by the people in defense of their liberty. And so the cycle begins again.

This struggle is manifested in many ways. One of the really vital arenas of conflict between the interests of power and liberty occurs in the courtroom. In the civilizations of Western Europe, a mechanism evolved during the course of struggles between the state and the people which ensured that the people have a defensive handle on the government. This was the institution of trial by common law jury, by which citizens drawn from the community passed judgment not only on whether defendants had been accurately charged with violating the laws of the government, but also on the laws themselves. This enabled the people to define for themselves the nature and extent of their rights, and thus to remain masters, and not servants, of the government.

During historic struggles for liberty, the jury played a pivotal role. And the power of the jury was naturally subjected to attack by the State. Jury power receded whenever the State gained power, and reasserted its pre-eminence as the need became acute. For centuries, whenever all else has failed to keep governments in line, juries have risen to the task.

For instance, in the American experience, juries aware of their power made the Fugitive Slave Act virtually unenforceable by choosing not to convict members of the Underground Railroad. And prohibition of alcohol became largely unenforceable as juries refused to convict bootleggers.

In recent times, the issue of jury nullification became an issue during the Vietnam War as defense teams for anti-war and draft protesters sought to argue the merits of the war and tried to instruct jurors that they could vote according to the dictates of conscience. Whether they were allowed to do so depended on the judge's opinion of the war.

Starting in the last half of the nineteenth century, judges began to chip away at the power of juries. The legal debate has not been over whether juries have the power to judge the law (they do, indisputably) but whether the judge should inform them that they do—or whether the defense counsel can so tell the jury, or argue the merits of the law, or discuss the motives of the defendant.

We are now entering another period of crisis in the defense of liberty, and with it the rise of another jury power movement. The Fully Informed Jury Association (FIJA) is seeking to reform the American court system, which has been invested with incrementally stolen power, and would return that power to our juries, where it properly resides. In the process, we would hope that a century's accumulation of laws which have not had the benefit of adequate review by common law juries would finally be subjected to community review, and appropriate adjustments made.

This will serve to bring the law into closer alignment with community standards and will, perhaps paradoxically, increase the respect citizens have for the law and for the courts. By reducing the intrusiveness and perceived injustice of the law, people will once again feel more like free agents, and those laws which remain, will be respected. Citizens who perceive that they have significant power as citizen jurors will be more responsible, and more concerned with civic virtue. This would have to be an improvement over the alienated, hostile, and bitter citizens the current system breeds, convinced they are powerless pawns in a game they neither control nor benefit by.

Jury nullification, as the power (and the legal doctrine) is known, remains largely intact because jurors are not held accountable for their verdicts, and may not be punished if their verdict displeases the authorities. And a verdict of "not guilty" is final and may not be appealed. We at FIJA believe that jurors ought to be told the truth about the true extent of their powers, and seek to require that judges tell jurors that they may in fact judge the merits of the law, and that they may vote according to their consciences. At the very least, the defense ought to be able to inform the jury without contradiction, and argue the justice and constitutionality of the law.

We would also prohibit judges and prosecutors from striking potential jurors who indicate a willingness to vote according to their consciences, or who question the law, and would stop the practice of requiring jurors to take a false (and unenforceable) oath that they will judge the case strictly on the facts and disregard their opinions of the law or the dictates of individual conscience.

FIJA began in the summer of 1989, when this writer joined Larry Dodge in the tiny, remote town of Helmville, Montana to begin the task of creating a national organization devoted to rescuing the jury system from judicial and po-

litical emasculation. The FIJA movement has evolved into a remarkable coalition which has active organizations in over 40 states. As this is written, over 600 articles have appeared in the print media: all sorts of journals, newspapers, and newsletters, large and small, from across the political and cultural spectrum. Appearances on radio talk shows and coverage by television and radio news programs, computer bulletin boards, short wave radio and literature distribution at conventions, rallies and demonstrations have also helped to spread the word.

In excess of 400,000 pieces of FIJA literature have been distributed directly from national headquarters, and local activists have printed thousands more. To date, millions people (the exact figure is of course unknowable) have been informed that they have more rights than they knew, and the response has been very, very positive.

FIJA has received the enthusiastic support of groups as diverse as the delegates to the 1990 National Rifle Association convention (if not their central bureaucracy), Gun Owners of America, and dozens of state and local gun rights organizations; the Congress of Racial Equality (CORE), the South Carolina branches of the NAACP and Rainbow Coalition, the Black and Cajun Caucuses in the Louisiana legislature; the Platform Committees of the Republican Parties of Iowa and Nevada, and the national Republican Liberty Caucus; the national Libertarian Party and many state and local Libertarian Party groups; the California Green Party, and Greens from across the county; the American Hemp Council, NORML, the Cannabis Action Network and drug reform groups across the country; Constitutionalist/conservative/tax- protest/ Christian patriot/ populist groups by the dozens; the Oklahoma chapter of the National Hispanic Democrats; the death penalty focus group of the northern California ACLU and ACLU activists across the country; seat belt and helmet law opposition groups; home schoolers and alternative medicine practitioners and advocates; both pro-choice and pro-life activists; two retired state Supreme Court Justices (and more and more honest judges are coming forward, though still not many), several law professors, and many criminal defense lawyers, including Public Defenders from across the country.

As of this writing, FIJA legislation or Constitutional amendments have been introduced (or sponsors identified) in the legislatures of nineteen states, with bipartisan support. The legal establishment can usually be found slinking around behind the scenes working against FIJA, but given the rate of growth of FIJA and its grass roots popularity, the handwriting has been clearly affixed the a number of state house walls. Our legislative sponsors are typically enthusiastic and knowledgeable about the issue.

FIJA holds conferences and an annual convention. Pending 501(c)3 non-profit status will enable us to expand our educational activities still further. FIJA promotes a "National Jury Rights Day/Week", September 5-11, which features rallies across the country. In 1991, six state governors signed Jury Rights Day proclamations declaring September 5 to be "Jury Rights Day" in their states. (Montana, Iowa, Alaska, Indiana, Wisconsin, and Utah.) September 5 is the day the Edward Bushell jury acquitted William Penn (on trial in London in 1670 for preaching an illegal religion), against the instructions of the court. For this, the jury was fined, and four were thrown in prison. When they were finally released nine weeks later on a petition of habeas corpus, the decision firmly established the principle that jurors were not to be punished for their verdicts, and that they were free to follow the dictates of conscience.

While we would not claim that juries can pronounce laws unconstitutional in any sense beyond their right to refuse to convict a particular defendant because they believe the law to be unconstitutional or in violation of the Bill of Rights (or because police procedures appear to have violated the defendant's rights), it is clear that trial by jury does have an important role to play in enforcing and protecting the Constitution and Bill of Rights. They appear to be in need of a great deal of last-ditch defense. We hope that FIJA can in fact contribute usefully to protecting the rights of all Americans.

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Don Doig was born in Bozeman, Montana. A 1972 graduate of Montana State University, he worked toward a Ph.D. in microbiology, specializing in research on leukemia. He decided his time would be more productively spent working to improve the political climate in this country, which he has done as a writer, researcher, and political activist.

SUGGESTIONS FROM THE FULLY INFORMED JURY ASSOCIATION

IF YOU'RE CALLED FOR JURY DUTY...

Show up, of course. Should this happen before FIJA becomes law, just remember that it is always your right to decide on the justice of any law you're being asked to apply to the accused. So if the judge insists that you must consent to follow and apply the law as he or she describes it, do not be intimidated: you may in fact safely follow your conscience.

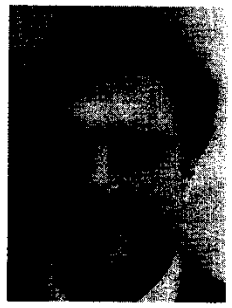
While you cannot be punished for voting your conscience, you may be harassed (interrogated before or after serving, reprimanded, or possibly even disempaneled) if you urge other jurors to do likewise; unbelievably, it has happened. But jurors are not bound to do anything against their wills, nor bound by oaths given under duress, nor are they required to return a unanimous verdict.

You shouldn't look at jury duty as an onerous task which is to be avoided if possible. For one thing, it's your chance to do some real good for yourself and community. In many cases, this may mean voting to convict someone whose behavior is truly dangerous to life, liberty, property or pursuit of happiness.

In other cases, it may mean acquitting someone because the evidence to convict is not convincing, or because the law or its application to the accused person appers wrong. Defense of the rights of the citizens of your community is the whole point of a jury system, and those include the rights of the accused and of the jurors themselves. Justice therefore demands that common law jurors insist on their right to consider both the facts of the case and the merits of the law.

For these reasons, we urge you to regard jury service as an opportunity, a right worth defending, or a personal duty, despite whatever obstacles may be thrown in your path. Since most states select jurors form voter registration lists, consider the chance to serve on a jury as another reason to register to vote!

ANSWERING THE HARD QUESTIONS ABOUT "FIJA," THE FULLY INFORMED JURY ACT



Larry Dodge

While on my road trips, in meetings, talk shows, and media interviews, the same or similar questions come up again and again, which has encouraged me to come up with a repertoire of satisfying answers. These I want to share with you, since you may need to respond to similar questions during the campaigns ahead, though I make no claim that mine are the best or only answers.

Most of these answers are to questions which arise from a basic misunderstanding—that fully informing jurors will somehow give them *new* rights and powers. It will not, of course. But it's been so long since jurors were told the truth about their right to judge both law and fact, and to vote according to conscience, that the idea *seems* novel—and is new to many people.

That is why it is important to make it clear that FIJA "would require trial judges to *resume* the practice of *reminding* jurors of their rights"—before, during, and after your replies to the kinds of questions listed below:

Won't FIJA lead to anarchy, with juries judging the law?

FIJA is actually an antidote to the kind of "anarchy" we're already experiencing as a byproduct of passing more laws than people can obey, an anarchy which helps explain both soaring crime rates and overcrowded prisons. When juries consistently refuse to convict people of breaking a certain law, the incentive is for lawmakers to change or erase it—lest they lose the next election. When the law books become cleansed of unpopular or confusing laws, the rate of compliance with the remaining laws will be high because they will enjoy public respect and understanding.

Additionally, whenever jurors end up apologizing for convicting him (which is quite often, nowadays), and then later find out they had the authority to vote according to conscience, but weren't told about it (or worse yet, were told they could not) their own respect for the law and our justice system can only diminish. In other words, failure to inform juries of their rights breeds anarchy.

Four states (Indiana, Oregon, Maryland, and Georgia) already have general provisions in their constitutions acknowledging that juries may judge law, and twenty-two other states have the same provision included in their sections on freedom of speech or libel. To my knowledge, no chaos has resulted because of these provisions.

Couldn't the jury convict someone of a worse crime than the one he is charged with?

No. Juries do not and would not have the power to escalate or invent charges against a defendant. Their power may only be exerted in the direction of mercy, never of vengeance. Nor can juries "make law" by which to convict a defendant. That remains the job of the legislature. They may, however, reduce the charges against an accused person, provided the lower charge is a less serious form of the same crime he was originally charged with. The decisions of juries do not and would not establish precedent for future cases.

What if the jury is prejudiced in favor of the defendant, and lets him go even though he's clearly guilty?

This is the "corrupt jury" problem, and happens periodically with or without jury instruction in their right to judge the law. Jury members should be randomly selected from the population as a whole. If, instead, a jury is selected so that all its members come in determined to acquit a guilty person, it is likely to do just that, no matter what it's told or not told. For this to happen virtually requires that both the prosecutor and judge be corrupt, as well, taking no steps to see that at least some of the jurors are not prejudiced. In short, if the defendant faces fourteen people, all of whom favor letting him go free regardless of the evidence, he will go free.

Even under these circumstances, if jurors were instructed that each of them could vote according to his own conscience, as FIJA provides there is at least a possibility that one or more jurors would not go along with the rest, thus hanging the jury with one or more *guilty* votes. Chances for justice might then improve, via another trial, perhaps a change of venue, or a different judge, and certainly another jury.

Further, victims of crimes who do not find satisfaction in a criminal trial verdict have, with fair success, been able to sue perpetrators for damages. In other instances, crime victims who were unhappy with verdicts handed down in state courts have been able to have defendants tried in federal courts on other charges, often for violating their civil rights.

Do jurors have the right, or just the power, to judge the law?"

They have *both*. They have the power, because in a jury system, no one can tell the jury what verdict it must reach, nor restrict what goes on in jury-room deliberations, nor punish jurors for the verdict they bring in, nor demand to know why they reached that verdict. It is no accident that our nation's founders provided for appeals of guilty verdicts, but not of acquittals: they intended the jury to have the power to halt a prosecution.

They have the right, because each juror is partially responsible for the verdict returned, thus for the fate of the accused individual—and for every responsibility there is a corresponding right. In this case, that is the right to consider everything necessary for him or her to vote for a just verdict. That includes evidence, the defendant's motives, testimony, the law, circumstances—whatever, including the juror's own *conscience*.

Additionally, any restrictions placed upon the options the jury may exercise in fulfilling its responsibility to judge the defendant may be considered violations of his or her right to a fair trial.

Finally, when one gets right down to it, there is precious little difference, except in academic legal discourse, between a

right and a power. Most dictionaries recognize this by listing them as symptoms.

Wouldn't our courts be flooded with jury trials if FIJA were to become law?"

It's probable that the number of jury trials involving some of the least popular and most frequently broken laws would increase, until prosecutors began choosing not to attempt convictions on them any more, police began letting up on enforcement, and legislators began reading the writing on the jury-room walls. But the peak should soon pass. And a reduced number of costly appeals to higher courts is expectable, because more people would feel they'd received justice at their original trials.

Ultimately, though, one must ask what's more important, fast service at your local courthouse, or *justice* for accused individuals, and real-world feedback to the lawmakers?

Wouldn't there be a lot of variation from place to place in jury verdicts, according to local community standards?

Perhaps, though it could hardly compete with the variations in verdicts and sentences already being handed down by different judges....

It might prove true that informed-jury verdicts would vary more than they do now from place to place with respect to certain types of offenses. Tolerance of abortion, drugs, pornography, gun ownership, *etc.* might be higher in some communities than others. But then, what's the merit in trying to force-fit a diverse society into one huge homogenous mold, in obliging every person or every community to conform to some central authority's notion of how to behave? We suggest that if your act doesn't go over locally, walk.

Actually, the overall thrust and effect of FIJA should be to promote consistency—in the form of *tolerance*—everywhere. It is already happening, as different kinds of Americans are joining together in coalitions to make FIJA into law. Most people, it turns out, would rather secure their own liberty than damage someone else's—it's just that our political system spawns and promotes rancor between competing special-interest groups, where one group's gain is usually another's loss.

FIJA will also make it more difficult for majorities to deny the rights of minorities, because any minority (and we're all minorities) will be able to defend itself via jury veto power.

The real payoff is that government, which grows in power and intrusiveness with every escalation of distrust and intolerance between warring factions of citizens, may lose its grip as trial juries resume their check-and-balance function, and "live and let live" re-emerges as the American ethos.

What happens if the jury nullifies a good law?

This is not generally a problem. We have centuries of experience with jury veto power, and generally laws that protect people against invasions of their property or threats against their safety, are supported by the community as a whole, and are enforced by jurors. Maryland and Indiana report good success with nullification instructions.

It is both *elitist* and *erroneous* to accuse the ordinary citizens of this country of not being able to govern themselves when the opportunity or need arises. Political science studies show that people become extremely conscientious, cautious and responsible when they sit on a jury—more so than at practically any other time in their lives.

What would become of the practice of basing verdicts upon legal precedents?

The role of case law, or precedent, would remain useful as advice for all parties to a trial, but its use as a basis for verdicts in current jury trials would end. A major objective in fully informing juries of their rights and powers is to provide ever-evolving *feedback* to our legislators, so that regular adjustments can be made in the rules that we live by.

The idea is to match our laws to our standards of right and wrong on an ongoing basis, so that gaps will no longer develop between them. This kind of consistency cannot be had when "precedent requires" that the same verdict be found for a modern case as was found in similar cases in the past. When gaps between what's moral and what's legal get too large, we risk "anarchy" on the one hand, totalitarian intervention on the other.

Wouldn't FIJA violate our Fourteenth Amendment right to equal protection under the law?"

"Equal protection" is already tough to guarantee, given the differences in quality between judges, prosecutors and defense attorneys who may become involved in any given case. Add to them our media-assisted fads and fashions in law enforcement, and the very unequal kinds of deals which are regularly pushed upon defendants by the prosecutor and/or the judge outside of the courtroom (too often based upon the accused person's appearance, background, and ability to pay), and "equal protection" takes on the appearance of an ideal which draws a lot more lip service than real concern.

Juries generally become part of the problem only to the extent that both the prosecution and the defense have done everything in their power to select the least knowledgeable and most manipulable jurors possible. If those making an equal protection argument really cared, they'd ask for laws ensuring *random selection* of jurors from as broad a base as possible.

FIJA may provide a partial answer, because chances of equal treatment of defendants would appear to increase if the jury were to receive complete and accurate instruction in its veto powers, not because information begets fairness, but for at least two other reasons: (1) if jurors are lied to about their rights and powers, a certain percentage of them can be expected to see through the falsehood, then to rationalize reciprocating that dishonesty by lying to one or both attorneys and the judge during the selection process. Just what they may be covering up or misrepresenting, and why, will certainly vary from jury to jury, and that's exactly what the doctrine of equal protection rails against; (2) When both prosecution and defense know in advance that the jurors will be fully informed of their power to judge both law land fact, their jury selection criteria can be expected to change accordingly. Both sides would face an incentive to find jurors able and willing to consider not only factual but also moral-philosophical questions in search of justice, especially in those cases where the merits or the applicability of the law may be lat issue. The result should be both better-quality juries and more equality under the laws that they work with.

Wouldn't FIJA cause a great increase in the number of hung juries?"

In the short run, perhaps, as laws which are hard for people to understand, identify with, or apply are evaluated by juries. As "mercy buffers" between the power of the state and the accused individual, and between majorities and minorities, a certain frequency of inability to reach a consensus is to be expected. But that's the point: it's important for that there remains at least one institution of government which must achieve unanimity to make a decision, since most series of usurpations of rights in general begin with attacks on the rights of unpopular minorities or individuals.

On the other hand, juries always have a responsibility to identify, and sometimes to determine an appropriate punishment for people who damage the social fabric of their communities. When the trial is over, other members of the community often want to know how and why the verdict was found. This expectation provides a strong incentive for the jurors to make a serious attempt at unanimity.

When that incentive isn't strong enough, and a long series of hung juries on cases involving a particular law occurs, it sends a powerful message to lawmakers that reform is necessary. Such a series may reflect public demand for more precision, fairness, latitude, appropriateness or other features in the law. But the beauty of feedback from juries is that it is rarely a statement of special interest: hardly ever do all twelve people on a jury share a single political goal or viewpoint, and the chances that all the people on a series of juries will do so are utterly remote.

The relative frequency of hung juries can therefore be read as a measurement of true public sentiment about the law. The more *responsive* our legislatures become to that measurement, the stronger the association between community moral standards and the law will become, and the fewer hung juries there will be.

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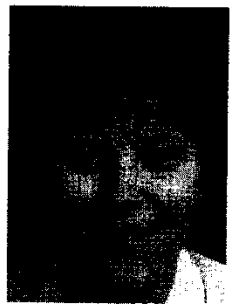
CHAPTER 9

Constitution of Kentucky
Section 2:

Absolute and arbitrary power over lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

A SLEEPING GIANT: SECTION II OF THE KENTUCKY *BILL OF RIGHTS*



Allison Connelly

Dr. Thomas Clark concludes that Kentucky's first *Constitution*—that of 1792—was an "incongruous mixture of fear, doubt, faith and hope." T. Clark, *A History of Kentucky*, at 95 (1960). This description could easily apply to Section 2 of Kentucky's present *Bill of Rights*. This section broadly proclaims:

> **Section 2: Absolute and Arbitrary Power Denied.** Absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority.

The history of this unique constitutional protection against the exercise of arbitrary official power, reflects Kentucky's own search for a political, economic and social identity. Indeed, it is the ultimate irony that Section 2, intended initially to safeguard the right of white males to hold slaves, now embodies Kentucky's due process and equal protection guarantees. Thus, while Section 2 was born from the fear that slavery would be outlawed, and from the doubt and mistrust that state and local officials could not safeguard the rights of their citizens, it has grown into a powerful tool that limits arbitrariness in the exercise of state power. Consequently, with faith and persistence in the obligation of our state courts to correct wrongs, this section contains the seeds of hope for the future in ensuring a fair and just criminal justice system.

Despite its sweeping language, until recently this powerful section has largely been ignored by criminal law practitioners. For example, while cases abound finding oppressive governmental action with respect to property rights, there is only one criminal case that equates Section 2 with an accused's right to a fair trial. *Dean v. Commonwealth*, Ky., 777 S.W.2d 900 (1989). Even Justice Stephens has noted, "while there are numerous cases which have been decided on the basis of this bulwark of individual liberty, the number is relative few, in view of its potential importance to our jurisprudence." *Kentucky Milk Marketing v. Kroger*, Ky. 691 S.W.2d 893, 899 (1985). Clearly, it is time to wake this sleeping giant and use it to challenge arbitrary practices by police officers, prosecutors, judges, correctional officials and other state actors, who exercise any power over the lives and liberty of accused and convicted citizens. Accordingly, in this time of shrinking constitutional protection at the federal level, we must rediscover our state constitution to champion the cause of life and liberty and give it meaning. Moreover, such an approach makes good legal and practical sense. While the U.S. *Constitution* defines the minimum rights guaranteed an individual, state constitutions may grant more expansive constitutional protections to their citizens. *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 81 (1980). Indeed, as a threshold matter, Kentucky courts must first determine the validity of the law or action under the Kentucky *Constitution* before resorting to its federal counterpart. *Fannin v. Williams*, Ky., 655 S.W.2d 480 (1983).

What follows then is an overview of Section 2, it's history, purpose, scope and application. It is hoped that by seeing where the section has come from, and how it has been judicially interpreted to reflect society's changing values, we will be equipped to tap into its vast and untested potential in the future.

I. *HISTORY AND PURPOSE OF SECTION 2*

The constitutional history of Section 2 has been shaped as much by historical accident as judicial interpretations. Under Section 4 of the Kentucky's *Constitution*, all supreme power rests with the people. Any power given to the state is expressly limited by Section 2. However, in the early nineteenth century, "the people" only included white males over the age of twenty one. Thus, the Kentucky *Constitution* of 1849, the third constitutional try, designed Section 2 so that it only applied to "free men." In fact, the entire 1849 constitution was built around the protection of slavery. Consequently, after slavery was abolished by the passage of the 13th, 14th, and 15th amendments to the federal constitution, Kentucky was forced to update and modernize its constitution. For this reason, a final constitutional conv ention was held in 1890. Still, Section 2 remained the same. As a result, it has been left to the courts to interpret Section 2 and give meaning and effect to its expansive and beautiful words.

II. *THE MEANING OF SECTION TWO*

Christened the "great and essential principle of liberty and free government...which is indispensable to the happiness of an enlightened people,"*Tierney Coal Company v. Smith's Guardian*, 180 Ky. 815, 203 S.W. 731, 734 (1918), Section 2 is unique in American jurisprudence. Only Wyoming has a similar provision, Wyom. Const., Article I, Sec. 7, and that was borrowed from Kentucky. However unique, it has been the courts in their expansive interpretation and definition of "arbitrary," which has given the section its true constitutional significance. As one court observed:

> [S]ection 2 of our *Constitution* is simple, short and expresses a view of governmental and political philosophy that, in a very real sense, distinguishes this republic from all other forms of government which place little or no emphasis on the rights of individuals in this society. *Kentucky Milk Marketing, supra*, at 899.

Because of this view point, the courts have painted with broad strokes the definition of arbitrary. In *Sanitation District No. 1 v. City of Louisville*, Ky., 213 S.W.2d 995, 1000 (1948), the court poetically exclaimed:

> [W]hatever is contrary to democratic ideas, customs and maxims is arbitrary. Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interest of the people is arbitrary.

Moreover:

> No board or officer vested with governmental authority may exercise it arbitrarily. If the action taken rests upon reasons so unsubstantial or the consequences are so unjust as to work a hardship, judicial power may be interposed to protect the rights of persons adversely effected. *Wells v. Board of Education, Mercer Co.*, Ky., 289 S.W.2d 492, 494 (1956).

Although emotionally compelling, such language is not simple legal rhetoric. These words are the reasons for, and the philosophy behind, Section 2. Yet, criminal practitioners have largely ignored the persuasive legal powers of these ideals. It is time to correct this neglect and began to test the true parameters of Section 2—the meaning of arbitrary power over life and liberty—in the representation of those in the criminal justice system.

III. *THE SCOPE OF SECTION TWO*

Section 2 "was enacted as a safeguard to the individual in respect to his life, liberty, and property and has no connection with the appropriation of public funds." *Commonwealth v. Johnson*, Ky., 166 S.W.2d 409, 412 (1942). However, although Section 2 only protects individuals, it acts as "a curb on the legislative as well as on any other public body or public officer in the assertion or attempted exercise of political power." *Sanitation District No. 1 v. City of Louisville, supra*, at 1000. Thus, Section 2 broadly encompasses the arbitrary exercise of power by any "board or officer vested with governmental authority." *Wells v. Board of Education, supra*, at 494. Clearly then, Section 2 applies to every state actor, including any administrative agency or officer, who acts pursuant to governmental authority. Similarly, because of the breadth of Section 2's language, the Kentucky Supreme Court has held it is the functional equivalent of both federal due process of law and equal protection of law. *Pritchett v. Marshall*, Ky., 375 S.W.2d 253, 258 (1963). Yet, Section 2 is even broader than the 14th amendment. A review of the decisions invoking Section 2 reveals it has been construed to embody many of our most precious constitutional rights. Statutes, ordinances, regulations and administrative actions have been invalidated under this section for overbreadth, *Commonwealth v. Foley*, Ky., 798 S.W.2d 947 (1990), for vagueness, *City of Campbellsburg v. Odewalt*, Ky., 72 S.W.2d 314 (1903), for a denial of procedural due process, including the right of cross-examination in an administrative hearing, *Kaelin v. City of Louisville*, 643 S.W.2d 590 (1983)., on substantive due process grounds, *City of Louisville v. Kuhn*, 284 Ky., 684, 145 S.W.2d 851 (1940), and on equal protection grounds *City of Ashland v. Hecks*, Ky., 407 S.W.2d 421 (1966).

Unfortunately, Section 2 has also been used to thwart fairness and justice. For example, it was held not to be an arbitrary act by the legislature to prohibit integration of schools. *Berea College v. Commonwealth*, 123 Ky. 209, 94 S.W. 623 (1906). Likewise, in *Mahan v. Buchanan*(18), 221 S.W.2d 945 (1949), the court concluded Section 2 was not violated when Mahan's parole was revoked despite his acquittal on a subsequent charge. Similarly, in *Hines v. Commonwealth*(19), Ky. 357 S.W.2d 843 (1962), the court held Section 2 was not infringed despite the fact Hines had an airtight alibi defense. Hines had documentary evidence proving he was in prison at the time of the crime upon which he stood convicted. Moreover, his claims of ineffective assistance of counsel were ignored.

Still, while constitutional rights never change, the scope of their application expands or contracts to meet new and changing conditions. The wisdom and necessity of laws, regulations and practices which, as applied to existing conditions of the past, were routinely sustained, now probably would be rejected outright as arbitrary and oppressive. We must constantly challenge the past with new and creative solutions. Section 2 is stagnant from disuse. We must make it on our own. We must define it and use it to advance progress, so that its words grow, live and give meaning to our precious constitutional rights.

IV. *APPLICATION OF SECTION TWO.*

In applying Section 2, the function of the court is "to decide a test of regularity and legality of [official] action...by the constitutional protection against the exercise of arbitrary official power. *Kentucky Milk Marketing, supra* at 899. Just what amounts to arbitrary power is a judicial question. *Brunner v. City of Danville*, Ky., 394 S.W.2d 939 (1965). Likewise, the question of reasonableness or arbitrariness of action "is one of degree and must be based on the facts of the particular case. *Boyles City Stockyard Company v. Commonwealth*, Ky.App., 570 S.W.2d 650 (1978). Thus, a legislative or administrative finding of fact is not conclusive on the court. *U.S. Mining and Exploration Natural Resources Company v. City of Beattyville*, Ky., 548 S.W.2d 833, 835 (1977).

While all of these principles are common to Section 2 analysis, because of the broad range of subjects encompassed, different tests have evolved to determine whether a constitutional violation has occurred. For the most part, these "tests" parrot their federal counterparts. However, a brief review of the court's use of Section 2 reveals that in many instances the standards employed in its application are less stringent than the federal criterion.

PROCEDURAL DUE PROCESS:

The guarantee of procedural fairness which stems from both the 5th and 14th amendments of the U.S. *Constitution*, is also encompassed within Section 2 of the Kentucky *Bill of Rights*. *Turner v. Peters*, Ky., 327 S.W.2d 958 (1959). Consequently, Section 2 has been used to invalidate regulations, ordinances, statutes and even administrative actions. To invoke federal procedural due process, it must be shown that a deprivation of a "*significant* life, liberty or property interest has occurred." Only then are the affected parties entitled to notice and an opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 79 (1972). On the other hand, Section 2 has no such requirements. Section 2 simply requires a minimal showing that a party's life, liberty or property right has been affected in some manner by state action. *Kentucky Alcoholic Beverage Control Board v. Jacobs*, Ky., 269 S.W.2d 189 (1954). Indeed, in the final analysis, the ultimate question of whether or not state procedural due process was granted revolves around the question of arbitrariness. *American Beauty Homes Corp. v. Louisville, etc.*, Ky., 379 S.W.2d 450, 456 (1964). Arbitrariness is so broadly defined that in this setting, it is simply equated with "fairness." *Id.* Thus, if the "state" acts outside its statutory powers, or did not afford the party fair notice or a fair opportunity to be heard, or if the action taken is not supported by substantial evidence, it is arbitrary. *Id.* For example, in *Marcum v. Broughten*, Ky., 442 S.W.2d 307 (1969), the court granted a writ of habeas corpus to a prisoner charged with capital murder. The court concluded that a successor judge had acted arbitrarily for revoking Marcum's bail without any reason for the revocation.

In short, the opportunities to invoke Section 2 on state procedural due process grounds are enormous. Every unfair action by state officials can be challenged. The fruits of such defiance may lead to a trial type hearing to resolve disputes of adjudicative facts. *Kaelin v. City of Louisville*, KY 643 S.W.2d 590 (1983).

OVERBREADTH AND VOID

FOR VAGUENESS

Because of the broad reach of Section 2, the distinction between procedural and substantive due process and the void for vagueness and overbreadth doctrines has been somewhat blurred by the Kentucky appellate courts. As such, Section 2 has been utilized to strike down statutes, ordinances and regulations that are overbroad or vague. Most recently, the Kentucky Supreme Court struck down the 1988 election reform statute on Section 2 grounds. *Commonwealth v. Foley*, Ky., 798 S.W.2d 947 (1990). The court held that the statute was facially unconstitutional because it was vague and overbroad in that it prohibited constitutionally protected conduct, and was susceptible to arbitrary and discriminatory enforcement. *Id.* at 951. In invoking Section 2, the court noted the following:

> The statute as written is so broad and subject to such a vast array of interpretations that it must fail on due process and equal protection grounds. This statute is an open invitation to arbitrary, retaliatory, selective, trivial, and therefore unjust criminal prosecution. *Id*, at 953.

Although the court recognized a legitimate state interest in honest elections, the court invalidated the statute using the following test:

> For a facial challenge on overbreadth grounds to prevail, real, substantial and basic constitution rights must be at risk. This Court has determined that KRS 119.205 lacks minimal objective guidelines for its application and therefore threatens the constitutional rights of all Kentucky citizens.*Id.*

SUBSTANTIVE DUE PROCESS

The federal courts have received a lot of criticism for invalidating statutes on substantive due process grounds. That is because the U.S. *Constitution* speaks only of a procedure due an individual. Our courts, however, have never been subject to such criticism because the power to nullify legislative and quasi-legislative acts is implicit in the language of Section 2. Yet, decisions pertaining to criminal law are woefully lacking in this area. Nowhere does a Kentucky court invoke Section 2 to hold that certain requirements are "implicit in a concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319 (1937), or that certain rights are "fundamental to the American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145 (1968), or that convictions cannot be brought about by methods that "shock the conscience", *Rochin v. California*, 342 U.S. 165 (1952). In fact, only recently did the Kentucky Supreme Court hold that Section 2 and Section 11 implicitly guarantee a defendant the right to a fair trial. *Dean v. Commonwealth, supra*, at 905. Finally, there are no Section 2 cases that have used a strict scrutiny review for determining whether fundamental rights owed the criminal defendant have been abridged. Under federal due process standards, a law that touches upon or limits a fundamental right will be strictly scrutinized, to insure that the law is necessary to promote a compelling or overriding interest of government. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Clearly, it is time to test the parameters of Section 2 in this area. Certainly, the language of Section 2, its inclusive scope and its definition of arbitrariness is broad enough to encompass a strict scrutiny analysis of fundamental rights due individual citizens. We must push the court to reach this conclusion.

EQUAL PROTECTION CLAUSE

The philosophy behind the equal protection clause is that a government must treat similarly situated individuals in a similar manner. Thus, the equal protection clause regulates the ability of government to classify individuals for purposes of receiving governmental benefits or punishment. Although Section 2 has been used as one part of Kentucky's equal protection clause since 1947, *see Illinois Central Railroad Company v. Commonwealth*, Ky., 204 S.W.2d 973 (1947), there was no analytical test established by the court until 1978. In *Standard Oil Company v. Boone Co. Board of Supervisors*, Ky., 562 S.W.2d 83 (1978), the court resolved the issue of unconstitutional discrimination under Section 2 by holding:

> [I]n order to invoke those fundamental protections against the unfair administration of the law that is not itself unconstitutional, the unequal treatment must amount to a conscious violation of the principle of uniformity.*Id.* at 85.

In *Hummeldorf v. Hummeldorf*, Ky.App., 616 S.W.2d 794 (1981) the Court of Appeals struck down the divorce venue statute as unconstitutional for fixing venue in the home county of the wife. The court held that the law impermissibly discriminated against men in violation of both Section 2 and the Equal Protection Clause of the 14th Amendment. In finding the statute arbitrary, the court said the statute was "unjust and unequal" and "exceeded the reasonable and legitimate interest of the people." *Id.* at 797. Once again, the court has gifted us with language to use in the future. By analyzing our cases from a policy standpoint, we will be able to argue Section 2's application. Then again, while there are more criminal cases devoted to the equal protection prong of Section 2, there simply are not enough cases to determine the value Section 2 can play in the defense of accused citizens. We must raise and litigate these issues in order to determine the boundaries Section 2 can play in the defense of individuals.

CONCLUSION

Section 2 is a sleeping giant with the potential to change our world. We must wake this bold giant and creatively raise it, litigate its meaning and advocate zealously for its application. Only in this way, can we hope to give it the constitutional significance it so richly deserves.

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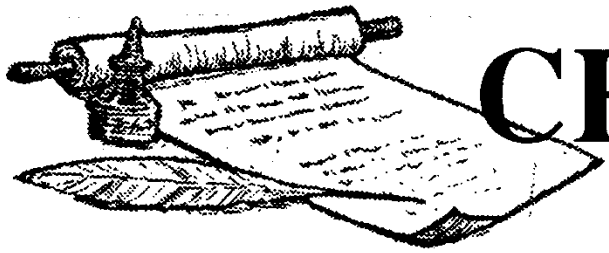
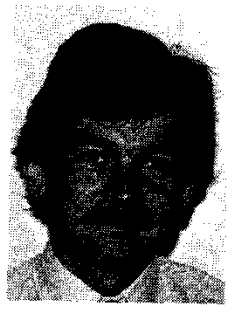


CHAPTER 10

CONSTITUTION OF THE UNITED STATES

Rights of accused: In all criminal prosecutions, the accused shall have the Assistance of Counsel for his defence.

SOME BICENTENNIAL OBSERVATIONS ON THE SIXTH AMENDMENT RIGHT TO COUNSEL



Edward H. Johnstone

A bill of rights is what the people are entitled to against every government on earth....

Thomas Jefferson

Politicizing criminal issues in the name of "law and order" is a fact of modern American life. A dangerous side effect of this "law and order" movement is a corresponding decline in the importance society places on the *Bill of Rights* and on the lawyers who protect those rights.

As we celebrate the 200th anniversary of our *Bill of Rights* on December 15, 1991, it is important to consider the risk that the *Bill of Rights* may become empty rhetoric subordinate to the task of fighting crime. Open and frank discussions of the *Bill of Rights* during this bicentennial year will raise complex and controversial issues and hopefully elevate its importance in our nation. While each Amendment is significant, this article is limited to the Sixth Amendment right to counsel in the belief that it is the conduit for preservation of other guarantees afforded by the *Bill of Rights*.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . and to be informed of the nature and causes of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The rights to equal justice, judicial fairness and protection from arbitrary governmental actions which serve as the foundation for the Sixth Amendment have stood, at least in theory, for over 700 years. [1] The right to counsel arose as a component of the concept of equal justice. At common law, those charged with misdemeanors were provided counsel while those accused of felonies, treason or other serious crimes had no right to legal representation. [2] This procedure was based on the premise that a judge would insure a fair and impartial trial and the assumption that the Crown would not charge an individual with a serious crime if he had a defense. [3] The American colonists rejected these limitations [4] and thus the Sixth Amendment was adopted to provide the right of counsel to all criminal defendants.

Today, the law recognizes that the Constitutional right of counsel attaches in both state and federal criminal proceedings. [5] While the Sixth Amendment has always attached to federal criminal cases, the history of its extension to state actions reveals a laborious course.

The application of the right to counsel in state criminal proceedings was initially addressed in *Powell v. Alabama*. [6] In *Powell*, nine minority defendants were charged with the rape of two white girls in rural Alabama. This was a capital offense. Although the trial court appointed all 18 members of the Scottsville bar to appear for the defendants at arraignment, on the morning of trial, no specific defense attorneys had been assigned. At the beginning of trial, the judge requested legal assistance for the defendants but stated that no lawyer would be required to appear. With this "appointment," the trial was conducted and each of the nine black men sentenced to death.

The convictions were appealed to the United States Supreme Court. The Court, over 140 years after ratification of the *Bill of Rights*, held that due process of law under the Fourteenth Amendment necessarily includes the right to counsel at each and every stage of a capital case. Speaking for the Court, Justice Sutherland, stated:

> [W]e are under the opinion that . . . the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment . . . in a capital case... it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. [7]

For seven years following *Powell*, the right to counsel in state court cases, other than those involving the death penalty, continued to plow in a row of uncertainty. In *Betts v. Brady*, [8] the Court adopted a "fundamental fairness" test to determine whether a state court's failure to appoint counsel for indigent defendants in non-capital cases was violative of due process. The uncertainty lingered.

Public defenders are the modern patriots carrying the torch which the founders ignited 200 years ago.

During the next twenty years, hundreds of non-capital cases against indigent defendants passed through the state courts. In some cases lawyers were appointed, in others they were not. Finally, in 1963, the Court again considered the applicability of the Sixth Amendment right to counsel in state court proceedings. In *Gideon v. Wainwright*, [9] the Court examined the *pro se habeas* petition of Clarence Earl Gideon. Gideon was a small time gambler who had been tried and convicted for theft. In his hand written petition, Gideon argued that the *Constitution* guaranteed an attorney to all criminal defendants. The Court agreed with him holding that due process requires the appointment of counsel for criminal defendants in all state and federal felony cases. As Justice Hugo Black so eloquently said:

> [R]eason and reflection require us to recognize that in our system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot

be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. [10]

Gideon settled the uncertainty by recognizing that the criminally accused have a Constitutional right to legal representation in state court felony proceedings.

While the original Amendment mandated the right to counsel in criminal proceedings, it took 180 years to etch this principle into mainstream Constitutional thought. This sluggish development is attributable to the lack of concern from those in our society who control the pace at which ideological, procedural and to some extent legal concepts develop. For the affluent, liberty, dignity and the right of legal representation is less dependent upon a Constitutional guarantee. Unfortunately, the result is a system which has fostered ambivalence toward legal representation for the accused. Provided an attorney is physically present, the public presumes the attorney is competent and adequately prepared to represent the interests of the accused. However, those intimately concerned with the criminal justice system know the importance of providing experienced, motivated and adequately compensated trial attorneys to forcefully protect such rights. [11]

Recent decisions and trends have increased the burden upon those who represent and protect the rights of the accused. For example in *County of Riverside v. McLaughlin*, [12] the Court held that an individual arrested on a minor offense may be imprisoned up to 48 hours without seeing a judicial officer.

Later, in *McNeil v. Wisconsin* , [13] the Court eased limitations on police interrogation. Although a jailed suspect is represented by counsel on a criminal charge, he may now be questioned on unrelated matters in the absence of his attorney. The Court reasoned that the Sixth Amendment right to counsel is offense specific. In a dissenting opinion, Justice John Paul Stevens opined:

> As a symbolic matter, today's decision is ominous because it reflects a preference for an inquisitorial system that regards the defense lawyer as an impediment rather than a servant to the cause of justice.

As government moves more deeply into areas of our lives once considered private and with the judicial pendulum swinging towards the government and away from individual rights, it is critical that the Constitutional rights of the accused be fully protected by capable and motivated lawyers. The capability and motivation of lawyers retained by the affluent is a matter within the control of the individual. Yet for the indigent, the burden of insuring capability and motivation rests in large part upon society's willingness to support and fund public defender programs.

While candidates and elected officials promise and deliver increased budgets for prosecutorial and law enforcement efforts, support for public defenders is waning. Salaries for full and part time public defenders in Kentucky are low. Defense attorneys who contract with the public advocacy department and those appointed in federal cases are similarly under compensated. [14] For capital cases in Kentucky, the maximum fee the Department of Public Advocacy is able to pay a private attorney is $2,500 [15] - an amount below that commonly billed for a misdemeanor trial or a relatively simply real estate matter.

While society has yet to fully understand the need for competent representation, in the judicial system, positive signs are on the horizon. For example, the 1990 Federal Anti-Drug Abuse Act, 21 U.S.C. 848 (q)(4)(B) and (q)(9) provides increased counsel resources in federal habeas cases. Further, members of the private bar, recognizing the inadequacies of state-provided representation for death row inmates have, on occasion, donated their services to these individuals. For the most part, however, these volunteers do not regularly engage in criminal law practice and are not equipped to undertake public defender responsibilities.

We recognize the importance of prosecutors, law enforcement officials and others in furthering the cause of justice. However, in the final analysis, the task of protecting the accused usually falls upon appointed defense counsel. They shoulder the burden of seeing that, in the criminal justice system, individual liberties and dignity are not side-stepped or cheapened. This burden has often been shouldered in the face of overwhelming caseloads, public abuse and meager pay. [16]

So as we celebrate and reflect upon the *Bill of Rights*, we salute the lawyers who in the face of adversity dedicate themselves to its preservation. Yet we must be watchful that the right of counsel is not diluted as a victim of inconvenience. Should that happen, the remaining provisions of the *Bill of Rights* may likewise fall. *Public defenders are the modern patriots carrying the torch which the founders ignited 200 years ago.*

EDWARD H. JOHNSTONE
Chief Judge
United States District Court
Louisville, KY

Judge Johnstone was appointed United States District Judge for the Western District of Kentucky on October 11, 1977, and entered on duty October 13, 1977. He served as Chief Judge, October 1, 1985-September 17, 1990, retaining active status as district judge. He serves as a member of the Judicial Conference Committee on the Administration of the Bankruptcy System, and as Chair of the Kentucky Task Force on Death Penalty Cases since 1987.

He is a graduate of the University of Kentucky, receiving a J.D. degree in 1949. Prior to his appointment to the federal bench, he served as Judge of the 56th Judicial Circuit of Kentucky, and was a practicing attorney in Princeton, Kentucky for over 25 years with the law firm: Johnstone, Eldred & Paxton.

FOOTNOTES

[1] As early as 1215, the *Magna Carta* provided to no one will we sell, to no one will we "refuse or delay, right or justice."

[2] Prior to 1836, those accused of felonies and other serious crimes were entitled to representation by counsel only with respect to questions of law. 6&7 Wm. IV, c. 114, sec. 1 (1836).

[3] J. Chitty, *A Practical Treatise on the Common Law* I:406 (Philadelphia 1819) cited in D. Feldman, *The Defendant's Rights Today* 209-10 (1976); E. Coke, The Third Part of the Insitutes of the Laws of England 29 (London 1797). Although conceding that the rule was well settled at common law, Blackstone denounced it stating:

> For upon what face of reason can that assistance be denied to save a life of a man, which yet is allowed him in prosecutions for every petty trespass?

[4] W. Blackstone *355 cited in *Powell v. Alabama*, 287 US 45 (1931).

[4] *Powell v. Alabama*, 287 U.S. 45, 63-65 (1932). Prior to the adoption of the Federal Constitution, twelve of the thirteen colonies guaranteed all criminal defendants the right to counsel.

[5] See *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (application of Sixth Amendment to misdemeanors); *see also In re Gault*, 387 U.S. 1 (1967) (application of Sixth Amendment to juvenile defendants).

[6] 287 U.S. 45 (1935).

[7] *Id.* at 71.

[8] 316 U.S. 455 (1942).

[9] 372 U.S. 335 (1963).

[10] *Id.*; Nine years later in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) the Court extended the Sixth Amendment right to counsel to criminal misdemeanor proceedings.

[11] See Lawson, *Presuming Lawyers Competent to Protect Fundamental Rights: Is it an Affordable Fiction?*, 66 KY. L. J. 459 (1977-78) (stressing the necessity for experienced and competent counsel in the defense of indigents).

[12] 111 S.Ct. 1661 (May 13, 1991).

[13] 111 S.Ct. 2204 (June 13, 1991).

[14] *THE ADVOCATE*, Aug. 1990, at 7.

[15] KRS 31.170(4) provides a $1,250 fee cap "unless the court concerned finds that special circumstances warrant a higher total fee." When the court makes such a finding, the fiscal court must pay the ordered fee. KRS 31.240(3).

[16] *Ex Parte Farley*, 570 S.W.2d 617 (Ky. 1978) (attempts by public defenders to secure death penalty statistics for use in ongoing death penalty cases was described by the Supreme Court of Kentucky as "asinine litigation.")

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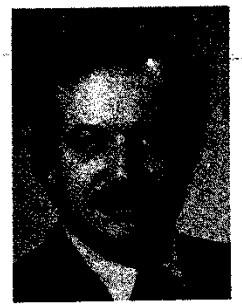
THE RIGHT TO COUNSEL: *AT RISK FOR KENTUCKY'S POOR*



Edward C. Monahan

In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defence.
Sixth Amendment, U.S. Constitution (1791).

In all criminal prosecutions the accused has the right to be heard by himself and counsel.... Section 11, Kentucky Constitution (1891).

We are rightly proud of our constitutional commitment to the liberties guaranteed us as individuals. Most are embodied in our United States *Bill of Rights*, which was enacted in 1791, and our Kentucky *Bill of Rights* first enacted in 1791. These liberties are what most distinguish us from all other countries in the world.

However, when we look at the balance sheet of how the United States Supreme Court, Kentucky's highest court, Congress, our state legislature, prosecutors and defense attorneys have substantively and financially treated the most important constitutional guarantee, the right to counsel for an accused citizen, too much red ink appears.

For the vast majority of our country's history, the right to counsel under the 6th Amendment and Section 11 has not been freely afforded to the poor. Under the 6th Amendment, *the right to counsel has not been constitutionally guaranteed indigents accused of a felony for 86% of the last 200 years*! (See 6th Amendment Timeline).

While the 6th Amendment guarantee of counsel was interpreted in a gradually expanding manner by the United States Supreme Court from 1932 until the 1970s, it has of late been restricted more often than expanded by that Court. It is further being undermined quite effectively by a society which refuses to fund counsel at a fair level for the poor accused of a crime. Constitutional law aside, society has decided to *structurally* deprive the poor of the full measure of counsel by *choosing* to underfund public defender programs. Over the years, prosecutors who are charged with seeking justice ironically have urged that the poor's access to counsel be diluted.

These trends are hardly befitting the 200th Anniversary of our United States *Bill of Rights* and the 100th Anniversary of our Kentucky *Bill of Rights, which we celebrated in the Fall, 1991. They raise the question of whether we are really committed to* the 6th Amendment and Section 11.

THE SLOW CONSTITUTIONAL EXPANSION

The 6th Amendment right to counsel is clearly stated and guaranteed to citizens by our *Bill of Rights*. However, it was not until 1932, 141 years after our *Bill of Rights* became a part of our *Constitution*, that our U.S. Supreme Court held an accused whose very life was in jeopardy had a right to counsel even if he could not afford one. *Powell v. Alabama*, 287 U.S. 45 (1932).

For most of our statehood, Section 11 clearly stated the people's belief in the fundamental right to counsel. However, our courts did not command much respect for the people's value of counsel, especially if you were a poor defendant accused of a crime. Counsel was not viewed as a sacred or a preeminent right for many years.

In 1886, the Kentucky Court of Appeals saw no need to afford appellate counsel to a person who had been sentenced to life and who was unable to employ counsel. *Turner v. Commonwealth*, 1 S.W. 475 (Ky. 1886).

The Court in *English v. Commonwealth*, 288 S.W. 320 (Ky. 1926) saw no right to counsel for a woman who was "an unfortunate, friendless old woman, addicted to the use of narcotics, and very poor...ignorant of all her rights" since she had not "specially called" the attention of the court to her lack of counsel.

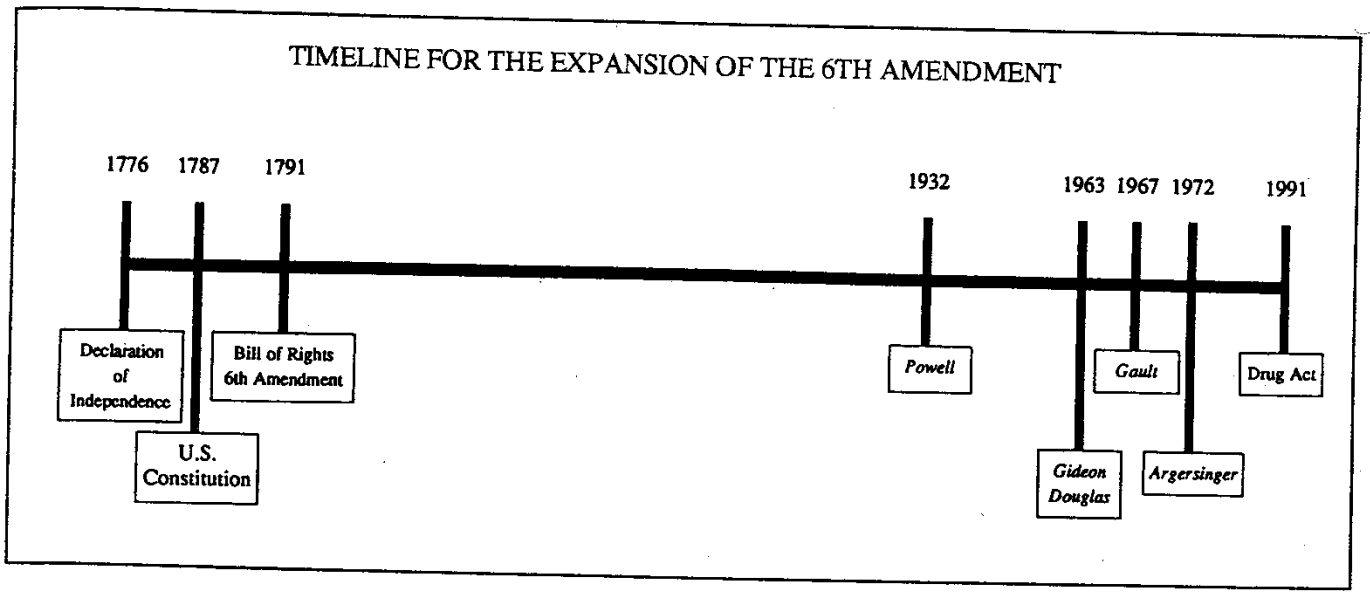
In *Williams v. Commonwealth*, 110 S.W. 339 (Ky. 1908) Kentucky's highest court reversed a robbery conviction of a person "stricken by poverty" who was tried without counsel but the right to counsel required more than just indigency. It required him to be "without education, and has not mind enough to know when he was placed in jeopardy...." *Id.* at 340. When a "court can see that the person charged is a person of at least ordinary intelligence and can fully appreciate the position which he occupies...," then the poor person was not entitled to appointed counsel under Section 11. *Id.*

Counseless poor persons who failed to ask for counsel and who failed to make "the necessary showing in support thereof" went to prison without appellate relief from their uncounseled conviction. *Hamlin v. Commonwealth*, 152 S.W.2d 297 (Ky. 1941).

Being 21 years old, inexperienced in court proceedings and legal matters was not enough to require the court to appoint an attorney for an indigent accused absent a request and sufficient showing by this young neophyte. *Moore v. Commonwealth*, 181 S.W.2d 413 (Ky. 1944).

It was not until 1948, 157 years after Section 11 breathed life, that Kentucky's highest court interpreted Section 11 to require that an attorney be appointed for a poor person charged with a felony unless that person intelligently, competently, understandingly and voluntarily waived counsel. *Gholson v. Commonwealth*, 212 S.W.2d 537 (1948). *Hamlin, supra* and *Moore, supra* were specifically overruled. See also *Hart v. Commonwealth*, 296 S.W.2d 212 (1956).

It was not until 1963, 172 years after passage of our *Bill of Rights*, that the Supreme Court of the U.S. in *Gideon v. Wainwright*, 372 U.S.



335 (1963) decided that due process required that counsel must be given at trial by the state to an indigent accused of committing a felony in a state court. In that same year the 6th Amendment right to an attorney was extended as a result of equal protection to an appeal by indigents convicted of a crime. *Douglas v. California*, 372 U.S. 353 (1963).

It took until 1967, 176 years after ratification of our *Bill of Rights*, for the guarantee under the 6th Amendment of free counsel for an indigent to be applied to juvenile defendants at trial. *In re Gault*, 387 U.S. 1 (1967).

Not until 1972, 181 years after our Bill of Rights became effective, was the 6th Amendment right to have legal counsel at trial required for citizens accused of committing a misdemeanor. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

THE QUICK CONSTITUTIONAL ASSAULT ON THE RIGHT TO COUNSEL

The right to counsel had flourished in the 40 years following *Powell*, but after 1972 the United States Supreme Court began its battle plan against the 6th Amendment. As a result of the Court's assaults, there is no federal constitutional right to counsel on discretionary criminal appeals following an appeal of right. *Ross v. Moffitt*, 417 U.S. 600 (1974); *Wainwright v. Torna*, 455 U.S. 586 (1982). Neither the due process clause of the 14th Amendment nor the equal protection guarantee of "meaningful access" requires the state to appoint counsel for indigent prisoners seeking state post-conviction relief. *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

As a result of an early Rehnquist Scud attack, poor persons convicted of a crime are not constitutionally entitled to an attorney if they are unable to have one when they request the U.S. Supreme Court to grant *certiorari* - even in capital cases. *Ross v. Moffitt*, 417 U.S. 600 (1974).

In 1989, Chief Justice Rehnquist and his highly trained fighting majority tomahawked the right to counsel by determining that a state which has sentenced a person to death was not constitutionally required to give that condemned indigent an attorney for his state post-conviction proceeding. *Murray v. Giarrantano*, 492 U.S. 1 (1989).

CONGRESS' LIMITED EXPANSION OF RIGHT TO COUNSEL

It has become so bad that in the Federal Anti-Drug Abuse Act, 21 USC Section 848(q)(4)(B) and (q)(9) (1990), Congress reacted to the U.S. Supreme Court's increasingly narrowing view of the right to counsel, and mandated that any indigent state prisoner under sentence of death "shall be entitled to the appointment of one or more" experienced attorneys and when reasonable necessary with "investigative, expert or other services" for federal habeas proceedings.

Congress has also recently begun to fund federal resource centers to meet the significant capital federal habeas counsel needs. Kentucky has been fortunate to obtain a federal resource center but its focus is only in the federal forum. State legislatures, including Kentucky's, have yet to follow this funding lead for state trial, appeals and post-conviction capital cases.

PROSECUTORS SEEK TO LIMIT RIGHT TO COUNSEL

In each of these cases decided by the United States Supreme Court, a prosecutor argued that the United States *Bill of Rights* did not require counsel for poor people charged with committing a crime who were too poor to hire an attorney.

In contrast, defense attorneys, most often public defenders or appointed counsel, urged the Court in each of these cases to apply the *Bill of Rights* to insure its full meaning by giving counsel to those too poor to hire their own lawyer when their life or liberty were at stake.

COUNSEL MUST BE FULLY FUNDED

Without the proper *resources* available to the attorney for an indigent accused, the 6th Amendment and Section 11 right to counsel is virtually meaningless. Resources and experts are the fingers of the guiding hand of counsel. A hand without fingers is not capable of guidance.

The ultimate resource for the appointed attorney is adequate compensation. For a public de-

fender system it is adequate funding which permits reasonable caseloads. Without fair funding, there is no realized right to counsel for the poor.

Adequately funded counsel is required for competent performance by that counsel. Since an attorney's time is his/her livelihood and since the time devoted to a client depends on the compensation received or the caseload that the funding permits, an appointed attorney who is not fully and fairly paid for his legal services or a public defender who has too large a caseload cannot realistically give a client effective assistance with any regularity. *See* "Attorneys Must be Paid Fairly: Defense Attorneys are Entitled to Fair Market Value," ABA *Criminal Justice*, Vol. 5, No. 2 (Summer 1990). A public defender system lacking in necessary funds cannot provide constitutional counsel.

Well-meaning *pro bono* efforts are not a solution to inadequate funding of attorneys for indigents and, in practice, are unethical because they create and legitimize incompetent representation. *See* "*Pro Bono* Services in Criminal Cases is Neither Mandatory Nor Ethical," ABA *Criminal Justice*, Vol. 5, No. 3 (Fall 1990).

Access to competent defense experts, investigators and other ancillary resources are necessary to insure the effective representation by a public defender or appointed counsel. However, the right to funds for experts has only been afforded in a limited way to this point by the U.S. Supreme Court. *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* has been more narrowly read by lower courts than perhaps any other constitutional right. *See, e.g., Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) (*en banc*).

Most Kentucky fiscal courts, the funding source under KRS 31.200 for these resources in Kentucky, have lawlessly refused to meet their clear statutory duty. While the Kentucky Supreme Court has repeatedly recognized that fiscal courts have the duty to pay for these resources, *see, e.g., Simmons v. Commonwealth*, 746 S.W.2d 393 (1988), in the over 10 published cases the court has never once reversed a case when a fiscal court refused to pay or a trial judge refused to order a fiscal court to pay for experts or other resources.

CURRENT FUNDING DOES NOT REFLECT RIGHT TO COUNSEL VALUES

Funding for the 6th Amendment and Section 11 provided by states, counties, cities and the federal government is not sufficient. To illustrate this reality, we look at public defender funding in Kentucky, and how much money we spend on counsel relative to other ways we spend our money.

UNDERFUNDED COUNSEL FOR INDIGENT DEFENSE IN KENTUCKY

The state of Kentucky's 1990-91 budget is $8.922 billion. All of Kentucky's criminal justice agencies received $466 million (5%) of the total state funding.

Kentucky indigent criminal defense efforts received a paltry .1% of the total state budget and an embarrassing 2% of the funding for Kentucky criminal justice agencies. (See state money for agencies graph).

Is the right to counsel furthered by this kind of division of the available money? Not when this means that public defenders and appointed attorneys in Kentucky are underpaid and overworked. Full-time public defenders in Louisville start at $17,500. An appointed attorney handling a Kentucky capital case receives a $2,500 fee. At best, this is minimum wage. It is what we pay people who flip hamburgers. Yet, Kentucky gives its Corrections Cabinet an average of $12,901 to house each state prisoner.

Kentucky has recently built a state prison at a cost of $89,900 per cell. The money spent for one cell is literally more money than the funding 70 of Kentucky's 120 counties receive for all indigent cases in their county for an entire year.

The Kentucky Corrections Cabinet received a 53% increase in its 1990-91 state funding. Their budget jumped $76 million from $147 million to $219 million. Apparently, we stand ready to fund our security but not our liberty.

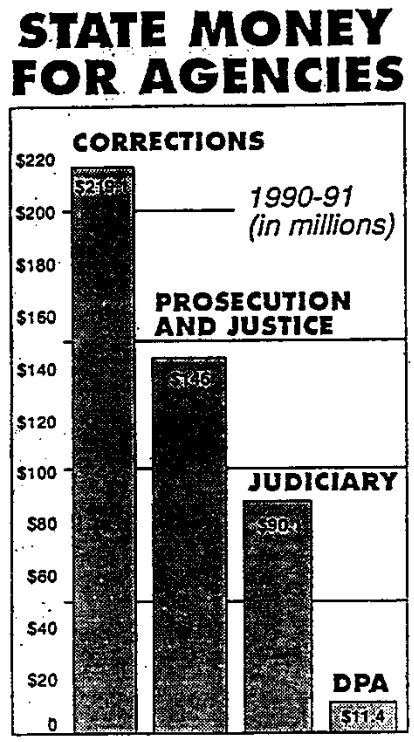
In 1986 the national *average* funding for indigent defense was $223 per case. At that time Kentucky ranked 47th in the nation with funding at $118 per case. In 1990, Kentucky's average funding for the more than 70,000 indigent cases handled is but $162 per case. That includes major felony cases, murder cases, and capital cases.

Nationally, Kentucky ranks at the bottom in its money allocated to counsel for the poor. Kentucky is woefully underfunding its indigent accused responsibilities, especially in contrast to the funding for the prosecutors, police and corrections.

On top of the inadequate and imbalanced funding for Kentucky's public defender system within the criminal justice system funding, the underfunding and imbalance are exacerbated by the one-sided federal drug money grants and federal confiscation and forfeiture proceedings.

In fiscal year 1990, Kentucky police and prosecutors received $4,614,190.64 from civil seizures and forfeitures in drug cases. Kentucky public defenders received none of this money.

In fiscal year 1990, police and prosecutors received $6,080,000 from drug grants under the Federal Comprehensive Crime Control Act. Kentucky public defenders received but $100,000 of this money. When this drug and seized money is added into the state funding, prosecution and police in Kentucky received



$156 million each year compared to the public defenders receiving $11.5 million. Kentucky prosecutors and police receive $14 for every $1 provided public defense. Does that make for a fair fight?

As a result of these vast new resources, drug arrests in Kentucky have skyrocketed since 1987 - a full 114%. Not only have the drug grants and the confiscations increased the funding imbalance, these new funding sources for the police and prosecution have put greater demands on the underfunded Kentucky public defender system.

FUNDING PERSPECTIVE: THE UNDERVALUING OF COUNSEL FOR THE POOR

The right to counsel, which is crucial to our two most fundamental values, our life and liberty, is further affronted when we put indigent criminal funding in context.

Nationally, in 1986 but $1 billion was spent on the defense of indigents in criminal cases. One B-2 Stealth bomber costs $1.1 billion. We spend $36 billion a year on tobacco products, and $3.3 billion each year to attend spectators sports.

Kentucky funded its indigent defense at $11.4 million in 1990. That amount would build but 4 miles of two lane road in Kentucky. The University of Kentucky's athletic budget of $15.9 million is $4 million more than our funding for counsel. The 9 baseball players with the highest 1991 salaries at each position totalled $29,608,333 (see the $29 million lineup) - more than 2-1/2 times the Kentucky funding for indigent defense.

The chief prosecutor in a Kentucky county is paid a salary of $67,378. The chief public defender in the county starts at $35,220.

Kentucky's criminal justice system is funded at $466 million in 1990. At the same time, the federal government spent $557 million just in Kentucky on military contracts.

Across the board, we do not think much of the constitutional right to counsel nationally or in Kentucky relative to other interests and values.

CONCLUSION

Constitutional protections are devoid of meaning without counsel. The right to counsel is the preeminent protection of the United States and Kentucky *Bill of Rights* because all other guarantees depend on legal counsel to effectuate them. Unfunded, underfunded, and imbalanced funding risks the 6th Amendment and Section 11.

Stan Chauvin, the ABA's immediate past-President, recognizes that the "role of the public defender is crucial, critical and essential to insure the fair and effective administration of justice. Without adequate funding, the discharge of this duty is impossible. We must face this reality and act accordingly." Isn't this 201st year of both our *Bill of Rights* the year to do it?

Why do we spend so little on counsel for the poor? It cannot be that society does not have the money. After all, we spend $3.3 billion on dog food annually. Could it be that we are intentionally refusing to fairly fund indigent defense services... because we want the prosecution to have a decided advantage? ...because we want the criminal defendant to have a low paid, overworked, ineffective public defender? ...because we want a bankrupt system defending the poor criminal? ...because we do not understand how important the 6th Amendment and Section 11 are to us? Are we deciding to learn the value of counsel by living out the once popular refrain, "Don't it always seem to go that we don't know what we got 'til it's gone...."?

In 1932 when the United States Supreme Court first put its down payment on the right to counsel in *Powell v. Alabama*, the Justices recognized that denial of counsel was a murderous act:

> Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate, and feeble-minded, unable to employ counsel, with the whole power of the state arrayed against him prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted, and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder....
> *Powell, supra*, 287 U.S. at 72.

The Court of Appeals in *Lavit v. Brady*, S.W.2d (Nov. 8, 1991) has sounded the warning siren on the unconstitutionality of Kentucky's inadequately funded public defender program.

The Bar has special reasons to be interested in promoting fully funded public defense. *Jones v. Commonwealth*, 457 S.W.2d 627, 632 (Ky. 1970).

Only by acting now can we keep the right to counsel from the shackles of debtor's prison.

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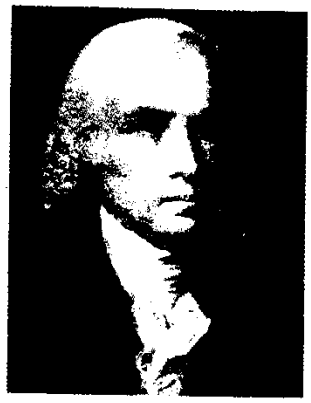

"...What is government itself but the greatest of all reflections on human nature?"

James Madison

FREE COUNSEL: A RIGHT NOT CHARITY

James Neuhard

"In our adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel."[1]

The proposal of this paper is quite simple: all those charged with a crime, regardless of economic status, are entitled to free counsel. The presence of counsel is fundamental to the operation of our courts and to the assertion of the rights of those charged with crimes. The current eligibility criteria are a modern day "jabberwocky"[2] with the result that determination is either *pro forma* or, when pursued, too costly. Finally, if counsel is denied, the availability of the most important of rights is determined and denied without the defendant having a skilled advocate arguing for that right. For this and other reasons, eligibility determinations are not worth the time, cost and the threat to constitutional rights they pose.

Universal eligibility solves not only the problems of definition,[3] of delay, cost,[4] the constitutional questions[5] raised by determination procedures, and the counselless nature of the determination but also will simplify court procedures, assure counsel availability at a much earlier time in the process, and allow whatever funds defendants may have to be applied *after* and if there is a *conviction*, to restitution, fines or other public purposes.

"The right to counsel has historically been an evolving concept."[6] We have now reached that time when we must recognize that the "right to counsel" means universal eligibility for counsel to those charged with a crime.

The impact of universal eligibility should be modest. Universal eligibility would not expand the areas where counsel is required. Further in those proceedings where counsel is now provided, in most metropolitan urban areas, the indigency rate is 90% in felony cases. Therefore, even if all those currently retaining counsel were to avail themselves of free counsel, the expense would be nominal. As a practical matter, however, those without any funds make an effort to pool whatever resources they, their family and friends might have to retain counsel of their choice. Whatever slight cost increase there might be, would be more than offset in the simplification and streamlining of the process of obtaining counsel along with savings generated by appointed counsel filing bond reduction motions much earlier for jailed clients.[7]

ELIGIBILITY IN PRACTICE - COMPETING, OFTEN CONFLICTING, VALUES DETERMINE WHETHER FREE COUNSEL IS GRANTED

The determination of eligibility for free counsel has several powerful - most frequently extraneous - pressures which often effect the outcome of the determination: 1) judicial attitudes; 2) cost, 3) the perception of the right to free counsel as a charity, and 4) the *pro forma* nature of the proceeding.

JUDICIAL ATTITUDES

Judges believe they are neutral and that they can therefore adequately protect most defendants' rights, therefore defendants do not really need an appointed or, for that matter, retained attorney. Experienced judges feel routine cases merit routine treatment. Counsel, after all, is often young and inexperienced and will "lawyer" the case to death. Therefore, judges may often make some effort to resolve the case without counsel. This attitude, still rampantly present in rural America in felonies and universally present in misdemeanors, is not new nor is it a product of current "docket pressure." This "judgey" attitude traces to the 16th and 17th century.

In England, following the Revolution and the merger of Equity and Law Courts in the 1600's, criminal justice became increasingly neutral towards the accused and the state. Prosecutions were brought by private persons and by the mid-18th century, the judge viewed himself as a disinterested referee rather than an essential arm of Crown power. Ironically in matters of treason, counsel was fully allowed and provided - likewise in misdemeanors. This supposedly neutral position of the judge furnished an excuse, however, for continuing the practice of denying counsel in felonies. The reason commonly given was that the judge was impartial and looked with equal suspicion on both sides in criminal actions, with the further explanation that a criminal proceeding was so simple that any man could understand what was being done.[8] Another reason, though certainly not stated openly at the time, was that the defendant, having been indicted as an enemy of the king, was at least half guilty and that all aids should be furnished to the King, whose security, at any rate during the 17th century, was more important than that of the individual accused. Such judicial attitudes exist today but more frequently, the prosecution bias of judges is attributed to their being jaded, conservative or too sensitive to media and public pressure.

COSTS

The second pressure, costs, not only affects the determination of eligibility, but often determines which lawyer, what delivery system will supply the lawyer and what support services will be available to the lawyer. The marriage of cost consciousness and the judge's self-image of fairness frequently results in judges berating appointed counsel for "needless" and unnecessary work. Their fear of the cost of defense creates pressure to deny counsel, order unwarranted recoupment costs, or appoint attorneys who need work but are not that good.

CHARITY

The third attitude, "charity," has the effect of our extending access to counsel based on hardship of the defendant or that a sense of fairness and compassion is more appropriate in the counsel eligibility question. The effect is that some

judges feel sympathy for the defendant and err on the side of granting counsel than denying counsel to a financially strapped defendant.

PRO FORMA

The marriage of charity with "laziness" sometimes allied with cynicism leads to the fourth pressure, pro forma proceedings. Well meaning, lazy, and/or time conscious judges alike cannot define "unable to afford counsel" or "indigency," they do not have time to realistically investigate the data, and they fear reversal is more likely for denying counsel. All and any doubts are resolved in favor of appointing counsel.

COUNSEL DENIAL

Studies in England starkly reveal the above patterns of counsel denial and are equally apparent in this country: If a judge views the matter as trivial and his own righteousness as high - counsel is denied disproportionally to the incidents of poverty. This pattern is present in misdemeanor assignments throughout the United States[9] and England. Furthermore, it was not until the 1980's in England that studies showed compliance with the right to free counsel was being granted by judges. As long as the judges were free to deny counsel unless "the case warranted" counsel, counsel was frequently denied. Within courts of the same jurisdictions, counsel assignment rates varied by as much as 60%. Since the most recent reforms in England, 97% of those charged with "felonies" have assigned counsel and in the "misdemeanor" court representation by private counsel is rare."[10] As a consequence of the serious attention the abuse of non access to counsel has had in England - principally because of reluctant judges - the cost for counsel has risen from 45 million pounds in 1977/78 to over 100 million pounds in 1982. However, the final step to universal eligibility, though not yet taken in England, will be relatively low in cost - given that those defendants still using private counsel would undoubtedly continue to do so.[11]

EVOLUTION OF THE RIGHT TO FREE COUNSEL

To date, two dominant themes have driven the issue of access to free counsel for those charged with crime who cannot afford their own lawyer. One is charity, the other is due process.[12]

The Anglo-American history of the "right to counsel" dates to the ecclesiastical courts of early England and was truly a charity. Pope Honorius III (1216-1227) decreed that those unable to obtain counsel were to be given free counsel by the court. This lead ultimately to the granting of an array of technical privileges to the benefit of the poor in ecclesiastical courts. However, charitable rights, essential to equity jurisdiction, were not originally absorbed formally in the secular system when, in the 16th century, the co-equal authority of Church and State became secularized into one court.[13] Consequently, the theme of poverty did not play a role in the common law or constitutional development of the right to free counsel until *Johnson v. Zerbst.*[14] Ironically, but predictably, the right to free counsel emerged in this country during the height of the great depression and the new deal. The great counsel cases decided during the depression-affected 1930's and the civil rights and war-on-poverty affected 1960's were strongly written in due process terms but were made possible by the great human and civil rights causes of the day.

> "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices judges share with their fellow-men, have a good deal more to do with that than syllogisms in determining the rules by which men should be governed."[15]

In *Powell v. Alabama,*[16] Justice Sutherland's oft quoted language forcefully and eloquently stated the due process impact of the assistance of counsel:

> "The assistance of counsel is often a requisite to the very existence of a fair trial.
>
> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."[17]

The perception of the "right to counsel" as a fundamental and essential due process right continued to grow following *Powell*. However, in *Betts v. Brady,*[18] the Supreme Court was not ready to determine that the assistance of counsel was such a fundamental right that the *Constitution* mandated the right to *free* counsel in the states through the due process clause of the 14th amendment.

In 1963, the Supreme Court clearly laid the foundation for universal eligibility of free counsel in all adversary proceedings where a person is charged with a crime:

> "...lawyers in criminal cases are necessities not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[19]

In *Gideon v. Wainwright,*[20] the court squarely rejected *Betts v. Brady* and held that it was an aberration from the clear line of cases recognizing the right to counsel as a fundamental necessity-not a luxury, and hence, equal protection mandated that the *poor* receive free counsel. Following *Gideon,* the constitutional right to free counsel was recognized in an array of proceedings.[21] Most of the subsequent free counsel cases extended the constitutional right[22] to counsel throughout charging, conviction, sentence and post-conviction proceedings.

As the right to counsel was rapidly extended, the quantity of change and the strength with which the need for counsel was expressed inexorably revealed that the time for universal eligibility had arrived. Justice Powell recognized in *Argersinger* the anomaly the impact the right to free counsel cases would have on working and middle class Americans.

> "Indeed, one of the effects of this ruling will be to favor defendants classified as indigents over those not so classified, yet who are low-income groups... The line between indigency and assumed capacity to pay for counsel is necessarily somewhat arbitrary, drawn differently from State to State and often resulting in serious inequities to accused persons. The Court's new rule will accent the disadvantage of being barely self-sufficient economically."[23]

In recognizing the evolution of the right to free counsel, he expressed concern over the enlargement of the right.

> "No one can foresee the consequences of such a drastic enlargement of the constitutional right to free counsel. But even today's decision could have a seriously adverse impact upon the day-to-day functioning of the criminal justice

system. We should be slow to fashion a new constitutional rule with consequences of such unknown dimensions, especially since it is supported neither by history nor precedent."[24]

His concern was either that the system would slow down because everyone would assert and use their right to a lawyer or that the cost would bankrupt local governments. As often is the case when fundamental human rights have been recognized and enforced - the concerns were not realized. But even in recognizing that the Republic did not fall because the poor now had lawyers, Justice Rehnquist still expressed reservations about expending the right to free counsel:

"*Argersinger* has proved reasonably workable whereas any extension would create confusion and impose unpredictable, not necessarily in-substantial, costs on 50 quite different States."[25]

THE NEED FOR UNIVERSAL ELIGIBILITY NOW

Even though the costs for defense counsel make up usually less than 1-3% of a jurisdiction's criminal justice budget, such "costs" have brought great pressure to be "contained." Seldom looked at as a percentage of total costs but usually looked at in isolation, they are easy targets. Seen as funds for criminals - worse as funds for indigent criminals - they lack a constituency and, hence, are usually low priority or neglected areas. Further by viewing charity as the driving force behind the right to counsel, the right has suffered the general backlash all "poor" people's programs currently suffer. The effect has been to tighten the finding of eligibility, overassign public defenders, force defendants to repay counsel costs, and create high volume and woefully inadequate contract systems. Overall, this pressure has lead to generally disparaging of the use and abuse of the right to counsel generally and particularly undermined support for free counsel for the *poor*. If we hope to ensure the validity and fundamental importance of the right to counsel - then we *must* remove any hint that free counsel is tied to charity or is only the province of the functionally poor.

The evolution of the right to counsel, to the right to free counsel, to the right to free paid counsel and finally to the right to reasonably competent free paid counsel - has brought us now to the time, just as a similar evolution did in segregated education, to recognize free counsel in criminal cases as a fundamental necessity. Access to free counsel should not be dependent on a judge or a bureaucrat making a determination of eligibility using unworkable criteria where the defendant is asserting a request for the most fundamental right of all - and lacks counsel doing so.

As the United States Supreme Court said in *Brown v. Board of Education*:[26]

"In approaching this problem, we cannot turn the clock back to 1868 when the [14th] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[27]

So it is with the role defense counsel plays in our criminal justice system. Is the above language regarding education different from the United States Supreme Court's observation regarding the importance of counsel in criminal cases?

"In *Gideon v. Wainwright, supra* (overruling *Betts v. Brady*, 316 U.S. 455, 86 L.Ed. 1595, 62 S.Ct. 1252), we dealt with a felony trial. But we did not so limit the need of the accused for a lawyer. We said: '[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assured fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.' 372 U.S. at 344, 9 L.Ed.2d at 805, 93 ALR2d 733." (Footnotes omitted).[28]

In the daily lives of our citizens, assertion of basic rights - indeed rights once paid for - roads, parks, schools, voting, and education - now are deemed so essential and fundamental that access to them is free and unqualified by wealth or poverty. Indeed, rich or poor enjoy equal access to public schools and public facilities.

If we want to reorient the current woeful imbalance of funding within the criminal justice system,[29] then we must remove defense counsel costs from the province of the poor only. If indeed the presence of defense counsel is essential to the efficiency of our system and fundamental due process, then competent counsel should be universally available to all regardless of their economic class. Such a reorientation of the role of assigned counsel will make the importance of counsel less easy to dismiss as a charity that will be provided in good times but so easily deferred in hard times when only essentials come first.[30]

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Jim Neuhard *has been long time Director of the Michigan State Appellate Defender Office. He was President of the National Legal Aid and Defender Association from 1987-1989. He is Chair of the ABA Bar Information Program, and he has presented at NLADA's National Defender Management Conferences. He is Chair of ABA's Special Committee on Underfunding of Justice System. Jim is also Chair of*

the Bar Information Program (BIP) which provides technical assistance to local bar associations, courts and legislatures on how to deal with crisis in defense underfunding.

FOOTNOTES

[1]*Lakeside v. Oregon*, 435 U.S. 333, 341, 55 L.Ed.2d 319, 98 S.Ct. 1091 (1978). "[T]he interest protected by the right [to a jury trial]...is not as fundamental to the guarantee of a fair trial as is the right to counsel." *Argersinger v. Hamlin*, 407 U.S. 25, at 46, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (Powell J., concurring in result).

[2]C. F. Evans, *"The Definition of Indigency: A Modern-Day Legal Jabberwocky?"* 4 St. Marys L.J. 34, 35 (1972).

[3]For articles detailing the virtual impossibility of establishing uniform and simple indigency guidelines see: Carter and Hauser, *"The Criminal Justice Act of 1964*, when is a defendant 'financially unable to obtain counsel,' investigative, expert or other services necessary to an adequate defense?" 36 Federal Rules Decisions 67 (1964); W. Fortune, *"Financial Screening in Criminal Cases - Impractical and Irrelevant,"* 1973 Wash. U.L.Q. 821; Note, *"Determination of the Right to Counsel,"* 5 Wilmette L. J. 663 (1969); Note, *"Judicial Problems in Administering Court Appointment of Counsel for Indigents,"* XXVIII Wash. and Lee L. R. 170 (1971); Note, *"Indigency: What Test,"* 33 Ark. L. R. 533 (1979).

[4]For discussions on the gross lack of cost efficiency of recoupment proceedings (recovering counsel costs partially or wholly from defendants) and of constitutional implications of such proceedings see: William P. Curtis, *Recoupment for Public Defender Services: A Viable Revenue Generating Mechanism?* (September 30, 1981) (unpublished manuscript); William H. Fortune, *"Financial Screening in Criminal Cases Impractical and Irrelevant"* 1973 Wash. U.L.Q. 821; Goschka, *"Recoupment Statutes: Free Defense for a Price"* 53 J.Urb.L. 89 (1975); see also Case notes, 52 J.Urb.L. 363 (1974); Norman Lefstein, *Criminal Defense Services for the Poor: Methods and Programs for and Programs for Providing Legal Representation and the Need for Adequate Financing* (May 1982); National Center for State Courts, *Providing Legal Services to Indigents in Colorado* (December 1982); National Legal Aid and Defender Association, *Guidelines for Legal Defense Systems in the United States* (1977); North Dakota Counsel for Indigents Commission, North Dakota Supreme Court, *North Dakota Judicial System: Indigent Defense Procedures and Guidelines* (May 1983); Note, *"What Price Probation?* Reimbursement of Costs of Appointed Counsel as a Condition of Probation," 33 Baylor L. Rev. 393 (1978); *Report to the North Carolina General Assembly on the Indigency Screening Project* (May 23, 1984) (unpublished report); Some specific examples of the impact of recoupment on total public defender expenditures are: In Ohio, 1980 total state costs of providing defense services was $12,458,810.00 while recoupment produced only $1,423.00 (approximately .01% of the total budget); In Connecticut, the total budget was over $4 million in 1981 while recovery was slightly over $3,600 (approximately .09% of the budget); New Jersey's total budget was over $16 million while recovery was $242,739 (approximately 1.5% of the total budget in 1981). Because of the small percentages of income recovered, combined with the constitutional and ethical issues delineated below, we have serious doubts about the efficacy of recoupment as a revenue raising measure. To complicate matters further, the cost of collection of money recouped frequently exceeds the amount recovered. For example, several states have now begun experimenting with so-called "eligibility screening units" created to verify client eligibility and recover the assessed costs of counsel. In Colorado, the forerunner of such screening units, a four year history of collections from indigent defendants ordered to pay the portion of their attorney's fees accounts for only 35% of the eligibility screening unit's total budget. This data raises serious questions about whether recoupment is a viable means to reduce the costs of indigent defense services, or may actually make them more expensive. R. Wilson, *Report to the National Association of Counties* (June, 1984) (unpublished report).

[5]Another critical problem in current indigency determinations is the clash between a defendant's assertion of the 6th amendment right to counsel and their 5th amendment right to remain silent. Carol Slatin chronicles cases where information garnered during indigency determination proceedings was used against defendants in criminal prosecutions. See Note, C. Slatin, *"Determining Eligibility for Public Defense: Constitutional Conflicts Posed by California Indigency Proceedings*, 12 Univ. of S.F.L. Rev., 717 (1978).

[6]*Argersinger v. Hamlin*, 407 U.S. 25, 44 (Chief Justice Burger, concurring).

[7]In the misdemeanor area, indigency is running as high as 60% in urban courts. However, this may be a "soft" figure as misdemeanor courts are notoriously bad at informing defendants of their right to counsel. Any true cost increases in this area will be from the enforcement of *Argersinger, supra*, n.3, and not from the universal eligibility proposed in this paper. See generally, Lefstein, "Criminal Defense Services for the Poor...," *supra*.

[8]Theodore F. Plucknett, *A Concise History of the Common Law*, 3rd Ed. (London: Butterworth, 1940), pp. 385 ff.

[9]See generally, Lefstein, *supra*.

[10]See G. Hughes, *"English Criminal Justice: Is It Better Than Ours?"* 26 Ariz. L. Rev. 507, 546-51 (1984).

[11]Some Scandanavian countries provide every defendant counsel at state expense regardless of his poverty or wealth, subject to his right to retain counsel privately. *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 FRD 389, 396 (1967), cited in T. Matthis, *"Financial Inability to Obtain an Adequate Defense,"* 49 Neb. L. Rev. 37 (1969).

[12]For misdemeanors - only if the defendant faces jail. *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979).

[13]*"The Definition of Indigency: A Modern-Day Legal Jabberwocky?,", supra*, note 2.

[14]304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). *"The Definition of Indigency: A Modern-Day Jabberwocky?" supra*, note 2, at 35.

[15]O. Holmes, Jr., The Common Law I (1951).

[16]287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1938).

[17](*Powell v. Alabama, supra*, at 68-69, 77 L.Ed. at 170).

[18]316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942).

[19]*Gideon v. Wainwright, supra*, 372 U.S. 335.

[20]372 U.S. 335, 344-45 (1963).

[21]See R. Brandt, *The Right to Counsel: An Overview*, (Published Paper pursuant to an LEAA Grant No. J-LEAA-008-79) Abt. Associates, Cambridge, Mass. (1980). Brandt details the right to counsel before, during and after trial; in sentencing, appeal, collateral attack, probation and parole revocation proceedings, juvenile delinquency proceedings, mental commitment cases, deportation proceedings, extradition, prison disciplinary proceedings, military courts and other non-

criminal actions such as paternity and child custody cases.

[22]It should be noted that many states either by statute, common law or state constitutions already had a broad right to free counsel. Comment, "Right to Counsel: The Impact of *Gideon v. Wainwright* in the Fifty States," 3 Creighton L. Rev. 103 (1970).

[23]407 U.S. 25, at 50, 92 S.Ct. 2006, 32 L.Ed.2d 530 (Powell, J., concurring in result).

[24](Powell, concurring) at 407 U.S., p. 52.

[25]*Scott v. Illinois*, 440 U.S. 367, 373, 99 S.Ct. 1158, 59L.Ed.2d 383 (1979) (Rehnquist).

[26]374 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1953).

[27]347 U.S. 492-493.

[28]407 U.S. 25, 32.

[29]See generally, Lefstein, *supra*.

[30]It has been my experience in 15 years of budget hearings in Michigan (a state with a boom or bust economy) that there has never been a "good time" for defense funding. Perhaps only nuclear waste sites are lower in popularity than criminal defense services.

CHRONOLOGY OF BICENTENNIAL DATES RELATED TO THE RATIFICATION OF THE *BILL OF RIGHTS*

JANUARY 16, 1786: Virginia's legislature adopts a statute for religious freedom, originally drafted by Thomas Jefferson and introduced by James Madison. The measure protects Virginia's citizens against compulsion to attend or support any church, and against discrimination based upon religious belief. The law serves as a model for the First Amendment to the United States *Constitution*.

MAY 25, 1787, OPENING OF THE CONSTITUTIONAL CONVENTION: On May 25, a *quorum* of delegates from seven states arrives in Philadelphia in response to the call from the Annapolis Convention, and the meeting convenes. Ultimately, representatives from all the states but Rhode Island attend. Of the 55 participants, over half are lawyers and 29 have attended college. The distinguished public figures include George Washington, James Madison, Benjamin Franklin, George Mason, Gouverneur Morris, James Wilson, Roger Sherman and Elbridge Gerry.

MAY 29, 1787: Rather than amend the *Articles of Confederation*, the VIRGINIA PLAN is proposed which describes a bicameral legislature, a judiciary branch and a counsel comprised of the executive and members of the judiciairy branch with a veto over legislative enactments.

AUGUST 6, 1787: The five-man committee appointed to draft a constitution based on 23 "fundamental resolutions" drawn up by the convention between July 19 and July 26 submits its document which contains 23 articles.

AUGUST 6-SEPTEMBER 10, 1787: The Convention debates the draft constitution.

SEPTEMBER 8, 1787: A five-man committee comprised of William Samuel Johnson (chair), Alexander Hamilton, James Madison, Rufus King and Gouverneur Morris, is appointed to prepare the final draft.

SEPTEMBER 12, 1787: The Committee submits the draft, written primarily by Gouverneur Morris to the Convention.

SEPTEMBER 13-15, 1787: The Convention examines the draft clause by clause, and makes a few changes.

SEPTEMBER 17, 1787: All twelve state delegations vote approval of the document. Thirty-nine of the forty-two delegates present sign the engrossed copy, and a letter of transmittal to the Congress is drafted. The Convention formally adjourns.

SEPTEMBER 20, 1787: Congress receives the proposed *Constitution*, and on September 28, resolves to submit the *Constitution* to special state ratifying conventions.

OCTOBER 27, 1787: The first "Federalist" paper appears in New York City newspapers, one of 85 to argue in favor of the adoption of the new frame of government. Written by Alexander Hamilton, James Madison and John Jay, the essays attempt to counter the arguments of anti-Federalists, who fear a strong centralized national government.

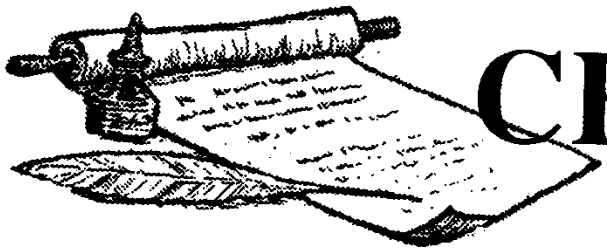
DECEMBER 7, 1787: Delaware ratifies the *Constitution* the first state to do so by unanimous vote.

JULY 2, 1788: The President of Congress, Cyrus Griffin of Virginia, announces that the *Constitution* has been ratified by the requisite nine states. A committee is appointed to prepare for the change in government.

NOVEMBER 20, 1789: New Jersey ratifies ten of the twelve amendments submitted by Congress in response to the five states ratifying conventions that had emphasized the need for immediate changes, The *Bill of Rights*, the first state to do so.

DECEMBER 15, 1791: Virginia ratifies the *Bill of Rights*, making it part of the United States *Constitution*.*

* Three of the original thirteen states did not ratify the *Bill of Rights* until the 150 anniversary of its submission to the states. Massachusetts ratified on March 2, 1939; Georgia on March 18, 1939; and Connecticut on April 19, 1939.



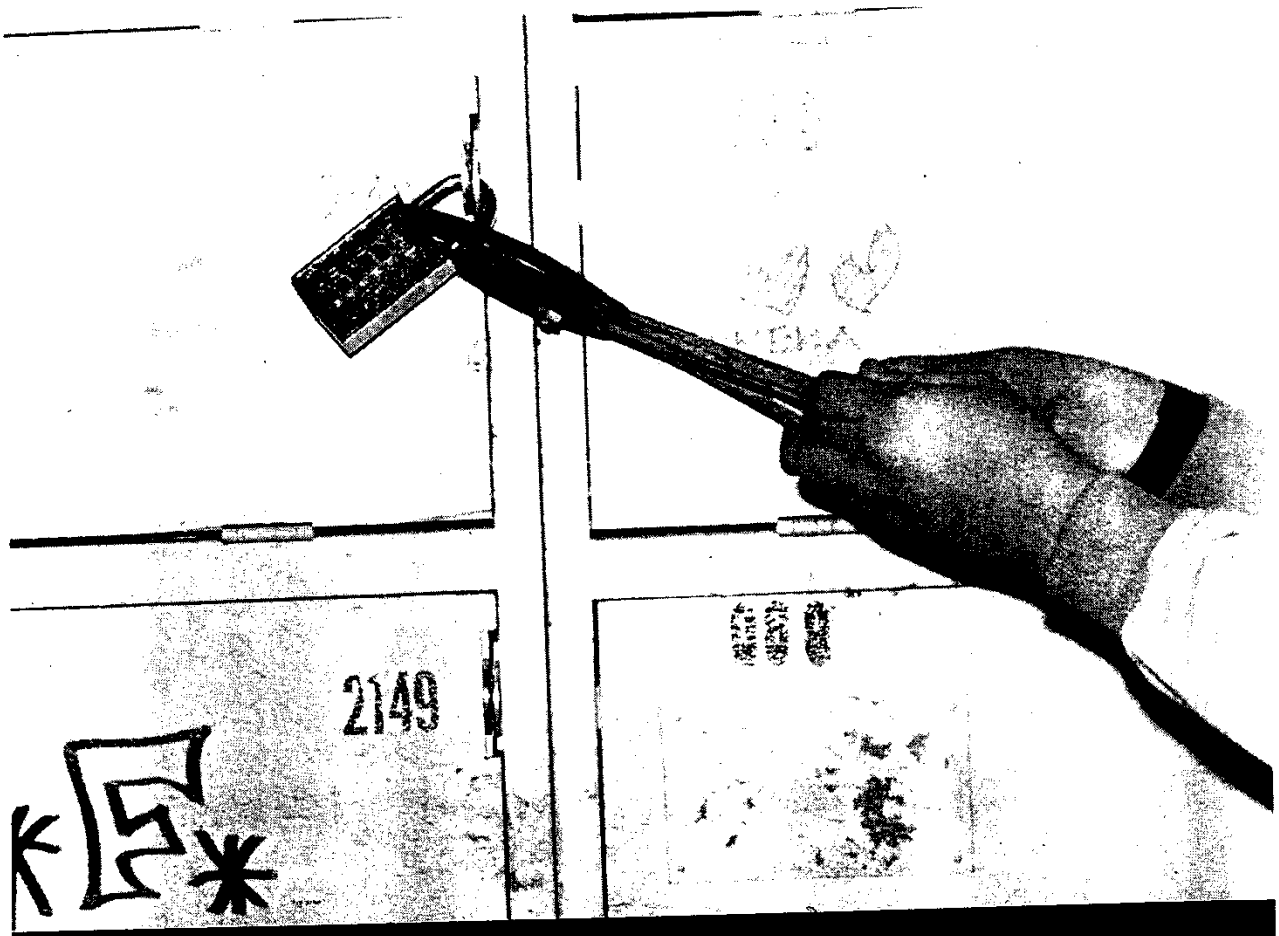
CHAPTER 11

Constitution of the United States
Fourth Amendment

Unreasonable searches and seizures: 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, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of Kentucky
Section 10

Security from search and seizure; conditions of issuance of warrant: The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrent shall issue to search any place, or sieze any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.



HARMFUL

Some people would have you believe that it's OK to take away one person's Constitutional rights in order to protect our children. But they're wrong.

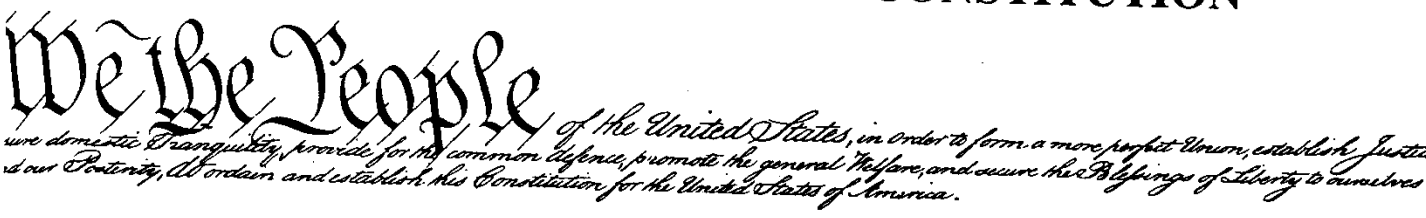
When a locker is searched illegally it only hurts our kids. Because in the end, if the Fourth Amendment rights of one person are taken away, they are taken away from everyone, including our children.

So don't believe it if others tell you that they only want to protect our kids. The Bill of Rights was written for our children, too. So let's preserve it for the future. It's the best gift we can give to our children.

The Bill of Rights

STACEY BOLT,
UNIVERSITY OF OREGON

BEYOND THE BATTERED CONSTITUTION



The bicentennial of the *Constitution* in 1987 commemorated the enduring terms of the most favorable deals the framers could agree among themselves to strike. Conceivably, 1987's constitutional commotion was misconceived. At least as important as the framers' deals was the fact that they societally sealed. Only "We the People" could ratify the framers' separate agreements as the one *Constitution* of the United States of America, which, of course, "We the People" did in 1788. It is a wonder that the ratification of the *Constitution* is not "bicentennialized." After all, the *Constitution* itself comes closer to commanding that "We the People" commemorate its *ratification*, rather than its *framing*, in its preamble.[1]

Maybe we have become so accustomed to each Supreme Court saying that the *Constitution* and prior Supreme Court opinions do not really mean what they say that "We the People" do not bother to worry about constitutional consistency. But worry we should. Nowhere is this judicial repositioning more oblivious to the language of the *Constitution* and more obstructive to the blessings of liberty than in the realm of perhaps the most important amendment to the *Constitution*, the fourth, which provides:

> 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

If we start with the proposition that warrantless searches and seizures are *per se* unreasonable unless falling within one of the "specifically established and well-delineated exceptions to the warrant requirement"[2] and, if we assume, in an abstract instance, we are left with a situation in which the fourth amendment requires a warrant. According to the *Constitution*, "no Warrants shall issue but upon probable cause." According to the Supreme Court, however, no warrants shall issue but upon a "fair probability that contraband or evidence of a crime will be found" on a particular person or in a particular place.[3] That something is a fair probability does not necessarily mean that it is probable. A probability is a likelihood.[4] Whether a probability is fair is in the eyes of the beholder. In the context of a warrant, the beholder is a magistrate who is to look at the amorphous "totality of the circumstances"[5] and who is to be paid "great deference."[6] In other words, what the magistrate says, for practical purposes, goes,[7] despite constitutional language to the contrary.

In the rare instance where a court finds a search warrant not supported by the Supreme Court's notion of probable cause, and, in

> the absence of an allegation that the magistrate abandoned his detached and neutral role, [the] suppression [of evidence obtained by police officers in reliance on the warrant] is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

Given the Supreme Court's definition of probable cause and, unless any dishonesty or recklessness on the part of a police officer in preparing the affidavit was blatant, the evidentiary outcome is predetermined[9] and contrary to the fourth amendment's limitation upon governmental encroachment of individual privacy.

Under the deterrence rationale of this good faith exception to the exclusionary rule, the Supreme Court knows no limits. Evidence is not inadmissible because it was seized pursuant to a statute subsequently declared unconstitutional, unless a reasonable police officer should know that the statute is "clearly unconstitutional."[10] Query: could anything be more constitutionally confounding and jurisprudentially pernicious than permitting the conviction of a defendant on the basis of evidence seized pursuant to an unconstitutional law?

Query or no query, overstating or lamenting that the *Constitution* of the United States is battered, beaten, and all but shredded is counterproductive.[11] It is enough to show that that is the state of the federal *Constitution*, at least in some instances, from the perspectives of the criminal defendant, his or her counsel, and those who care to keep the *Bill of Rights* off the Endangered Species List. This now becomes a take heed type of tale bottomed on the notion that there is no sanctuary but in purposeful action. In particular, this tale intends to incite a nationwide state constitutional riot.

The riot should originate from the site where the rallying cry is most insightful, in Oregon. In accord with the spirit and power of state constitutional law, the motto of the State of Oregon is *Aliis Volat Propriis* ("She flies with her own wings").[12] She is guided by Oregon Supreme Court Associate Justice Hans Linde,[13] wrote the now well settled Oregon rule that

> [t]he proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.[14]

Every state is free to adhere to such a rule.[15] Various states have done so in varying degrees.[16] Until every state fully does so, the state constitutional revolution must continue.

Oregon's rallying cry for incisive independent analysis has mostly[17] reverberated in the confines of cases arising under article I, 9, of the Oregon *Constitution*, which is practically identical to the fourth amendment of the federal *Constitution* in providing that:

> no law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure; and no warrants shall issue but upon probable cause, supported by oath, or af-

firmation, and particularly describing the place to be searched, and the person or thing to be seized.

The textual differences between article I, 9 and the fourth amendment are neither significant for practical purposes nor necessary for different results. Oregon's text, like that of most states, was not modeled from the federal *Bill of Rights*, but rather from other states' bills of rights.[18] Besides the historical primacy of states' bills of rights and the hierarchical logic of constitutional law in a federal system,[19] there are three main reasons for independent state constitutional analysis. One is that the decisions of the United States Supreme Court, especially in the area of search and seizure, are often fraught with awkward logic and are as unstable as the Supreme Court's membership. Another is that each state's judiciary is independently responsible to safeguard the rights of citizens under the state constitution.[20] The other is that, from a defendant's perspective, there is nothing to lose and everything to gain.

For the first four reasons, the Oregon Supreme Court has frequently departed from federal precedent.[21] In particular, in Oregon, contrary to the federal position, probable cause means probable cause,[22] rather than fair probability or substantial chance.[23] Evidence obtained by police officers in reliance on a search warrant subsequently found unsupported by probable cause is routinely excluded in Oregon.[24] Rather than base the exclusionary rule on a speculative theory of deterrence, Oregon courts deny "the government the fruits of its transgressions against the person whose rights it has invaded ... to preserve that person's rights to the same extent as if government's officers had stayed within the law."[25] More precisely, the Oregon Supreme Court has looked "to the character of the rule violated in the course of securing the evidence when deciding whether the rule implied a right not to be prosecuted upon evidence so secured."[26] Oregon's personal rights rationale, in contrast to federal deterrence theory, necessarily leads to the exclusion of evidence obtained pursuant to a statute subsequently found unconstitutional.[27]

In Oregon and across the country, countless state constitutional claims inherent in search and seizure cases await appellate recognition. In making state constitutional claims, instruct the court how to analyze the provision at issue and explain why the claim deserves recognition.[28] To that end, relentless research and independent judgment will go far. In the empowering words of Justice Hans Linde:

> What the life of the law of search and seizure needs is more logic, not more experience. . . The rule that searches must be judicially authorized whenever possible and that warrantless searches are extraordinary departures from the rule deserves to be more than a comforting fable (because the primary) source of the governing premises remains the (state) constitutional guarantee of a judicial warrant ... not what judges write about it. The guarantee will remain for future judges to apply, as long as the people do not choose to amend the constitution to sacrifice that guarantee.[29]

In sum, beyond the battered, beaten, and all but shredded federal *Constitution*, the promises of those who framed our state constitutions, until amended, remain intact.

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FOOTNOTES

[1]U.S. CONST. preamble provides: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

[2]*Katz v. United States*, 389 U.S. 347, 357 (1967).

[3]*Illinois v. Gates*, 462 U.S. 213, 238 (1983). At one point, the Court asserted that "probable cause requires only a probability or substantial chance of criminal activity." *Id.* at 243 n.13.

[4]Webster's New World Dictionary of the American Language 1132 (2d college ed. 1970).

[5]*Gates, supra* note 3 at 241.

[6]*Id.* at 236.

[7]*Franks v. Delaware*, 438 U.S. 154 (1978), describes the hoops a defendant must jump through in order to challenge a warrant affidavit sufficient on its face:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly or intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. *Id.* at 155-56.

[8]*United States v. Leon*, 468 U.S. 897, 926 (1984).

[9]This is so even though the Court has held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

[10]*Illinois v. Krull*, 107 S.Ct. 1160, 1167 (1987). The Court's holding provides politically pressured legislatures with a grace period during which the police may freely perform unreasonable searches and creates a positive incentive to promulgate unconstitutional laws which may affect thousands or millions of citizens, given that it is not apparent how much constitutional law a reasonable police officer is expected to know. *See Id.* at 1175-77 (O'Connor, J., dissenting).

[11]Nevertheless, commentators obsessively contemplate criminal defendants' constitutional crisis. *See, e.g.*, THE BURGER COURT: THE COUNTERREVOLUTION THAT WASN'T (V. Blasi ed. 1983).

[12]OR. REV. STAT 86.040 (1987).

[13]Justice Hans Linde is quite possibly the primary instigator of the burgeoning state constitutional revolution. For his visionary analyses of a "New Federalism," see *Linde, Without "Due Process"—Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); Linde, Book Review, 52 OR L. REV. 325 (1973) (reviewing B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (2 vols. 1971); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT L. REV. 379 (1980); Linde, E Pluribus: *Constitutional Theory and State Courts*, 18 GA L. REV. 165 (1984).

For the analyses of other thoughtful commentators on the trend toward a "New Federalism," *see Symposium: The Emergence of State Constitutional Law*, 63 TEX.L. REV. 959 (1985); Abrahamson, *Reincarnation of State Courts*, 36 SW.L.J. 951 (1982); Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.F. 371 (1984); O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981); Pollack, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts*, 59 NOTRE DAME L. REV. 1118 (1984); Welsh, *Whose Federalism? The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819 (1983); Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court's Reasoning and Result*, 35 S.C.L. REV. 403 (1984); Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 168 (1983); Note, Developments in the Law—*The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1331 (1982).

For a selection of 1970's analyses on this trend, see Willner, *Constitutional Interpretation in a Pioneer and Populist State*, 17 WILLAMETTE L. REV. 757 n.2 (1981).

[14]*Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123, 126 (1981) (Linde, J.). Oregon Supreme Court Associate Justice Wallace P. Carson, Jr., cogently summarized the underlying rationale of the Oregon rule as well as the application of it in a speech to the Oregon Criminal Defense Lawyers Association on March 24, 1983. For a slightly revised version of the speech, see Carson, "Last Things Last": A Methodological Approach to Legal Argument in State Courts, 9 WILLAMETTE L. REV. 621 (1983).

[15]See *Michigan v. Long*, 463 U.S. 1032 (1983); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

[16]See *Collins & Gaile, Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U.CIN.L. REV. 317 (1986); Collins, Gaile & Kincaid, State *High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 14 HASTINGS CONST.L.Q. 599 (1986). *Cf. Delaware v. Van Arsdall*, 475 U.S. 673, 689-780 (1986) (Stevens, J., dissent-

U.S. 673, 689-780 (1986) (Stevens, J., dissenting).

[17]A striking example of the Oregon Supreme Court's willingness to independently analyze a state constitutional counterpart to an amendment of the federal Constitution other than the fourth is found in an obscenity case called *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987).

[18]See *Carson, supra* note 14, at 647-48, 652. "It is fiction too long accepted that provisions in state constitutions textually identical to the *Bill of Rights* were intended to mirror their federal counterpart. The lesson of history is otherwise: the *Bill of Rights* was based on corresponding provisions of the first state constitutions, rather than the reverse." 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 383 (1971).

[19]*See supra* text accompanying note 14.

[20]In response to an argument that textual similarities between the Oregon and United States *Constitutions* ought to beget similar results, Justice Linde responded:

Diversity is the price of a decentralized legal system, or its justification, and guidance on common issues may be found in the decisions of other state courts as well las in those of the United States Supreme Court. The state argues, correctly, that diversity does not necessarily mean that state constitutional guarantees always are more stringent than decisions of the Supreme Court under their federal counterparts. A state's view of its own guarantee may indeed be less stringent, in which case the state remains bound to whatever is the contemporary federal rule. Or it may be the same as the federal rule at the time of the state court's decision, which of course does not prevent that the state's guarantee will again differ when the United States Supreme Court revises its interpretation of the federal counterpart. The point is not that a state's constitutional guarantees are more or less protective in particular applications, but that they were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics. State courts cannot abdicate their responsibility for these independent guarantees, at least not unless the people of the state themselves choose to abandon them and entrust their rights entirely to federal law.

State v. Kennedy, 295 Or. 260, 270, 71, 666 P.2d 1316, 1323 (1983) (citations omitted).

[21]*See, e.g., State v. Boyanovsky*, 304 Or. 131, 743 P.2d 711 (1987) (rejecting dictum concerning sobriety checkpoints in *Delaware v. Prowse*, 440 U.S. 648 (1978); *State v. Brown*, 301 Or. 268, 721 P.2d 1357 (1986) (revising the "automobile exception" to the warrant requirement set forth in *United States v. Ross*, 456 U.S. 798 (1982); *State v. Atkinson*, 298 Or. 1, 688 P.2d 832 (1984) (rejecting warrantless noninvestigatory inventory holding in *South Dakota v. Opperman*, 428 U.S. 364 (1976); *State v. Caraher*, 293 Or. 741, 653 P.2d 942 (1982) (rejecting the federal standard for searches incident to arrest set forth in *New York v. Belton*, 453 U.S. 454 (1981). *Cf. State v. Dunning*, 81 Or. App. 296, 724 P.2d 924 (1986 (adhering to the reformulation in *State v. Montique*, 288 Or. 359, 605 P.2d 656 (1980) of the framework for analyzing the sufficiency of an affidavit in support of the application for a search warrant developed in Aguilar v. Texas, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), while implicitly rejecting the United States Supreme Court's abandonment of the *Aguilar-Spinelli* framework in *Illinois v. Gates*, 462 U.S. 213 (1983)).

[22]*See State v. Anspach*, 298 Or. 375, 380-81, 69 P.2d 602, 605 (1984) (holding that the "probable cause requirement means that the facts upon which the warrant is premised must lead a reasonable person to believe that seizable things will probably be found in the location to be searched").

[23]*See supra* note 3.

[24]See *State v. Valentine/Durroch*, 264 Or. 54, 504 P.2d 84 (1972).

[25]*State v. Davis*, 295 Or. 227, 234, 666 P.2d 802, 806-07 (1983). The *Davis* court did not mince words in criticizing the deterrence rationale for the exclusionary rule.

[26]*Id.*, at 235, 666 P.2d at 807. Thus, Oregon does not recognize the good faith exception to the exclusionary rule adopted in *United States v. Leon*, 468 U.S. 897 (1984).

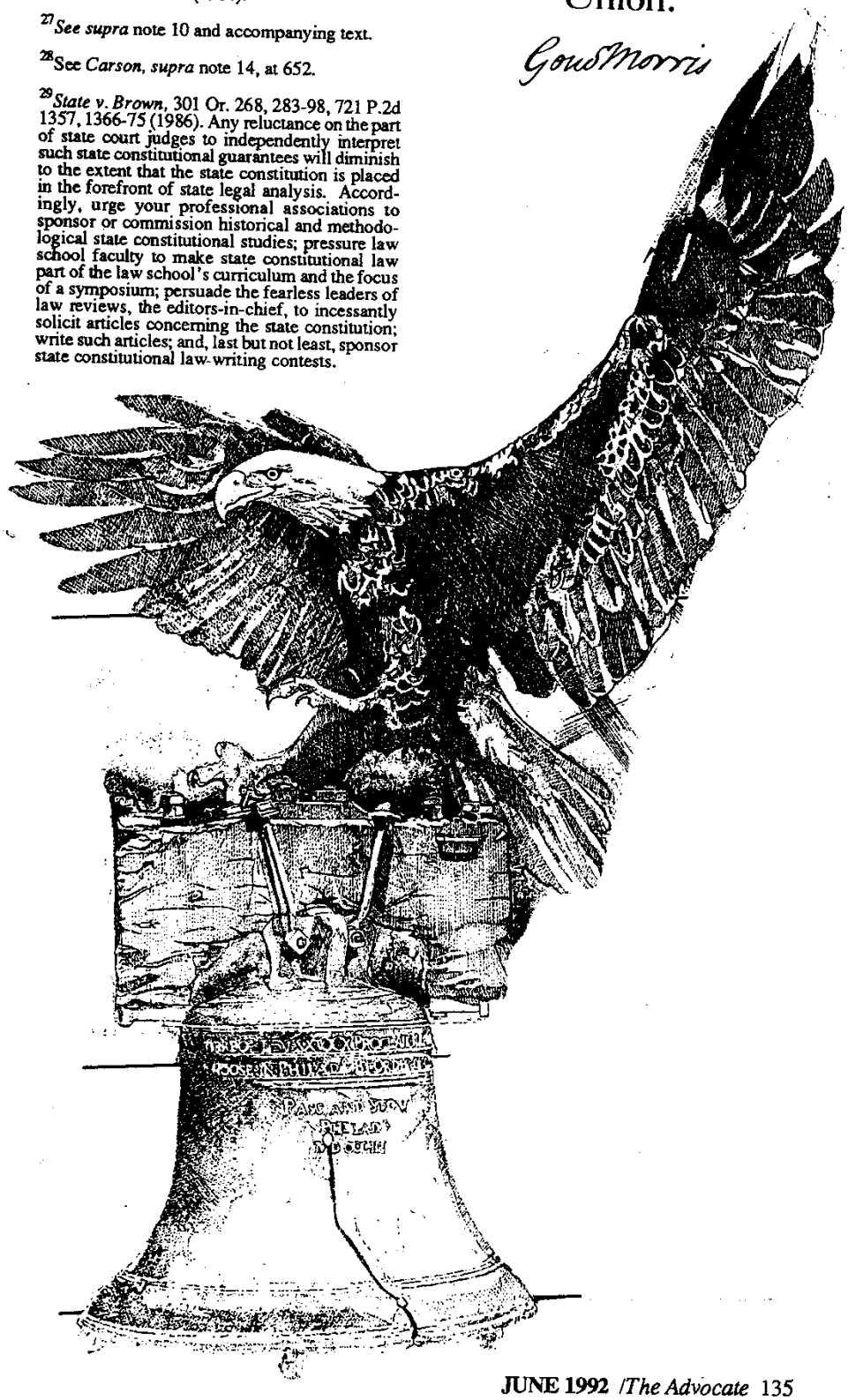
[27]*See supra* note 10 and accompanying text.

[28]See *Carson, supra* note 14, at 652.

[29]*State v. Brown*, 301 Or. 268, 283-98, 721 P.2d 1357, 1366-75 (1986). Any reluctance on the part of state court judges to independently interpret such state constitutional guarantees will diminish to the extent that the state constitution is placed in the forefront of state legal analysis. Accordingly, urge your professional associations to sponsor or commission historical and methodological state constitutional studies; pressure law school faculty to make state constitutional law part of the law school's curriculum and the focus of a symposium; persuade the fearless leaders of law reviews, the editors-in-chief, to incessantly solicit articles concerning the state constitution; write such articles; and, last but not least, sponsor state constitutional law-writing contests.

"We the People of the United States, in Order to form a more perfect Union."

Gouv Morris



Importance of Civil Liberties to the FBI

Constitutional Limits on Police Authority

I want to take this opportunity to communicate about an issue that is very important to me and to everyone at the FBI—the importance of civil liberties. And then, I want to give you a better understanding of the challenge that the FBI faces: balancing the use of sensitive investigative procedures that penetrate criminal organizations with the rights of the individual.

I begin with a story about a city in southern Florida that is being torn apart by drugs. In Miami, drug dealers can be found everywhere, violent crime is rampant, young people despair of ever getting out of their situations, and older people fear walking the streets at night. The FBI decided to do something about it.

In mid-1987, agents from our Miami field office began an undercover drug operation by setting up a electronics store in Hialeah, Florida. These undercover agents, knowing that one of the vulnerabilities of drug traffickers is the fact that they must communicate with each other, were able to gain the confidence of a number of Colombian drug traffickers by selling them beepers, cellular phones, navigational devices, and short-wave radios. Through the use of sensitive investigative techniques—informants, electronic surveillance, and undercover operations—the FBI was able to obtain information about drug shipments. We determined the locations of cocaine-laden freighters and sailboats in the Caribbean and the Gulf of Mexico which were heading toward the United States.

As a result of this investigation, 92 people in the United States and abroad have been indicated. But, even more importantly, we severely disrupted the ability of these Colombian drug cartels to transport and distribute their drugs in the United States.

INVESTIGATIVE TECHNIQUES MUST BE LAWFUL

We could not have done this without the use of sensitive investigative techniques. Today, I'd like to reflect on some of these techniques—what they are and how and why we use them; how we balance our use of them against the privacy rights of individuals, and what successes we've had with them.

As Americans, we are offended by any intrusion into our private lives. We don't want our telephones tapped. We don't want to be watched as we go about our daily business. We don't want to be searched.

But we get angry if our society is not protected from those who want to do it harm. We don't want terrorists to kidnap or kill innocent people. We don't want spies to sell our nation's secrets to our enemies. We don't want drug dealers ruining the lives of our children.

How can the FBI—which is charged with enforcing the federal laws that protect our society—bring terrorists, spies, and drug dealers to justice and, at the same time, protect the rights and freedoms of the individual? I think the answer is clear: Through the *lawful* use of sensitive investigative techniques.

I know that some people wonder why we need to use these techniques. Why not just do what the FBI has done for years—interview witnesses, search crime scenes, physically observe a suspect until he or she is caught in the act. Well, these more traditional investigative techniques *may be* enough to catch bank robbers, kidnapers, can thieves, and the like.

But, what happens if there are no witnesses to question, no crime scene to search, and no suspects to follow? Who do you question about a Colombian drug trafficker? What physical evidence does a corrupt public official leave behind? And, how do you even begin to develop serious suspects of a bombing if a number of terrorist groups claim responsibility for the deed?

Today, criminals are much more sophisticated than their counterparts of 40 or 50 years ago. Gone are the days of Bonnie and Clyde and John Dillinger, when most criminals were within the reach of the arm of the law. Today's criminals insulate themselves from the law by surrounding themselves with others who do their bidding for them. Today's criminals have also taken advantage of the advances in technology and now possess cellular telephones, beepers, and the like.

We are dealing with a whole new class of criminals, criminals like the terrorist and the drug kingpin, both of whom were virtually nonexistent 40 or 50 years ago. These new types of criminal organizations often times can't be penetrated by our more traditional investigative techniques. We need techniques that will reach into these criminal enterprises at their highest levels.

I'd like to focus on 3 of these techniques that facilitate our mission to reach into the upper echelons of these criminal organizations— 1) informants, 2) court-authorized electronic surveillance, and 3) undercover operations.

INFORMANTS

First, a few words about informants. Informants are called the single most important investigative tool in law enforcement. The greatest problem in solving a crime is knowing who committed the crime, and this is where the informant is important. The word "informant" sometimes has a negative connotation, but the FBI informant category includes any individual who willingly provides information of a general criminal nature and requests confidentiality. The motivation of these individuals may be moral, patriotic, or self-serving; but, the end result of informant cooperation solves cases and brings criminals to justice.

We use informants to get information on criminal activity; we use them to recover stolen property, to locate wanted persons, and to detect crimes in the planning stages. Above all, we use informants to put our undercover agents in contact with criminal organizations.

How do we choose our informants? Obviously with great care, since we can—and have—had some backfire on us. First, we look for someone in a position to furnish information or provide operational assistance, and second, we look for someone who is willing to help. I want to emphasize that we don't use informants indiscriminately. If we can obtain the same information in another, less intrusive manner, we generally do.

The FBI protects its informants by keeping their identities secret, but we also make sure that each informant is operated in strict compliance with attorney general guidelines. We keep records of what the informants have been instructed to do, what they have done, what they have been paid, and what they have produced. We regularly check the informant's information to make sure the individual is truthful and reliable, and we periodically review the informant's file to ensure the informant is being operated in compliance with FBI rules and procedures as well as the attorney general guidelines.

FBI informants are not used by the FBI to circumvent legal or ethical restrictions. They are given specific instructions not to participate in acts of violence, use unlawful techniques to obtain information, or initiate a plan to commit criminal acts. They are advised that if they violate our rules, they will be subject to prosecution by either federal or local authorities.

Informants work. Strategically-placed informants have been at the core of virtually every major long-term organized crime, drug, white-collar crime, and domestic terrorism investigation conducted by the FBI over the past few years. For example, in the La Cosa Nostra organized crime "commission" case of several years ago, we were able to obtain indictments of the leadership of 5 New York organized crime families. How did we reach this leadership? From evidence that came from court-authorized electronic surveillances; and from informants who provided us with the information we needed to show probable cause in order to get the electronic surveillances in the first place.

Also, in a 1987 case I'm sure you're all familiar with, the FBI was able to arrest a Lebanese terrorist in international waters in the Mediterranean because of the assistance of an informant. As you may recall, this terrorist was an alleged participant in the hijacking of a royal Jordanian airliner in Beruit, Lebanon, which held a number of U.S. nationals. Without the use of an informant, he would probably still be at large.

Incidentally, the arrest of this terrorist marked the first time that an individual was arrested outside the United States and returned for prosecution to the United States for a violation of recently-passed extraterritorial legislation. This legislation gave the FBI extended jurisdiction in certain terrorism matters and, among other things, made it a criminal offense to take a U.S. person hostage during a terrorist act.

ELECTRONIC SURVEILLANCE

Now, I'd like to turn to the use of court-authorized electronic surveillance, one of the most effective and valuable techniques used in both criminal and national security investigations.

With Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and the addition of the Electronic Communications Privacy Act of 1986, Congress provided the comprehensive statutory basis for using court-authorized electronic surveillance in investigating violations of certain major federal criminal statutes. These violations include organized crime activities; murder, kidnaping, robbery, or extortion; obstruction of justice; hostage-taking; mail fraud; and the manufacture of, or trafficking in, narcotics, marijuana, or other dangerous drugs.

However, since electronic surveillance is such an intrusive technique, we must meet very stringent requirements and show probable cause that evidence of criminal activity will be intercepted by it before a federal judge will approve the application. And, we use it *only* in instances where other investigative techniques would not or could not work.

The case agent in an FBI field office prepares the affidavit in support of an application for the principal legal advisor in the FBI field office, by the U.S. Attorney's Office, and by supervisory personnel in the field office. If everything is in order, it is then sent to FBI Headquarters in Washington. At headquarters, our Legal Counsel Division, Criminal Investigative Division, and attorneys at the Department of Justice (DOJ) scrutinize every affidavit in support of the application. We then refer the application, including the affidavit, to the Attorney General, or his designee, for authority to file it in federal court. The application is then submitted by a U.S. Attorney to a District Court Judge. When the application involves particularly sensitive circumstances, my special assistants and I also carefully review and approve it.

Once the application is authorized by the federal judge, it is good for up to 30 days, and we prepare reports periodically to keep the judge abreast of what is happening. We must reapply for extensions, if we need them, every 30 days.

Title III Electronic Surveillance has a number of safeguards built in to the statute, including a requirement to discontinue the interception during a non-criminal conversation and when attorney-client privilege might be involved. These minimization measures protect the individual's privacy and maintain a proper standard of fairness. The application and the affidavit submitted by the FBI Title III Electronic Surveillance must include a description of the minimization measures that the bureau plans to take.

A good example of the effectiveness of court-authorized electronic surveillance is the recent case concerning alleged bribery and fraud in the Pentagon's procurement process.

This 2-year investigation, conducted jointly by the FBI and the Naval Investigative Service, made extensive use of electronic surveillance. As a result of this surveillance, we were able to identify individuals involved in improper dealings between consultants, some defense contractors and certain government officials. The first indictments are guilty pleas in the case were handed down last month, and more are expected.

Up to now, I've been talking about using these sensitive investigative techniques in criminal investigations. I just wanted to let you know that these same techniques, when used in foreign counterintelligence investigations, are managed much the same way. The restrictions and guidelines which the bureau must follow in cases of national security are as equally stringent because of the very nature of foreign counterintelligence investigations. For example, when seeking authorization for electronic surveillance of U.S. citizens under the Foreign Intelligence Surveillance Act of 1978, we must establish, to the satisfaction of a special federal court, that the subject is an agent of a foreign power.

UNDERCOVER OPERATIONS

The third type of investigative technique I'd like to talk about is the undercover operation. Over the years, undercover operations have become very glamorized, but our undercover agents are trained professionals who work long and hard to infiltrate criminal organizations. It's not easy to associate with criminals every day for extended periods of time. Our agents also face a great deal of danger. But, because of their work, we are able to reach into the upper echelons of criminal organizations, bring their leaders to justice, and put them out of business.

An undercover agent can provide first-hand testimony in a court of law relating

to the nature and scope of the criminal activity, the extent of involvement of various offenders, and the location of the evidence. This testimony, along with the physical evidence and the information obtained from electronic surveillances, is an unbeatable combination in the courtroom.

The use of undercover agents who can then testify in court about a criminal enterprise increases the chance of conviction. That means that it's not always necessary to offer immunity or reduced charges to defendants or to use convicted felons or former confederates in order to prosecute higher echelon subjects. It also means that our informants often won't have to testify in court, so that their identities remain secret, they will be safe from physical harm, and they can continue to provide us with information on other matters.

As with other sensitive investigative techniques used by the FBI, undercover operations are conducted under strict Attorney General guidelines and are subject to many levels of FBI approval before they can actually be implemented. And, like the use of informants and court-authorized electronic surveillance, undercover operations are used only if more traditional investigative techniques would not or could not work.

In accordance with the Attorney General guidelines, there are 2 kinds of undercover operations conducted by the bureau. One type, which is approved at the field office level by the special agent in charge, or SAC, involves the gathering of information on a limited basis with limited funds. The second type, which involves a substantial expenditure of money and/or "sensitive" circumstances, must be approved by headquarters.

The approval process for an undercover operation is very stringent and must be followed every time an operation is proposed. It begins in the field, when the undercover scenario is prepared. As I said earlier, if the operation involves a limited amount of information gathering and funds, the SAC can approve it. But, any other undercover operation scenario must be forwarded from the SAC to FBI headquarters.

Once at headquarters, the operation scenario goes to the Criminal Investigative Division, which reviews it and then submits it to our Undercover Operations Review Committee. This committee is made up of representatives from the Criminal Investigative Division, the Legal Counsel Division, and attorneys for the Department of Justice. These representatives carefully assess the benefits of the undercover operations, as well as a number of other factors—such as the risk of invasion of privacy, the risk of harm to private individuals or undercover employees, and the suitability of undercover employees of cooperating private individuals participating in the activity.

The committee then forwards its recommendations to Floyd Clarke, the head of our Criminal Investigative, for final approval. If, however, the operation involves particularly sensitive circumstances, the committee forwards its recommendations to me directly for my approval.

The FBI has had many, many successful undercover operations that have struck at the very heart of some criminal organizations. One example I'd like to share with you is a 3-year money-laundering investigation we called "Cashweb/Expressway." The purpose of this investigation was to identify and gain enough evidence to prosecute individuals at the highest levels of 3 money-laundering syndicates operating in South America and the United States.

During "Operation Cashweb," FBI undercover agents operating out of a number of FBI field offices were able to work their way into the inner-sanctum of these Colombian drug-trafficking organizations by gaining the confidence of their members. Our undercover agents were asked to transfer almost one-half billion dollars in drug proceeds to Colombia. They actually laundered approximately $175 million.

As a result of the "Cashweb" investigation, the FBI arrested the hierarchy of 3 major Colombian money-laundering organizations. We also seized 2,500 pounds of cocaine, 22,000 pounds of marijuana, and $25 million in cash.

We could not have concluded this investigation successfully without the use of undercover agents who had direct contact with members of these drug cartels.

ACCOUNTABLE TO THE PUBLIC

When using any sensitive investigative technique, whether we are dealing with criminal activity or threats to national security, the FBI is always fully accountable to the public through the provisions of the Freedom of Information-Privacy Acts, through the close scrutiny of the media, and through various Congressional Oversight Committees. My assistants and I have testified and will continue to testify on Capitol Hill on the value of using sensitive investigative techniques. We are also willing to listen to recommendations made by these committees on how we can better serve the public.

TRAINING ON *BILL OF RIGHTS*

And, in order to ensure that these sensitive investigative techniques continue to be used by our agents in a fair and lawful manner, we provide a wide variety of legal training to our special agents. Our new agents are required to take legal courses on, among other things, the *Constitution* and the *Bill of Rights*. These courses are designed to sensitize the agents to the constitutional limits on their authority.

Our special agents in the field, as well as those at FBI headquarters, regularly attend legal seminars, in-services, and refresher courses on the latest legal issues.

Here in the United States, as we have for over 200 years, we pride ourselves on the rights our *Constitution* guarantees each citizen. Many other nations do not have such rights. We also pride ourselves on the knowledge that we are able to live freely and safely in our society.

The FBI is responsible for enforcing the federal laws that protect our society without infringing on the rights of the individual. How can we strike a balance? By conducting lawful investigations—by following closely our statutes, guidelines, rules, and regulations; by striving for fairness; and by seeking to always balance the concerns of liberty and order.

WILLIAM S. SESSIONS
Director
Federal Bureau of Investigation
Washington, D.C. 20535

Remarks made before the Harvard Law School Forum, Cambridge, Massachusetts, February 8, 1989

William S. Sessions received his J.D. from Baylor University School of Law. He was appointed U.S. Attorney for the Western District of Texas in 1971. He was U.S. District Judge in 1974 and became Chief Judge of that court in 1980. He resigned that position on November 1, 1987 to become Director of the F.B.I.

AMERICA'S UNFUNNIEST HOME VIDEO

After the third or fourth time I watched the national broadcast of the home video showing Los Angeles police officers using an unarmed suspect for billy club practice, I have to confess that my defense lawyer instincts book over and I found myself less interested in the broken bones of the alleged victim and more interested how the criminal defense lawyers representing the officers were going to pull this one out of the fire.

As any defense lawyer knows, representing a police officer charged with a crime allegedly committed while on duty is usually a piece of cake. Most often, juries are willing to accept a police officer's version of events regardless of the number of other witnesses or the implausibility of the account. How many times have jurors sat with straight faces while an officer testifies in a resisting arrest case along the lines of the following: "Then the suspect threw his head at my fist and thrust his stomach into my knee. As I held up my billy club to defend myself, the suspect backed into it at a rapid rate of speed causing me to be fearful for my life." In a drug case, the scenario goes something like this: "As I stood at the foot of the suspect's driveway approximately one quarter of a mile from the house, I detected the distinct odor of light green growing marijuana emanating from the rear upstairs bedroom, which I recognized from my experience to be between 20 and 25 shoots approximately four to five days old."

But for the home video, the Los Angeles officers' defense would be the simple and straightforward "Swarm of Killer Bees" defense: "As the suspect exited his vehicle he was suddenly attacked by a swarm of Killer Bees which crossed the border near Tijuana four days earlier. At great risk to themselves, officers attempted to interdict the bees using the safest weapons available under the circumstances - their billy clubs." When used properly, this defense has the additional advantage of a likely commendation for bravery and can form the basis of a later disability claim for injury to the officer's rotator cuff.

With the video, however, this is clearly a case worthy of the skills of John Wilkes (whose exploits in successfully defending the hopeless case are chronicled in issues of *The Champion*). The video was unfortunately of excellent quality, having been shot with the same type of low lux camera made famous by Rob Lowe. You could almost hear the wheels of the defense lawyer's brain as they obtained repeated continuances - for arraignment, no less. Having occasionally found myself on the wrong side of the hopeless case, I found myself developing a deep professional respect for the defense team.

"What could they possibly be up to?" I asked myself. Were secret negotiations underway for dismissal of charges in exchange for testimony against Daryl Gates? Were they doing the "Rope a Dope" hoping the continued pretrial publicity would form the basis of changing venue to Little Rock, Arkansas? Were they simply stalling, hoping for help from on high?

Within days my question was answered. It came from the United States Supreme Court which ruled, in a landmark reversal of prior cases, that coerced confessions may, under some circumstances, be proper. The defense was now as clear to me as the proverbial diamond bullet to the brain. The officers were simply questioning the suspect. Of course this was being done with a little help from a long shoddy shaft of lead-filled, steel-tipped, North Carolina hickory, which they affectionately refer to as "The Interrogator." Now that California has adopted a federal interpretation of its state's constitution, they might even get "good faith" exception instructions from the right judge. What initially looked like a hopeless case was now a dead-bang winner. Even John Wilkes would be proud.

This could only happen in Los Angeles, right? Wrong. We are told that we live in the great Northwest where "police bashing" is where the police are the bashees as opposed to the bash-ors. We are told that there is no need to watchdog the police departments to make certain that the wrong message isn't sent to the few renegade officers who give a bad name to the majority who serve and protect with honor and distinction. We are told that there is no need to listen to citizens who provide credible accounts of how a few bad officers with a vocabulary apparently limited to the phrase "assume the position," stop and frisk people for little more probable cause than the color of their skin.

There is a serious potential problem for police misconduct everywhere, and criminal defense lawyers know this better than most. The problem is only made worse by police commissioners like Daryl Gates who publicly stated that casual drug users should be taken out and shot, and that the reason so many Blacks die from officer choke holds is that their necks are different from "normal people."

Please don't get me wrong. I have the highest regard for the great majority of police officers. In addition to being responsible for most of our business, their job is a most difficult one which is not made easier by a few high profile bully boys. If history has taught us anything about law enforcement it's that it is unwise to avoid facing up to the reality of police misconduct. The few officers who are the problem will see this as a "green light" or "wink" from elected officials to use whatever means necessary to deal with crime. It is at this point that the police become part of the problem instead of the solution. Criminal defense lawyers have a large role to play in seeing that this doesn't happen here.

MIKE FROST
WACDL President

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PRIVACY AND THE BILL OF RIGHTS

> Thus, like the formal Vice, Inequity, I
> moralize two meanings in one word.
> —Shakespeare,
>
> *Richard* III, Act III, Scene I

Taking its cue from Shakespeare's *Richard*, the law has moralized not two but many meanings in the one word, "privacy." Much of the debate about the law of privacy stems from the seemingly inexhaustible elasticity of the word, a word that verges on meaninglessness because it has been used to mean so many different things.

In *Anderson v. Fisher Broadcasting Co.*[1], privacy was taken to denote, "a personal or cultural value placed on seclusion or personal control over access to; places or things, thoughts or acts."[2] *Anderson* involved a tort claim, not a criminal case; and invited a discussion of privacy as a concept in civil law. Justice Linde reviewed the second Restatement of Torts, which followed the work of its original Reporter, Dean Prosser,[3] and concluded that "invasion of the right of privacy" mixed four distinct wrongs, related not by similarity of defendants' acts but only by "the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others."[4] The Restatement defined these distinct wrongs as "intrusion upon seclusion" (Section 652B), "appropriation of name or likeness" (Section 652C), "publicity given to private life" (Section 652D), and "publicity placing person in false light" (Section 652E).

United States v. Westinghouse Elec. Corp.,[5] describes privacy as protecting two kinds of interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[6] *Commonwealth v. Scagliotti*,[7] defined privacy, in the context of a sodomy case, as "removal from the public view and elimination of the possibility that the defendant's conduct might give offense to persons present in a place frequented by members of the public for reasons of business, entertainment, or the like."

For the Texas Court of Appeals, adjudicating a defamation claim, privacy meant "the right of a person to be left alone, to live a life of seclusion and to be free from any unwarranted publicity."[8]

Davis v. Bucher[9] afforded the Ninth Circuit an opportunity to canvas the law of privacy in the context of an inmate's claim that a correctional officer had displayed the inmate's "intimate photographs" to others. The court's review of the privacy cases lead it to conclude that the "contours [of the right to privacy] remain less than clear."[10]

Even if there were not so much difficulty merely in agreeing on the meaning of privacy, there would be objections to its use as a term of art in the law. In the words of Robert Bork, "There is, of course, no general constitutional right to be let alone, or there would be no law;" this is because "[a] general right of freedom—a constitutional right to be free of regulation by law—is a manifest impossibility. Such a right would posit a state of nature, and its law would be that of the jungle."

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As we shall see *infra*, a number of state constitutions provide in express terms a general right to be let alone, and the states which boast of such constitutional provisions manage to carry on organized and civilized societies, not particularly more or less jungle-like than those of their sister states. Perhaps more importantly, there is a substantial body of United States Supreme Court law holding that the United States *Constitution* recognizes certain aspects of human life as being so inherently personal, so necessarily secluded; in short, so private, that they fall within a realm into which, in the language of the old common law, the King's writ runneth not.

PRIVACY IN THE SUPREME COURT

Although the concept of personal privacy, by whatever name described, has been addressed by the United States Supreme Court in opinions going back at least as far as 1891, the controversy identified with the "right of privacy" is of relatively recent vintage. That controversy reached its apex at the confirmation hearings on the nomination of then-Judge Robert Bork to the United States Supreme Court. Bork, both in his private writings and his pronouncements from the bench, expressed (and continues to express) intemperate disdain for the notion that a right of privacy is to be found in the United States *Constitution*. The necessary concomitant of his position—the rejection, for example, of the *Constitution* as the source of any claimed right to an abortion—likely cost him his place on the High Court.

Shortly after his nomination was withdrawn, Bork left the bench and expressed his views in a book entitled *The Tempting of America* (Macmillan Free Press, 1990). In his book, Bork discusses in detail his philosophical objections to the right of privacy as constitutional doctrine. Contrasting the leading Supreme Court pronouncements on privacy with Bork's acerbic criticisms proves a serviceable heuristic device.

Like most students of the modern development of privacy, Bork begins with *Griswold v. Connecticut*[11] (this subchapter of his book is entitled, "The Right of Privacy: The Construction of a Constitutional Time Bomb"). **Griswold** involved a challenge to an old Connecticut statute making it a crime for anyone (even mar-

ried couples) to use, and for doctors to prescribe, contraception of any kind.

Justice Douglas, writing for the majority, canvassed prior opinions involving claims arising under the *Bill of Rights*, and concluded that the High Court had sustained many such claims even where the language of the applicable constitutional provision made no direct reference to the right asserted. Claims brought under the First Amendment, asserting, for example, the right to have one's children taught the German language in private school had been vindicated, even though the First Amendment says nothing whatever about education, children, or foreign languages.[12] From this, Justice Douglas deduced that, "specific guarantees in the *Bill of Rights* have penumbras, formed by emanations from those guarantees that help give them life and substance."[13]

The concept, if not the word, privacy, was often to be found in the penumbras and interstices of the *Bill of Rights*. In construing the Fourth and Fifth Amendments, for example, the Court had repeatedly referred to "the privacies of life" as being at the "very essence of constitutional liberty."[14]

In *Mapp v. Ohio*,[15] the Court found the Fourth Amendment to create a "right to privacy, no less important than any other right carefully and particularly reserved to the people."[16] Having concluded that a right to privacy is implied by the express provisions of the *Bill of Rights*, Justice Douglas had no difficulty concluding that the Connecticut statute was destructive of "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[17] Justice Goldberg, concurring for himself and two others, traced the history of the Ninth Amendment[18] and concluded that amendment was the constitutional source of the right of privacy, for the violation of which the subject statute was unconstitutional.[19] Justices Harlan and White concurred in separate opinions; Justices Black and Stewart dissented, finding no privacy guarantee in any provision or combination of provisions of the *Constitution*.

According to former Judge Bork, however, the *Griswold* case is not about any of the issues it purports to be about. Rather, "*Griswold* is more plausibly viewed as an attempt to enlist the Court in one side of one issue in a cultural struggle."[20] If by this he means, as he appears to, that *Griswold* was the result of a difference of opinion between certain Connecticut citizens whose views on contraception tended in one direction (Bork identifies the Catholic community) and certain other Connecticut citizens whose views on contraception tended in another direction (Bork identifies Yale civil libertarians), he may well be right. This tells us something about the genesis of the litigation, but nothing about the merits of the opinions, or about the right of privacy.

Judge Bork next takes on certain of the rhetorical devices employed by Justice Douglas in his opinion. Admittedly, the Justice may have gilded the lily, at one point declaiming, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[21] Overwriting in Supreme Court prose is a venal, not a mortal, sin, and surely not one on the basis of which Bork can hope to dismast Justice Douglas's reasoning.

Turning to the phrase for which *Griswold* is best remembered—that "specific guarantees in the *Bill of Rights* have penumbras, formed by emanations from those guarantees that help give them life and substance"—Bork concludes that "[t]here is nothing exceptional about that thought".[22] The problem, according to Bork, was that,

> None of the amendments cited, and none of their buffer zones, covered the case before the Court. The Connecticut statute was not invalid under any provision of the *Bill of Rights*, no matter how extended. Since the statute in question did not threaten any guaranteed freedom, it did not fall within any "emanation."[23]

This is a curious, and somewhat circular, bit of criticism. It begins by assuming its conclusion—that privacy is not a "guaranteed freedom". If by this Mr. Bork means that the right to privacy is not named or enumerated in the first eight amendments, his observation is very true and very banal. He seems to acknowledge that the penumbras or interstices referred to in *Griswold* will support the assertion of a "fundamental" (albeit not enumerated) right. Privacy, however, is not the *right* right. *Griswold* cites *Meyer*, which acknowledged a constitutional due process "right...to marry, establish a home and bring up children".[24] Thus the privacy right of a married couple to choose whether or not to beget children, free from arbitrary governmental interference, would seem to be less than controversial, even as a matter of constitutional doctrine. But it is too controversial for Mr. Bork.

Unsurprisingly, then, the next major case in the Supreme Court's privacy pantheon—*Roe v. Wade*[25]—registers off the far end of Bork's controversy meter. *Roe*, of course, was the first case in which the Supreme Court was asked to pass upon a woman's right to abortion; the High Court found such a right to exist, as a function of the constitutional right of privacy.

In Section VIII of his opinion in *Roe*, Justice Blackmun discussed the notion of privacy under the federal *Constitution*. "The *Constitution* does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R . Co. v. Botsford*[26] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the *Constitution*."[27]

Justice Blackmun then canvassed the cases tracing the roots of a right of privacy to various specific constitutional guarantees, including the First, Fourth, Fifth, Ninth and Fourteenth Amendments. These cases make clear that fundamental personal prerogatives, such as marriage and family choices, are included in this guarantee of privacy.

> This right of privacy...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[28]

To the same effect, see the concurring opinion of Justice Stewart at 168: " The *Constitution* nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the *Bill of Rights*." It was not only to prior Supreme Court precedent that Justice Blackmun gave consideration. A majority of lower courts that had considered the abortion issue had likewise concluded that the decision whether or not to continue with a pregnancy fell essentially within a woman's zone of privacy.[29]

"From the beginning of the Republic un-

til" the question in *Roe*, says Bork, "the moral question of what abortions should be lawful had been left entirely to state legislatures. The discovery this late in our history that the question was not one for democratic decision but one of constitutional law was...implausible...." This argument would have some weight if *Roe* overturned a prior line of authority holding that there was no right to privacy, or to abortions, implied by the *Bill of Rights*. But *Roe*, as Judge Bork knows full well, was a question of first impression. If another such question of first impression arises before the Supreme Court a month, a year, or 100 years from now, there will be no impediment to its justiciability simply because it did not arise before 1973.

Dismissing Justice Blackmun's 50-plus page opinion as bereft of "one sentence that qualifies as legal argument," Mr. Bork recurs to his concern for "our cultural wars". *Roe*, says Bork, is not really an exercise in judicial interpretation, but rather an expression of the Supreme Court's commitment to something Judge Bork deprecates as "untrammeled individuals." It may come as some news to defense attorneys that "untrammeled individualism" is a bad thing, and that the United States Supreme Court is committed to it; but Bork manages to make the locution "'untrammeled individualism" sound as exsufflicate as "the heartbreak of psoriasis."

Roe represented the next logical step in the development of a concept that had figured in United States Supreme Court jurisprudence for 80 years. That its doctrine was novel, and remains controversial, does not invalidate it as constitutional jurisprudence. Brown v. Topeka Board of Education was just such an extrapolation of existing law. In any event, although the existence of a right to abortion may depend upon the existence of a constitutional right of privacy, the existence of a constitutional right of privacy does not depend on the existence of a right to abortion. The overturning of Roe v. Wade was adumbrated in Webster v. Reproductive Health Services, ___US___ (July 3, 1989), and may be brought to fruition by a Supreme Court on which Justice Souter has replaced Justice Brennan. Whether abortion is a good thing depends on one's politics, philosophy, and theology; but if the overturning of *Roe* were to be taken as a repudiation of privacy as a constitutional principle, our lives and our constitutional law would be immeasurably impoverished.

Bowers v. Hardwick[30] involved a challenge to a Georgia statute criminalizing homosexual sodomy. In the Court's view,

> The issue presented is whether the Federal *Constitution* confers of a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.[31]

Justice White, writing for the majority, denied that previous Supreme Court authority in the area of privacy gave constitutional protection to private homosexual conduct.

> [W]e think it evident that none of the rights announced in those cases [i.e. cases dealing with privacy claims] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated....[32]

Judge Bork basically agrees with all this; but, just to be on the safe side, devotes over three full pages to criticism of Justice White's opinion, chiefly of Justice White's prose style. His real vitriol, however, Bork saves for the dissent.

Justice Blackmun, author of the *Roe* opinion, dissented for himself and three other justices.[33] The Supreme Court, said Blackmun, had construed the right of privacy along two lines: "First, it has recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make. *E.g., Roe v. Wade*....Second, it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged."[34] Bork states baldly, "Neither of these [rationales] withstands even cursory examination."[35]

The notion that certain decisions are private in the sense that they are "properly for the individual to make" is repugnant to Mr. Bork, because "[w]hat is proper is not an objective fact but a moral choice," which choice should not be made by the Supreme Court. Plucking a word out of context—here the word "properly"—is always a dangerous business; especially where, as here, the word is an ordinary one, not particularly central to the sentence in which it appears. Surely even Judge Bork would concede that *some* decisions are consigned to the individual and denied to government in any society aspiring to the title "democracy." Is it too much to suggest that some, if not all, of these decisions can be identified by reference to our *Constitution*, our Supreme Court jurisprudence, and our shared notions of what is implicit in the concept of ordered liberty?"[36] (There is, incidentally, no use protesting that, in our polyglot society, such notions were not shared, at least in substantial part, by all segments of our society, we simply could not exist as a society.) If it be conceded that such decisions exist, and further conceded that they can be identified, is there anything so wrong with Justice Blackmun using the shorthand "properly for the individual to make" to describe them?

Of course our jurisprudence is full of discussion of what decisions are properly reserved to the individual and protected from governmental intrusion. The Fifth Amendment identifies a freedom from self-incrimination. It says nothing about the entitlement of an individual, subject to custodial interrogation, to be informed of his right to remain silent; nor of the consequences of the waiver of that right; nor of the entitlement of that individual to be informed of his right to counsel; nor of the consequences of his inability to afford counsel. In *Miranda v. Arizona*, however, the Supreme Court determined that rights reserved to the individual under the Fifth and Sixth Amendments would be inert unless the individual in question understands that all "decisions [about] those rights...are properly for [him] to make."

Bork describes as "truly startling" Justice Blackmun's dictum that "a person belongs to himself and not others nor to society as a whole." This, says Bork, is "rampant individualism," "a position of extreme individualism."[37] Court watchers among the criminal defense bar have yet to notice this epidemic of individualism ravaging the Rehnquist court. Be that as it may, what is "truly startling" is that a former federal judge emphatically rejects the notion that, in our democracy, a person belongs to himself and not others nor to society as a whole. That the law imposes many obligations on each of us, as Mr. Bork reminds us, is hardly to say that each of us belongs to society as a whole. The principle advantage by which democracy recommends itself is that it requires each of us to cede the least part of our personal freedom and prerogatives in order to secure the greatest part. This has been fundamental democratic political theory at least since the time of John Locke.

Judge Bork is similarly unsatisfied with, "[t]he dissent's second line of argument, that a right of privacy attached because Hardwick's behavior occurred in his own home.... The Fourth Amendment...does not even remotely suggest that anything done in the home has additional constitutional protection."[38] This statement simply flies in the face of volumes of Supreme Court jurisprudence. Certainly the High Court has had no difficulty, in

recent years, ascribing a diminished expectation of privacy to places other than the home, on no other grounds than that only the home is entitled to the highest level of privacy. For example, in *California v. Carney*,[39] the Court determined that because a mobile home is more like a car than a house, the occupant's expectation of privacy was reduced. A man's car is not his castle.

Many Americans—lawyers and laymen alike—probably believe that what a man does in his own home is his own business, provided it harms no one else.[40] This principle, if it is a principle, ought not to protect Hardwick's conduct, says Bork, because, "[k]nowledge that an activity is taking place is a harm to those who find it profoundly immoral." To illustrate his point, Mr. Bork offers this hypothetical:

> Suppose...that on an offshore island there lived a man who raised puppies entirely for the pleasure of torturing them to death. The rest of us are not required to witness the torture, nor can we hear the screams of the animals. We just know what is taking place and we are appalled. Can it be that we have no right, constitutionally or morally, to enact legislation against such conduct and to enforce it against the sadist?[41]

Whatever the merits of this juicy hypothetical, conduct between sadists and helpless puppies can hardly be described as mutually consensual. By contrast, the Georgia statute for the violation of which Hardwick was arrested proscribes, on its face, mutually consensual oral sex between husband and wife in the "sacred precincts of [the] marital bedroom[...]."[42]

PRIVACY IN THE STATE COURTS

Many opinions, dissents, commentaries and snippets of dictum could boast of being the seminal contribution to the development of privacy law in state courts and constitutions. As early as 1928, in uplifting rhetoric that has been cited in untold numbers of cases, Justice Brandeis (sometimes identified as the father of the law of privacy) wrote:

> The makers of our *Constitution* undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect.... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[43]

Fifty years later, Justice William Brennan urged state judges to look to their own state constitutions for the vindication of those fundamental rights that the United States Supreme Court was increasingly unwilling to find in the federal *Constitution*.[44] To the extent that the development of the law of privacy in the state courts is merely a symptom or example of a larger phenomenon—the development of state constitutional rights as "rights of first resort" in state decisional law—Oregon Supreme Court Justice Hans Linde may fairly claim that his writings, both on the bench and in the literature, showed the way.[45]

Perhaps, however, it was the United States Supreme Court itself that told the state courts to develop the law of privacy as part of their own constitutional jurisprudence. In *Katz v. United States*,[46] the High Court warned that, "the protection of a person's general right to privacy—his right to be let alone by other people—is...left largely to the law of the individual States."

The states were not unwilling to respond. Florida is one of at least four states having its own express constitutional provision guaranteeing an independent right to privacy.[47] Another half-a-dozen state constitutions at least make some reference to privacy.[48]

T.W.

Although the Florida right of privacy has been part of the Florida *Constitution* since 1980,[49] important decisions construing that right have begun to appear in recent years.[50] In October of 1989, the state supreme court dropped a small bombshell called *In re: T.W.*[51] in which it held that the right of privacy rendered unconstitutional a statute requiring a minor to obtain parental consent before getting an abortion.[52] Unsurprisingly, the *T.W.* court began its analysis by canvassing the federal law on the subject, starting with *Roe*.

According to the Florida court, *Roe* acknowledged, "a right to privacy implicit in the Fourteenth Amendment [which] embraces a woman's decision concerning abortion. Autonomy to make this decision constitutes a fundamental right...."[53] Above and beyond federal constitutional guarantees, however, Florida's right to privacy, "is clearly implicated in a woman's decision of whether or not to continue her pregnancy. We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime...."[54] The court cited Professor Tribe for the principle that:

> Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when, and how one's body is to become the vehicle for another human being's creation; second, when and how—this time there is no question of "whether"—one's body is to terminate its organic life.[55]

The decision whether to obtain an abortion is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman.[56]

Having once concluded that the provisions of the Florida privacy guarantee insure far-reaching protection for a woman's abortion decision, it was a small matter to conclude that "even" minors share in the benefits of privacy. "The right of privacy extends to '[e]very natural person.' Minors are natural persons in the eyes of the law and '[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[57] In the court's view, neither the state's interest in the pregnant minor or her fetus, nor even a parent's interest in his or her pregnant child were sufficient counterweights to the constitutional principle of privacy.

BROWNING

In *In re: Guardianship of Browning*,[58] the privacy issue was not "whether, when, and how one's body is to become the vehicle for another human being's creation" as in *T.W.*, but was "when and how—this time there is no question of 'whether'—one's body is to terminate its organic life." In 1985, a then-competent Estelle Browning executed a declaration providing, *inter alia*:

> If at any time I should have a terminal condition and if my attending physician has determined that there can be no recovery from such condition and that my death is imminent, I direct that life-prolonging procedures be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying.

Some time later, Mrs. Browning suffered a massive stroke, rendering her entirely unable to care for herself. She was fed by means of a tube inserted directly in her stomach; in 1988, this gastrostomy tube was replaced by a nasogastric tube.

Nearly two years after Mrs. Browning suffered her stroke, her court-appointed guardian petitioned the court to terminate the nasogastric feeding and allow Mrs. Browning to die. Evidence adduced at the

ensuing hearing, including Mrs. Browning's "living will," a portion of which is excerpted above, clearly established that, at times when she was competent, Mrs. Browning stated her desire that her life never be artificially prolonged by such extreme measures as those to which she was now being subjected. Medical evidence established that death would occur within four to nine days were the nasogastric feeding tube removed; with the tube in place, Mrs. Browning might remain alive an additional year. Concluding that death was not "imminent" as that term is defined in Florida's "Life-Prolonging Procedures Act," the trial judge denied the guardian's application.

As the Florida Supreme Court saw it, the statute was inapplicable and "Mrs. Browning's fundamental right of self-determination, commonly expressed as the right of privacy, controls this case."[59] By privacy, Justice Barkett (the author of the *Browning* opinion) meant, "a fundamental right of self-determination subject only to the state's compelling and overriding interest."[60] The right to make choices pertaining to health, including the right to refuse unwanted medical treatment, was described as an "integral component of self-determination"; "we necessarily conclude that this right encompasses all medical choices."[61] A competent individual has the constitutional right to refuse medical treatment regardless of his medical condition.[62]

With the foregoing in mind, it was only necessary for the court to determine whether, in view of the undisputed incompetence of Mrs. Browning, and in light of her desires expressed at a time when she was undoubtedly competent, the guardian could exercise for Mrs. Browning the latter's right to forego medical treatment. This the court saw as a simple question. The guardian was fully authorized to exercise Mrs. Browning's right of privacy for her, subject to an important caveat:

> We emphasize and caution that when the patient has left instructions regarding life-sustaining treatment, the surrogate must make the medical choice that the patient, if competent, would have made and not one that the surrogate might make for himself or herself, or that the surrogate might think is in the patient's best interests.[63]

STALL AND *LONG*

Tommie Lynn Stall, Todd Long, and others, were charged with racketeering and other crimes arising out of a violation of Florida's obscenity statute. The statutory violations occurred through the showing, sale, distribution, and rental of allegedly obscene writings and videotapes. The trial court granted a pre-trial motion claiming that the Florida obscenity statute was unconstitutional as violative of the right to privacy. The intermediate appellate court reversed[64] and the stage was set for review by the Florida Supreme Court.[65]

The court began by recognizing a crucial distinction. Although "research discloses no Florida cases where the state prosecuted individuals merely for possessing obscene materials for their private use"[66] and although such a prosecution would be unconstitutional;[67] "this is not to say, however, that our privacy amendment was meant to protect those persons who deal commercially in obscenity." Before the right of privacy attaches, a reasonable expectation of privacy must exist. Although one may possess obscene material in one's home, the court found that there is no legitimate reasonable expectation of privacy in being able to patronize retail establishments for the purpose of purchasing such material. In support of this principle—the principle that the right to possess privately does not equate to the right to buy or sell publicly—the court excerpted from the lower court opinion under review:

> It is clear that Florida's right to privacy is broader than the federal right. However, it is not so broad that a person can take it with him to the store in order to purchase obscene material—even though he has the right to possess such material in the privacy of his home.[68]

Justice Barkett, author of the *Browning* opinion, dissented briefly, and not on privacy right grounds. For her, the problem was broader: the "basic legal problem with the criminalization of obscenity is that it cannot be defined." Although both the Florida and federal *Constitutions* require "criminal laws to unambiguously define the elements of a crime...this crime, unlike all other crimes, depends, not on an objective definition obvious to all, but on the subjective definition, first, of those who happen to be enforcing the law at the time, and, second, of the particular jury or judges reviewing the case."[69] Thus, according to Justice Barkett, the statute at issue was unconstitutional not on privacy right grounds, but on due process-notice requirement grounds.

Justice Barkett joined a second dissent, this one authored by Justice Kogan and running to some 30-plus pages. I cannot commend this dissenting opinion highly enough; it will set the standard for discussion of a constitutional right to privacy for the balance of this century.

It is Justice Kogan's thesis that, "the right recognized by this court [of an individual to read or view obscene materials in the privacy of his own home] necessarily must include a right of discreet access to entertainment, writings, and other such material if the state cannot show that those materials are actually harmful to specific persons or that they intrude upon the rights of others."[70] This is so, in part, because the Florida right to privacy is an express and fundamental constitutional guarantee.

The federal right to privacy—if such a thing exists—exists only as shadows or penumbra of express constitutional guarantees. Federal courts thus have no mandate to give an expansive interpretation to such an implied right. But the Florida right to privacy is entitled to the most expansive interpretation; indeed, by definition, privacy under the Florida *Constitution* must be broader and deeper than privacy under the federal *Constitution*. This is simply the natural distinction between implied and express rights. In sections II, III, and IV of his dissent, Justice Kogan provides a fascinating and exhaustive history of privacy as it has been defined and challenged in the federal courts, the state courts of Florida,[71] and the literature, both legal and popular. The state, through its obscenity laws, may not prohibit individuals from, "discreetly inquiring into matters that may interest them, whether characterized as literature, reading material, or entertainment." To permit such prohibition would be to read the privacy guarantee out of the *Constitution*.

Nor does Justice Kogan accept the notion, offered by the majority and the court below, that no individual can "take his privacy right to the store [or other public place] with him." If this were true, argues Justice Kogan plausibly, married couples would have a right to use contraceptives but not to obtain them; or to use only such contraceptives as they could manufacture in their own homes. A pregnant woman could "choose" only such an abortion as she might be able to perform upon herself in the privacy of her own home. Such constructions of the right to privacy, of course, render it no right at all; or no more right than Shakespeare's Shylock had, to take a pound of flesh from Antonio provided he could do so without spilling a drop of Antonio's blood.

> Contrary to the majority's suggestion, privacy is a right that protects both people and the aspects of their lives they have made private. It is a right that people can carry around with them, even when they are in public places and stores. People do not subject themselves to unlimited governmental scrutiny or intrusion into their lives simply because they walk out the front doors

of their homes or enter a public place such as a store.[72]

Characterizing Florida's right to privacy in a fashion sufficiently expansive and flexible to serve its constitutional purposes, Justice Kogan states:

> Florida's right to be let alone actually consists of a bundle of rights. It creates a zone of privacy protecting not merely seclusion and bodily integrity, but also guaranteeing a right to structure one's life as one sees fit so long as no avoidable harm is done to self or others. The right prohibits the government from intervening in the noninjurious aspects of personal life involving matters such as the actualization of one's own identity, spirituality, home or family life, intellect, personal opinions, and emotions.
>
> I believe that, of necessity, this bundle of rights includes a right to obtain noninjurious reading materials and entertainment for discreet personal use. Without such a right, the self-determination and self-actualization guaranteed by the right to be let alone would be meaningless indeed. Minds forbidden to inquire are no less enslaved than minds whose thoughts are dictated by others. The right to be let alone cannot be exercised if all such material, entertainment, and information are subject to the dictates of a community censor or the strictures of a censorial criminal code.[73]

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Edited by Ephraim Margolin.

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NOTES

[1]*Anderson v. Fisher Broadcasting Co.*, 712 P.2d 803 (Oregon 1986) (Linde, J.).

[2]*Id.* at 808.

[3]*See* Prosser, Privacy, 48 Calif.L.Rev. 383 (1960).

[4]Restatement, Second, Torts Section 652A, comment b (1977).

[5]*United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980).

[6]*Id.* at 577, citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

[7]*Commonwealth v. Scagliotti*, 371 N.E.2d 726(Mass. 1977).

[8]*Gill v. Snow*, 644 S.W.2d 222, 223 (Tex.Ap. 1982), citing *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973).

[9]*Davis v. Bucher*, 853 F.2d 718 (9th Cir. 1988).

[10]*Id.* at 719, citing *Carey v. Population Services Int'l*, 431 U.S. 678, 684-5 (1977) and *Grummett v. Rushen*, 779 F.2d 491, 494 (9th Cir. 1985).

[11]*Griswold v. Connecticut*, 381 U.S. 479 (1965).

[12]*See Meyer v. State of Nebraska*, 262 U.S. 390 (...), citing *Griswold* at 481, 1680.

[13]*Griswold* at 484, 1681.

[14]The phrases appear in *Boyd v. United States*, 116 U.S. 616, which opinion also reminds us that, "It is not the breaking of his [i.e. the householder's] doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his infeasible right of personal security, personal liberty and private property.... Breaking into a house and opening boxes and drawers are circumstances of aggravation.....

[15]*Mapp v. Ohio*, 367 U.S. 643 (1961).

[16]*Mapp* at 656, cited in *Griswold* at 485, 1682.

[17]*Griswold* at 485, 1682. Acknowledging "many controversies over the penumbral right of privacy, Justice Douglas nonetheless offers a string cite of some half-a-dozen cases, plus academic commentary, in support of its existence.

[18]The Ninth Amendment reads, "The enumeration in the *Constitution*, of certain rights, shall not be construed to deny or disparage others retained by the people."

[19]*Griswold* at 486-499, 1682-1690.

[20]*Bork, The Tempting of America* (hereinafter "Bork ") at 96.

[21]*Griswold* at 485-6, 1682.

[22]*Bork* at 97.

[23]*Bork* at 98.

[24]*Meyer* at 339.

[25]*Roe v. Wade*, 410 U.S. 113 (1973).

[26]*Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). The *Botsford* case involved a civil dispute for money damages arising out of a railroad accident. Defendant railroad company moved that the plaintiff, a female, be compelled to submit to a medical examination to determine the extent of her injuries. Nowadays this would seem pretty tame stuff, but the Supreme Court of 1891 was certainly not going to order a lady to take off her clothes in front of strangers; and insisted that the federal courts had no power to enter such an order. Although the facts of *Botsford* have ceased to be of interest, and the holding of *Botsford* has ceased to be of value, *Botsford* features substantial dictum extolling the notion of privacy in American life and law.

[27]*Id.* at 152.

[28]*Roe* at 113.

[29]*See* cases collected at *Roe*, pp. 154-5.

[30]*Bowers v. Hardwick*, 106 S.Ct. 2841 (1986).

[31]*Id.* at 2843.

[32]*Id.* at 2844.

[33]*Bowers* at 2850 *et seq.*

[34]*Bowers* at 2850-1 (Blackmun, J., dissenting) (emphasis in original).

[35]*Bork* at 121.

[36]*Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

[37]*Bork* at 122.

[38]*Bork* at 123. *Bork* has the candor to admit that, "[t]hat statement will be taken as repressive by many."

[39]*California v. Carney*, 105 S.Ct. 2066 (1985).

[40] *Cf. Stanley v. Georgia*, 394 U.S. 557 (1969).

[41]*Bork* at 124.

[42]*Griswold* at 485-1682.

[43]*Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[44]"State constitutions, too, are a font of individual liberties, their protections

often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." W. Brennan, *State Constitution and the Protection of Individual Rights*, 90 Harv.L.Rev. 489, 491 (1977). See also *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

[45]*See*, e.g., *Linde*, E. *Pluribus—Constitutional Theory and State Courts*, 10 Ga.L.Rev. 165 (1984); Linde, *First Things First: Rediscovering State's Bills of Rights*, 9 U.Balt.L.Rev. 379 (1980).

[46]*Katz v. United States*, 389 U.S. 347, 350-1 (1967).

[47]*See* also *Alaska Const.* art I, 22; Cal. Const. art. I, 1; Mont. Const. art. II, 10.

[48]*See* Ariz. Const. art. II, 8; Haw. Const. art. I, 6, 7; Ill. Const. art. I, 6, 12; La. Const. art I, 5; S.C. Const. art. I, 10; Wash. Const. art. I, 7. *See* generally, Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 Fla.St.U.L.Rev. 632 (1977).

[49]Article I 23 was approved by the votes of Florida on November 4, 1980. It provides: Right of privacy—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

[50]During the 1980's, the Florida Supreme Court seemed unwilling to give content to the privacy clause, and was able to resolve most constitutional problems without doing so. The court resolved many questions by reference to more "traditional" constitutional principles, such as the state analog to the Fourth Amendment. Much of the Florida Supreme Court's decisional law in the area of search and seizure was substantially more "liberal" than that of the United States Supreme Court. Dissatisfaction on the part of prosecutors and right wing groups led to the passage of an amendment to the Florida *Constitution* obliging the state supreme court to construe state search and seizure law in conformity with federal search and seizure law. Finding traditional avenues of analysis closed to it, the Florida Supreme Court then boldly went where no man had gone before, giving new life and vigor to the state guarantee of privacy. Ironically, then, it was the efforts of "law and order" types that led to hamstringing the state supreme court's search and seizure jurisprudence.

[51]*In re: T.W.*, 551 So.2d 1186.

[52]"Small bombshell" does not overstate the case. Chief Justice Leander Shaw, author of the *T.W.* opinion, was up for merit retention in 1990. Merit retention is ordinarily just a matter of going through the places, but opposition to Shaw, based solely and admittedly on his authorship of *T.W.*, was fierce. Fortunately, the principle of an independent judiciary was vindicated and Justice Shaw was retained.

[53]*Id.* at 1190.

[54]*Id.* at 1192.

[55]L. Tribe, *American Constitutional Law*, 1337-38 (2d ed. 1988).

[56]*T.W.* at 1193, citing *Roe* at 153. *See* also *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S.747 (1966).

[57]*T.W.* at 1193, citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

[58]*In re: Guardianship of Browning*, No. 74, 174 slip op. (Sept. 13, 1990).

[59]*Id.* at.

[60]*Id.* at , citing Gerety, *Redefining Privacy*, 12 Harv. C.R.C.L. L.Rev. 233, 281 (1977) and *Cope, To Be Let Alone: Florida's Proposed Right of Privacy*, 6 Fla.St.U.L.Rev. 671, 677 (1978).

[61]*Id.* at.

[62]Accord, *Cruzan ex rel Cruzan v. Director, Mo. Dept. of Health*, 110 S.Ct. 2841, esp. at 2852 (1990) ("for the purposes of this case, we assume that the United States *Constitution* would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition").

[63] *Id.* at.

[64]*State v. Long*, 544 So.2d 219 (Fla. 2d DCA 1989).

[65]*See Stall v. State*, So.2d (Fla. Oct. 11, 1990) (Nos. 74,020 and 74,390).

[66]*Id.* at .

[67]*Id.* at fn. 4 citing *Stanley v. Georgia*, 394 U.S. 557 (1969).

[68]*Id.* at (slip op. at 12), citing *Long*, 544 So.2d at 223 (citation omitted).

[69]*Id.* at (slip op. at 16) (Barkett, J., dissenting) (emphasis in original).

[70]*Id.* at (slip op. at 19-20) (Kogan, J., dissenting).

[71]The state courts of Florida have always been a proving ground for the concept of privacy. As Justice Kogan reminds us, one of the most publicized cases concerning the common law tort of invasion of privacy, *Cason v. Baskin*, 20 So.2d 243 (1944), concerned the life of author Marjorie Kinman Rawlings, and her book Cross Creek. A colorful history of the litigation appears in Acton, *Invasion of Privacy;* Univ. of Florida Press (1988).

[72]*Stall* at 42 (emphasis in original).

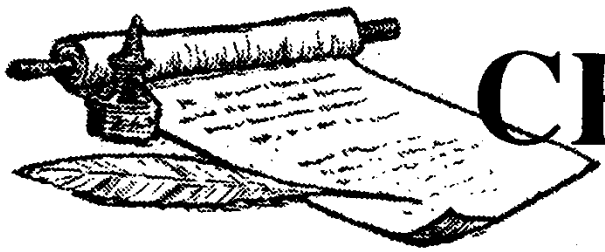
[73]*Stall* at 31-2.

In my view, the *Bill of Rights* is critical to our system of justice, because it is a concise statement of the practical objectives of all people who seek liberty and justice.

While the people of other lands, most recently the people of Russia and the Balkan states, have no clearly defined objective except the desire to be free, and still must confront and challenge the guns and tanks of oppression in the streets, the people of the United States have a written guarantee enforceable in the Courts rather than by armed conflict.

Nevertheless, the protection provided by the *Bill of Rights* can be lost by complacency and lack of understanding. The dedication and vigilance of those men and women who as public and private criminal defense lawyers battle to protect the rights of person accused of crime serves to protect us all and to keep us constantly reminded of the importance of the *Bill of Rights*

GEORGE E. BARKER
Chief Circuit Judge
Sixth Division
Fayette County Courthouse
Lexington, KY 40507



CHAPTER 12

I think we Criminal Defense Lawyers are the conservators of the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution. We are the law court officers, not necessarily just those colleagues of ours that wear badges and service revolvers. We are law enforcement officers and those are the rights and guarantees we protect.

John Delgado
1988

Do The Guilty Go Free?

Bob Carran

This article was written at the request of the Kentucky Post. It has yet to be published in that paper. Bob Carran has graciously permitted The Advocate to publish it.

When I was invited to participate in the *Kentucky Post's* discussion of this topic, I was initially struck by what I considered to be another example of the media's obsessive attention to crime and the criminal. Why, I asked, wasn't the title "Are We Losing Our Freedoms?",or"Is Our Gigantic Prison Population Necessary?" However, I am realistic and I know that putting people in prison sells newspapers, and politicians who publicly call for putting more people in prisons get elected (almost a perpetual food chain, one feeding upon the other).

The question, as I perceive it, is does America have a disproportionately high percentage of criminals running the streets?

Since the "Guilty Free" do not wear scarlet letters"G.F." around their necks,we can't really deal in a specific, concrete manner with identifying their numbers. What we can do, however, is review the statistics and studies of reported crime, apprehension, and incarceration for America and other Western democracies.

The United States Department of Justice, in a series of Special Reports released since 1986, reported that the United States has consistently had a higher proportion of its population incarcerated for criminal offenses than the other Western democracies. Other studies have shown that two countries of the industrialized world have a higher percentage of their population in prison—Russia and South Africa—and only one country has a higher percentage of its population on death row—South Africa.

The United States Department of Justice also reports that the average annual growth rate for the prison population during 1925-85 was 2.8% while the residential population of the United States grew at a rate of only 1.2%. The number of prisoners under the jurisdiction of Federal and State correctional authorities at year-end 1985 reached a record 503,601. The increase for 1985 brings total growth in the prison population since 1977 to more than 203,000 inmates—an increase of 68% in the 8 year period. Since 1980, the number of sentenced inmates per 100,000 residents has risen by nearly 45%, from 139 to 201 (a new record high).The result of this tremendous increase in Americans sent to prison has been the stretching of our prison and jail systems to the point of bursting at the seams. At the end of 1985, few states had any reserve prison capacity. Only 9 states were operating below 95% of their highest capacity, and 3 states exceeded their highest capacity by more than 50%. Overall, the Justice Department reports that state prisons are now estimated to be operating at approximately 105% of their highest reported capacities. All of this overcrowding is occurring despite the fact that since 1978 state prison systems have added approximately 165,000 beds, producing an increase in capacity of nearly two-thirds over the 7 year period.

While the above facts show that America is definitely doing a bang-up job of putting a high percentage of its citizens in prison, in and out of themselves these facts don't answer the questions raised by the *Posts* topic. One need merely assert that "Of course we have a tremendous percent of our people in prison and the percent is steadily rising. We have an unlawful populace that is growing increasing unlawful." However, this is not the case.

The Federal Bureau of Investigation *Uniform Crime Reports* for the United States disclose that the number of homicide, rape, robbery, assault and burglary offenses reported to the police decreased significantly from 1980 through 1984. The *Uniform Crime Reports* of the Commonwealth of Kentucky also show a significant decrease in the total number of reported crimes for the same period. Overall, between 1980 and 1984, commitments to prison relative to crime increased more than 2 1/2 times as fast as commitments to population(56% v. 18.5%).

The final conclusion is inescapable — America is certainly not lax about imprisoning Americans, and has been consistently doing so at a rate that far exceeds its population increase, and despite crime rate decreases.

Why then, is there the misperception by the public that America isn't doing enough to imprison people, and what is this misperception costing us?

America has passed through a period where its population contained an unusually high percent of people in the high crime rate age group. During this period the crime rate went up(as it must), the population reacted to the crime rate increase, and now, years later and well after the problem has materially passed, government and the courts are responding.

Studies dating back as far as 1842-1844 in England and Wales, and consistently through the present in the United States, have always shown that rates of crime rise during the teenage years, then decline after reaching a peak at about 18 to 20. The shape or form of the distribution/age curve in crime has remained virtually unchanged for about 150 years. Therefore, during the 1970s the United States was going to have an increase in the rate of crime no matter what we did(short of starting a major war—the two longest and deepest drops in the prison population increase occurred during World War II and Vietnam, when a significant proportion of our young population was sent out of the country).

Now that our population is growing older and the disproportionate number of teenagers has grown into the disproportionate number of Yuppies, Guppies and Uppies of the mid-1980s, we are seeing exactly what we should expect—a decrease in the rate of crime. But all the apparatus prepared in the '70s to increase imprisonment is now finally in place. So what happens? We put ourselves in the company of Russia and South Africa.

Not only is America challenging all other countries for supremacy in imprisonment, but it is also experiencing an erosion of the rights of its free citizens. As long as the populace reacts, politicians will jump on the band wagon. The result has been a judiciary more eager to incarcerate than ever before, and a political body more eager to pass laws and appoint"hanging judges" than ever before.

The floodgates will open soon, and when they do we will quickly reach the 1940s pace of executions—averaging one every other day. We may even be able to pass South Africa. Ironically, another spinoff of America's eagerness is a Supreme Court that can accept in the imposition of the death penalty a discrepancy that correlates with race, and can accept such judicially approved racism by merely accepting apparent disparities in sentencing are an inevitable part of our criminal justice system. Not surprisingly, this is the same court that has eaten away vast hunks of our *Bill of Rights*.

But the good news is the politicians have a platform issue and the media has a quick sale. Just yesterday another candidate called for the creation of a task force to run the criminal out of town—and received front page headlines. However, nothing was said in the article about addressing the problems teenagers face and lead them to crime, nor about our mental health treatment, nor about the truly incredible number of Saturday Night Specials available in our town. And no one from the media asked.

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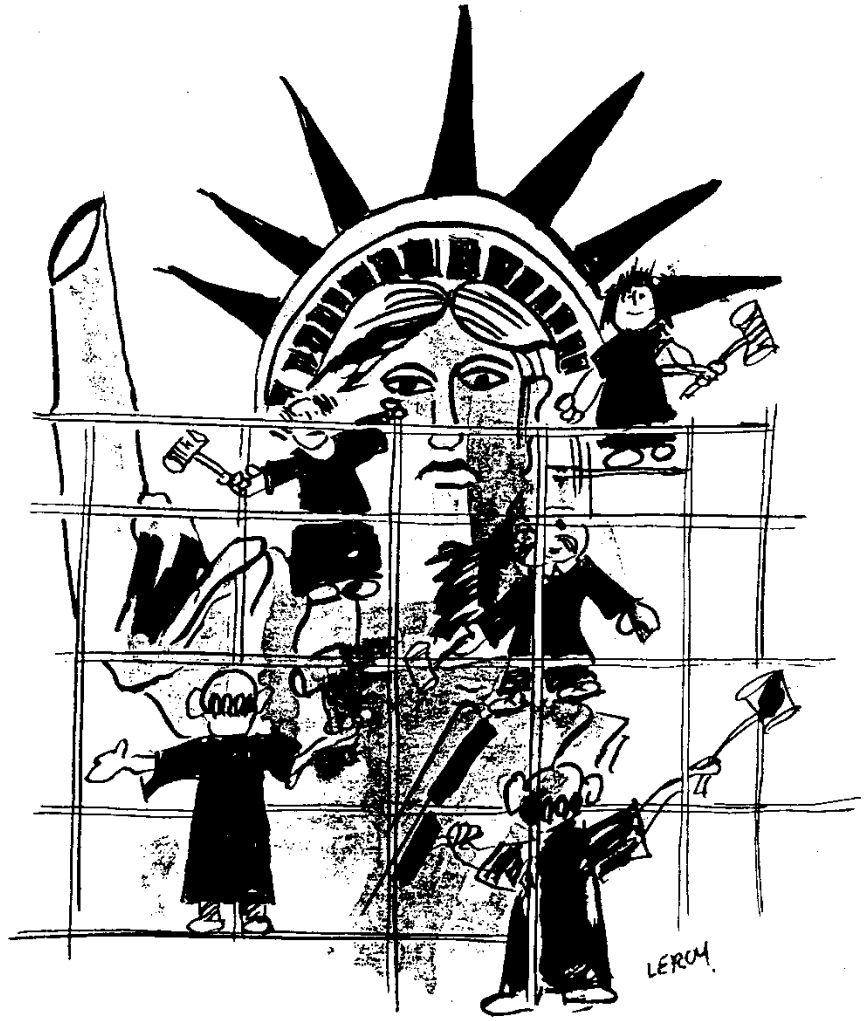
John Payne & Jeff Pendleton, Western Kentucky University

HOW CAN YOU DEFEND THOSE CROOKS?



"OFF WITH HER HEAD"

On television and in the movies, we criminal defense lawyers are not infrequently portrayed as brave and romantic figures, swashbuckling heroes in three-button blue.[1] Then we turn off the tube and find that, in real life, we are more often viewed as moral degenerates.

It is bad enough that whenever we are introduced to persons of intelligence and refinement, the very first question they ask us is "How can you defend those crooks?" Their clear implication is that anyone who devotes talents and energies to helping known criminals must have sold his soul to the devil. But when the same kind of sentiments are openly voiced by public prosecutors, legislators and judges, the defense of the damned becomes not only unpopular but downright dangerous.[2]

The prevailing attitude toward criminal defense counsel was recently expressed by a federal prosecutor in the Southern District of New York in the course of his rebuttal summation. The proper response to defense counsel's arguments, he urged the jury, was to "forget all that, because while some people, ladies and gentlemen, go out and investigate drug dealers and prosecute drug dealers and try to see them brought to justice, there are others who defend them, try to get them off, perhaps even for high fees."[3] How (he implied) could such a professional prostitute be worthy of belief?

While these and similar remarks by the virtuous young prosecutor ultimately led to reversal on appeal,[4] views not unlike his have been publicly urged at various times by prominent lawyers ranging from Warren Burger to Ralph Nader.[5] Serious thinkers from Jeremy Bentham to Jerome Frank have argued that any system under which an attorney is required to advocate the innocence of a person he knows is guilty is both morally repugnant and socially destructive.[6]

Rather than directly respond to such challenges, some have sought to avoid the issue by maintaining that a defense counsel never "really" knows whether his client is guilty or innocent, both in that his actual knowledge is imperfect and in that it is legally irrelevant (because only the jury can determine guilt). Classically, this was the argument advanced by Samuel Johnson,[7] and more recently, it was the position reportedly taken by Edward Bennett Williams.[8] Whatever the case with Johnson, however, one suspects that Williams, as an experienced trial lawyer, knew better. Anyone who has practiced in this field for any length of time has encountered more than a few clients whose guilt, directly confided by client to lawyer and corroborated by the lawyer's own investigation, is "known" to counsel with at last as much certainty as, say, the names of one's parents or the legitimacy of one's birth. And to say that such knowledge is legally irrelevant is to beg the very question in issue: whether counsel possessed of such knowledge is precluded from advocating to the jury his client's innocence.

For those who would meet the challenge head-on, however, the role of defense counsel in defending the guilty can be amply justified, whether the goal be truth, justice, or the vindication of public morals.

CONSIDER THE ALTERNATIVE

This may seem most surprising when the goal is promoting the truth. How can making a guilty man seem innocent ever advance the truth? The answer, in part, is to consider the alternative. Those systems in which a lawyer is called upon to reveal, rather than conceal his client's guilt have usually degenerated into systems that utterly subvert the truth. Thus, it is a tenet of most communist legal systems that (in the words of one such criminal code) "The defense must assist the prosecution to find the objective truth in a case," including ridiculing a client's defenses where they appear to defense counsel to be untruthful and educating the guilty client to his need to accept punishment.[9] The next step turns out to be public confession and Gulag.

Put more broadly, the defense counsel who must conform his defense to what he believes to be the objective truth becomes *de facto* an inquisitor, rather than an advocate. But experience suggests that the inquisitorial cast-of-mind tends to prejudge: to categorize too swiftly and assume too readily, "to reach a conclusion at an early stage and to adhere to that conclusion in the face of conflicting considerations later developed."[10]

These all-too-human tendencies "to judge too swiftly in terms of the familiar" can only be counteracted if counsel is honor-bound to ferret out and advocate every fact and argument that can be turned to the client's benefit, regardless of whether they accord with the lawyer's personal beliefs about the client's ultimate guilt.[11]

This is the genius of the adversary system at work. Such a system is premised on the belief that the best way to arrive at the truth is to hear both sides of the story, subject each proponent's assertions to the vigorous criticism of the opponent, and then have neutral arbiters decide which assertions make sense. But if such a system is to work at all, it requires that those who are called upon to advocate one side's story and criticize the other's not be diverted from this essential role by their own beliefs or conclusions, however strongly held.

On this analysis, an advocate's personal beliefs regarding the ultimate issues in a case are not merely, as Dr. Johnson would have it, irrelevant to the operation of the adversary system; rather, if allowed to infect a lawyer's advocacy, they are likely to undermine the truth-ferreting effectiveness of the system itself. Thus, for the price of occasionally imposing on an advocate the difficult role of arguing the innocence of someone the advocate believes (or knows) is guilty, the adversary system offers the reward of preserving the truly innocent from prejudgment, and effective conviction, at the hands of the lawyer.

Again, it is not, as Edward Bennett Williams would have it, that defense counsel never truly knows whether the client is guilty. It is, rather, that a system that inhibits the defense of such a client will inevitably inhibit the defense of clients the lawyer simply believes or presumes are guilty; whereas a system that requires the lawyer to vigorously defend the client regardless of the lawyer's knowledge or beliefs is far better calculated to develop the truth for those who are wrongly accused. Given the practical tendency of every system of criminal justice to assume the guilt of the accused, the importance of fostering such a tough-minded defense ethic cannot be overestimated if truth is our goal.

A SYSTEM FOR THE INNOCENT ONLY?

Our broader goal, however, is justice; and this may mean more than just ascertaining the truth. The medieval rack may have been a successful device for eliciting the truth, but no one now suggests that its use was just. Conversely, would we today regard as just a system that provides counsel for the innocent only? Yet, if one is forbidden to defend an accused of whose guilt one is certain, a large number of criminal defendants will be deprived of counsel altogether.

Of course, one could narrow the group by encouraging guilty defendants never to confess or even to hint at their guilt to their attorneys, on pain of losing their lawyers or at least their effective advocacy. The rule of such a system (effectively the one advocated by Bentham) is: lie to your lawyer or lose him. Bentham's belief that such a system is calculated to promote the truth seems dubious on its face. But in any event, can such a system remotely claim to be just, when it conditions one's right to a voice and a champion on the denial of candor? One would suppose that citizens both guilty and innocent would have considerably more confidence in a system that permits them to confide their innermost secrets to their counsel without having to fear that such confidences will be turned against them.

Furthermore, there is more involved here than individual peace of mind and confidence in the fairness of the system, important though those be. Vigorous advocacy on behalf of every defendant, guilty or innocent, is also the surest guarantee that due process will be preserved and that the government will hold to fair and decent standards. "It aims at keeping sound and wholesome the procedures by which society visits the condemnation."[12] As every defense counsel knows, most of what occurs in the criminal justice system occurs out-of-sight of any court: at the point of arrest, at the police station, in the prosecutor's office, in the grand jury. In every place, the accused is effectively presumed guilty, and the government's word is law. Only the threat that what happens in these places will eventually be the subject of vigorous scrutiny by defense counsel prevents these points along the process from degenerating into star chambers or worse.[13] No wonder that so many of our constitutional liberties derive from criminal cases, or that criminal defense counsel so often, and rightly, lay claim to be the first line of defense in the preservation of freedom. If the prosecutor presumes to speak for the social order, then it is the defense counsel who speaks for the liberty of the lone individual and who dares to assert on his behalf that "Though I be evil incarnate, if you trample my rights you will inevitably lose your own."

To defend the guilty therefore serves the causes of truth, justice and liberty. But for all these highfalutin' pretensions, does it still not fly in the face of conventional morality? Is there not something downright wicked in trying to get some known villain off the hook?

Such a question presupposes a narrow and artificial view of right and wrong. Even the simplest criminal case involves questions of principle and policy with broader implications than simply achieving an equitable result in the case at hand, important though that may be. Take these familiar examples:

The state says the defendant murdered her husband. The defendant says she did so only after years of physical abuse at his hands. What weight should we accord to such a defense, and what kinds of facts are relevant? Is it "moral" to convict her of murder?

The state says the defendant confessed to the rape, and offers little other proof. The defense says that the confession was coerced or, if not coerced in this case, was obtained by methods calculated to lead to coercion in other cases. If the former, is it "moral" to convict the defendant? If the latter, should the same consequences flow as if the former?

The state says there was ample probable cause to return the indictment. The defense says the indictment was returned by a grand jury selected through racially discriminatory methods. What does this mean? How is it determined? Should it be the subject of proof in a criminal case

itself? What remedy follows in the criminal case if it is true? Is it "moral" to try the defendant on such an indictment?

PRINCIPLES & POLICIES

Such examples are but simple illustrations of the clashes of moral principles and social policies that commonly arise in criminal lawsuits. They arise for two reasons:

First, they arise because, contrary to popular wisdom, neither justice nor morality is a fixed and known quantity in most cases. Rather, the ascertainment of what is wise and right requires careful weighing and balancing of a multitude of competing values and practices, a few which may be obvious and many of which may only become obvious upon careful reflection.

Second, the main reason why the less-than-obvious considerations are brought to the surface is because the adversary system encourages counsel to explore every defense in law, fact and policy that may be available to the client. Were the system not so designed, the complexity, difficulty, and moral ambiguity of these situations would largely be lost to the arbiter, just as they are lost to most people confronted with such situations outside the legal system.

The genius of the adversary system, then, lies in its recognition that life is complex, and that incentives should be provided to bring this complexity to the surface, so that a fuller and more far-reaching justice can be achieved. Nowhere are those incentives greater than in criminal cases. In such cases, therefore, the greatest advocacy often takes the form of demonstrating that "conventional" morality must be tempered by more fundamental principles expressive of a deeper and more genuine morality.

While it would be pleasant to end this article on such an affirmative note, candor compels the addition that there are certain existing impediments to the effective operation of the adversary system in criminal cases. To begin with, the system posits that, while counsel must be entirely partial to the clients, judge and jury must be utterly objective and unbiased in deciding between them.[14] When it comes to criminal cases, however, too many judges evidence a blatant and continuing bias in favor of the prosecution.[15] While there are many reasons for this, probably the most common one is that many judges believe that they have "seen it all before" and thus are unable to treat each criminal defendant afresh.[16] Fortunately, juries are not nearly so jaded, and the twin requirements that criminal cases be decided by a jury of twelve and that such a jury be unanimous tend to substantially mitigate the judicial bias.

There is, however, a second impediment not so readily discarded. The proper working of the adversary system posits, if not equality of talent among advocates, at least a minimal level of competence and resources below which the advocate never falls. But the truth is that there are not a few hacks practicing criminal law and, even more common, a great many competent lawyers whose resources are not remotely adequate to mount a serious defense, either because their clients cannot afford such a defense or because (in the case of indigents) the state is unwilling to pay for such a defense.

PLEA BARGAINING

Thus, as numerous studies have suggested, one of the major reasons a large number of indigent defendants plead guilty is because they quickly ascertain that their appointed counsel cannot hope to mount a meaningful defense on their behalf, and in the absence of such a defense they face far greater imprisonment if found guilty after a trial than if they enter into an appropriate plea bargain.[17] Plea bargaining in such circumstances is the total antithesis of what the adversary system is all about, and it may be inferred, not infrequently results in gross injustice.[18] Thus, until far more resources are poured into the public defender system, the great merits of the adversary system in promoting truth, justice, liberty and morality in criminal cases will be lost to a great many indigent defendants and, by extrapolation, to society as a whole.

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NOTES

[1] *Cf. Lawyers's Role In TV's 'Criminal Justice,'* N.Y.L.J., Sept. 5, 1990, p.1.

[2] *See* Morvillo, *Current Risks In Being A Criminal Lawyer*, N.Y.L.J., April 3, 1990, p. 3.

[3] Quoted in *U.S. v. Friedman*, Dkt. No. 90-21010 (2d. Cir., July 17, 1990), slip. op. at 5643.

[4] *Id.*

[5] See Freedman, *Lawyer's Ethics In An Adversary System* (1975) at VIII and 14-15 (*re* Burger) and at 10 (*re* Nader). Burger sought the disbarment of Freedman for suggesting that a lawyer might be ethically obliged to remain silent while his client committed perjury. Nader picketed Wilmer, Cutler & Pickering to protest its negotiating a favorable consent decree on behalf of General Motors.

[6] Bentham, in Chapter 5 of his *Rationale Of Judicial Evidence* (reprinted in his Works at 472 ff.) goes so far as to argue that a lawyer to whom his client has confessed guilt ought to testify against him. Frank, while not going so far, argues in Chapter V of *Courts on Trial* (1949) that to continue to urge the innocence of such a client is "the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation." *Id.* at 85.

[7] 2 J. Boswell's *Life of Samuel Johnson* (G.B. Hill ed. 1887).

[8] Freedman, *supra* note 5, at 51.

[9] *Id.* at 2.

[10] Fuller *The Adversary System*, in Berman (ed.), *Talks On American Law* (1961), at 39.

[11] *Id.*

[12] *Id.* at 35.

[13] *See generally*, Mitchell, *The Ethics Of The Criminal Defense Attorney—New Answers To Old Questions*, 32 Stan. L. Rev. 293 (1980).

[14] *See generally*, Landsman, *The Adversary System* (1984).

[15] Mitchell, *supra* note 13, at 322-23. See also Amsterdam, *The Supreme Court And The Rights Of Suspects In Criminal Cases*, 45 N.Y.U. L. Rev. 785, 792 (1970).

[16] *Id.*

[17] Mitchell, *supra*, note 13, at 319-20.

[18] *Id.*

Anatomy of a Criminal Lawyer

The following article, "Anatomy of a Criminal Lawyer," is adapted from a speech given on December 1, 1982, by then Dean of NCCD, Emmett Colvin, and it is reprinted here with permission of the National College for Criminal Defense in Houston, Texas, from their publication Criminal Defense (10, no. 1).

[T]he criminal lawyer is, by and large, an artist. For every artist, there must be a canvas. Our canvas is exceedingly broad, but we must not only appreciate its expanse, we must thoroughly understand its texture. The texture of our canvas, the *Bill of Rights*, is tension - a tension between the majority and the minority. To engage in our art, one must thoroughly recognize this tension.

We commonly hear expressions relating to the "rights" of the majority without [having] any real appreciation [of the fact] that a majority has no rights, nor was it contemplated by our forefathers that it should. Those in power need no rights. This was one of the expressed fears of Alexander Hamilton when the *Bill of Rights* was being considered. Hamilton's posture was that the *Bill of Rights* was not only unnecessary, but dangerous, for it would contain various exceptions to powers that were granted in the first instance. Why, he stated, should it be said that the liberty of the press shall not be restrained when no power (in the proposed *Constitution*) is given by which restrictions may be imposed. The danger, he said, is this: "It should furnish to men disposed to usurp, a plausible pretense for claiming that power." Perhaps an understanding of Mr. Justice Black's "shocking" absolute theory can be grasped by a reading of the "84th Federalist Paper," written in approximately 1788. These concepts are reflected in the agonizing judging process of those dedicated to achieve this matter of justice. Some, unfortunately, because of timidity, ineptness or other reasons avoid this arduous process, applying fictional rules upon rules, like the Sanhedrin of old, until the sense of justice is lost in the rule.

This canvas sets the stage for our performance as an advocate in the arena. All are touched by this described tension, one way or the other. When the prosecutor suggests the effect of a guilty verdict on the crime problem, he preys upon this tension - he, in fact, knows that regardless of the verdict that is returned, he will have more cases to try next year. The criminal lawyer has an acute awareness of this tension. He knows that it has caused the judge to run for reelection on a "fight the crime problem" theme, even though it is not his fight at all because he is supposedly a referee. He may, in fact, turn out to be a good referee, but at election time he must scrub with lye soap and give the outward appearance of an Eagle Scout.

While in law school we learn of the opinions of the higher courts and even cherish some of them, our warrior knows that the number of reversals is insignificant, and he learns to distrust the expounders of the law. His trust lies in the jury box.

Time and time again, beginning the jury selection, lawyers generally prosecutors, emphasize that actual jury trials bear no resemblance to television trials; that there is no Perry Mason. Jurors will mechanically respond that they can put aside preconceived notions about trials that they've acquired from television... It is naive to assume that a nation red-eyed from watching television and that merely scans the printed [page] can shuck TV-formed impressions for the duration of a trial. *Although lawyers should recognize that we are not the prime factor in a win or loss, it is time that we do realize that jurors are entitled to better than what they receive.* While we know that success in a trial is grounded largely upon lengthy preparation before trial, the jury does not see this.

What jurors do see and experience is one interruption after another and long delays. If [a trial] were a theatrical performance, their price of admission [would] rightly be refunded. Far too often, just as the trial catches the jury's attention, they are thrown into the hallway or the jury room while lawyers haggle over matters about which they can only speculate. Don't think they don't speculate! In fact, I have concluded that, on may occasions, jurors have far more common sense than do the lawyers. We worry too much about this common sense being influenced by inaccuracies portrayed in television trials.

Many criminal defense lawyers have fallen into the occupational habit of blaming the prosecutors and the courts for attempting to destroy America's great system of justice. Nonsense! Lawyers represent one citizen at a time, and whether we like it or not, the criminal lawyer is in show business. His works call for the finest form of acting. The few superb trial lawyers win because the audience believes the proof showed that the defendant was not guilty. The true art of trial work is in achieving this audience reaction. *Mere rhetoric will not suffice; cases are not won by rhetoric alone. The trial expert is a master of nuances; the force of understatement, the whisper to a jury held in rapt attention, the dignity of apparent truth and the appearance of an absolutely honest defense, to name but a few.*

Skill is assumed. While the civil trial lawyer may fumble through the rules of evidence, the criminal trial lawyer must execute [his case] with the precision of an experienced pianist on the keyboard. More important than the expert's particular skills, however, is the lawyer's belief in the case and in the client. One may call this the "glue" without which a case will not hold together. A lawyer need not have an absolute belief in his client's guilt or innocence; in fact, very often a lawyer's strivings are directed not toward the issue of guilt or innocence, but toward winning a reasonable punishment. Lawyers represent human beings and must recognize that the sorriest person in the world has some good qualities, or at least he must understand how he came to be the person he is. Without this understanding, a case will lack that crucial adhesive: a lawyer with a clear and unabiding belief in all his words and actions.

The form of acting that he is involved in is the Stanislavsky method of acting, where one throws oneself into the part he is playing. When you are portraying a

tree, you are in fact a tree. The lawyer who employs this method will not mechanically try cases the same way each time.

Before his death, "Uncle" Erle Stanley Gardner told me how distinctively different were the "greats" [who share] a sameness. That sameness is the "glue" - that belief - that total devotion to a human being in a courtroom.

In the courtroom the criminal lawyer flows on a stream of imagination and an understanding of human emotion.

This artist does not paint by the numbers. . . . He may use a graphologist to analyze the prospective jurors' handwriting on the jury cards, as well as the prosecutor's and the judge's where possible. Some insight, some edge is what he is seeking. On one occasion, the night before jury selection, my graphologist in reviewing cards, told me that one on the panel was "gay." In an indecent exposure case, that is significant! . . . Why the prosecutor took him, I don't know. He was, I'm sure, of great help in the favorable verdict.

[He] may hire the psychologist Cathy Bennett of Houston to analyze the jurors for [him]. Yet, these are but tools that aid in the lawyer's decision. Through his ability to continually observe humans and society as a whole, he learns for example that we live in a frustrated society; a society that knows it has little control over its destiny, its taxes, it's government. All above ignore our voices. As government grows and problems increase, so increases the frustration. Thus, when the jurors hear the United States Attorney say he represents the United States, they may be merely reminded of the source of their frustration. Fortunately or unfortunately, we have the platform for at least a more impartial jury.

We scan the panel for possible foremen. We know the prosecutor is looking for the cold-blooded authoritarian as a foreman; rarely does the jury make such a selection. And when it does, there is often a counteraction that leads to at least a hung jury. We learn from our experiences in psychodrama developed by the National College for Criminal Defense that the likely foreman is talkative, exceptionally warm, slightly above average in intelligence with good word usage and less than average in height. Likability is the strong factor.

We know that if the jury thinks a prosecutor is well prepared, persuasive and likeable, the jurors will tend to convict. Since the likability of the prosecutor is more significant than the likability of the defense lawyer, it is our task to cause the prosecutor to appear not so well prepared, not so knowledgeable and, indeed, not so likable.

We know the more likable the defendant, the more the jury is influenced to acquit. Thus, we prepare him - we dress him up. On the other hand, the more likeable the complaining witness, the more the tendency to convict. In an artful manner, we must destroy or change this image.

We know that in modern times reliance on ethnic stereotypes and traits is far too simplistic, risky and generally wrong. We have learned that generally women are not . . . all [so] compassionate [as tradition would have us believe].

We have perceived that those whose jobs demand precision, such as engineers, machinists, programmers, bankers and accountants, may first lean to conviction but are highly likely to change their minds after hearing other evidence. Then they seem to demand even more stringent levels of proof by the prosecution.

Through experience our criminal lawyer has learned that generally nurses, factory workers, professors, clerks, social workers and truckers do not lean either to guilt or innocence, at least initially.

We know that if there is one common [image] of a good defense juror, it is [that of] one who has "seen it all," who reads books, . . . watches television very little, comes from a large family, marries a liberal and thus had the breadth of experience to allow a tolerance of deviation.

Most of all, however, we must be acutely aware that all the many variables within the panel must be methodically and quickly calculated for selection. Having accomplished this, in large measure, the criminal lawyer is playing the game on his home field. He has his jury.

Now, with his jury, the lawyer's flow of evidence through prior preparation will excite the jury. There will be no unnecessary delays, at least on his part. Presentation of evidence will be planned to peak at just the right moment in the course of the trial. He will not overexamine, and he will not become enamored of the sound of his own voice. He will be honest and he will be natural. The jury will expect suspense, and he will give them suspense. While he cannot arrange for someone in the audience to jump up and confess, he will certainly pace the presentation of evidence so as to stimulate the jury. Certainly if an actress can peddle a maxi-pad, a lawyer should be able to sell a human being. While the lawyer does not have the booms, lights, sets and grips, he or she does have charts, graphs and photographs, together with imagination, which can provide much more. In giving the jury what it wants, the lawyer will look to the real world for tools to capture the jury's attention. While the jurors have to listen, their minds can wander. And how do you capture their attention? You do it with never-ending imagination. As you look around in this world you always look with one thought in mind: How can I use that before a jury? The possibilities are unlimited. Do you plan to use an aerial photograph at trial? Why have it shot from a piper club, when you can readily order a satellite or a U2 photograph at a reasonable cost? The contradictory statement at a prior trial or [a] hearing manuscript can be blown up to the size of the wall with an official look of the page and line number . . . all for the eye to see and the ear to hear.

Racehorse Haynes once suggested that lawyers might affect a "Huntley-Brinkley" method in courtroom argument. Do you remember the Huntley-Brinkley newscast? Suppose after making a point in argument a lawyer turns to his co-counsel and asks, "What do you think?" The co-counsel could then stand up and make his or her contribution. Do you assume that the trial judge would not permit this? How do you know until you try? The judge certainly has the discretion. Presenting an argument in this way could create a "think tank" atmosphere, increasing the chance that you will think of that brilliant argument before leaving the courtroom. *As performing artists we must appreciate a fundamental principle and realize that all art, one way or the other, speaks the truth.*

In his bag of imagination, there is, of course, humor. Humor in its finest form reflects an understanding of human nature. When relevant, nothing can be as effective in communicating with your jury. In one case, few of the jurors had prior jury service. I concluded my argument in this manner: "You will note I have not attempted to dictate your verdict. I have not done so because I would be trespassing on your intelligence. If I have helped you in analyzing the evidence, fine - that is what I should have done. From that point, however, your conclusions are really better than that of the lawyer, because you are not biased. I do not envy you your task; a decision that affects a person's freedom is, I'm sure, an awesome thing. Not only do you face an arduous task - on occasion it might be in fact somewhat awkward. At breaks in your deliberation, you may see me, my client, his friends and loved ones and others in the hallway. This will be unavoidable. We are all friendly persons, and there is generally the urge to speak - not about the case - but to simply pass the time of day. Actually, there's nothing too wrong about this - but the distant observer who does not hear our voice and

only sees our lips move might well form a different opinion as to what is actually said. So while it may be awkward, if and when we do see one another, we will understand. Perhaps we might even nod our heads, but don't move your lips." The purpose of this message with slight humor was (1) to give dignity to their opinion (I knew the prosecutor would demand a conclusion of guilt), (2) to show that I understood the trouble that they would face in the jury room (which they did) and (3) to cement a mutual understanding as to the hallway experience, which they did, in fact experience. I was amused, at one break, when a juror looked at me, smiled slightly, nodded and placed his hand over his lips.

I began [by addressing] the art of criminal advocacy, and in some respects I have simply told you about a way of life. In my practice this is one and the same. You can appreciate that when we pause at one time or another and reflect on why we are here involved in a continuing, unique American experience of man's ability to cope with man. Few in this world are so peculiarly blessed as we are with the most vital and challenging responsibility in a piece-meal resolution of this grand experiment. Our involvement encompasses the full gamut of human emotion, permitting us to relate to the next person with a greater maturity.

The sheer exhilarating thought each morning as we arise that we as individuals, men or women, stand between a citizen and the awesome power of the Federal or state government is an award that is achieved by few.

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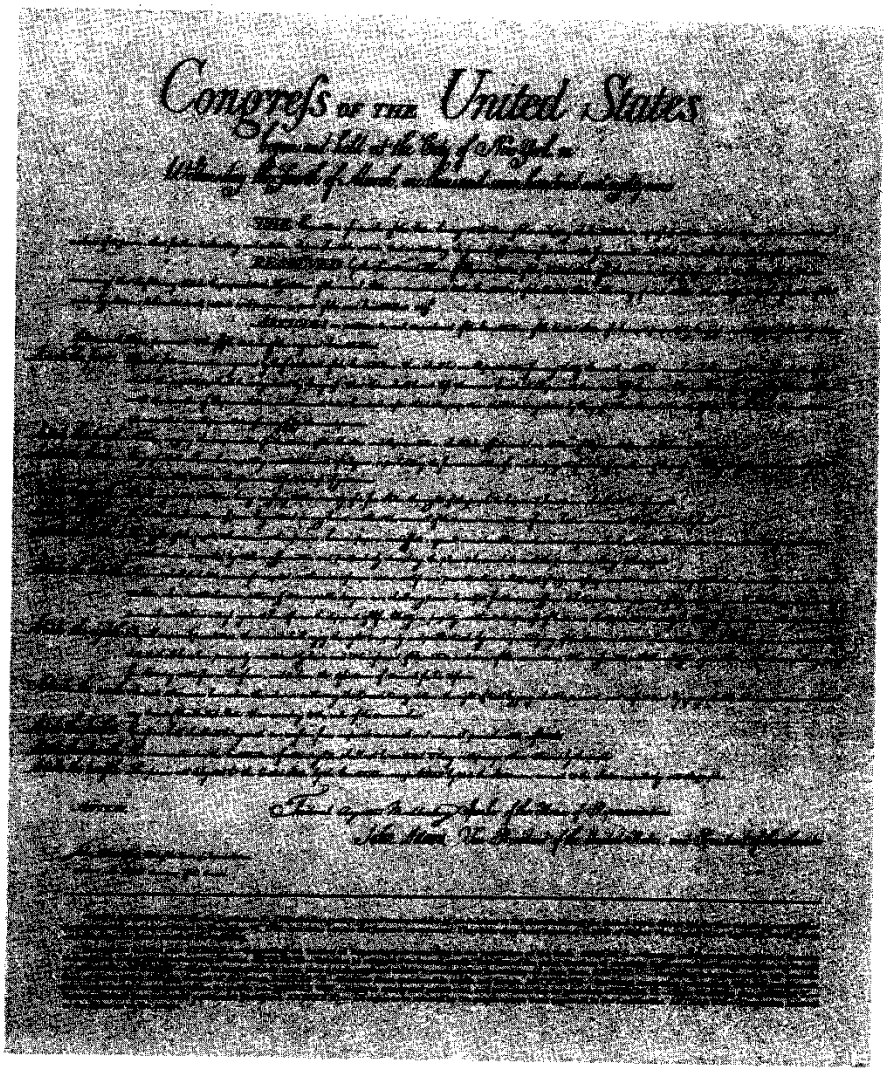


REFLECTIONS ON CRIMINAL DEFENSE WORK

John Delgado spoke at the 1988 DPA Trial Practice Institute on the work we do as criminal defense attorneys.

I had a law partner once eight or nine years ago that left South Carolina to go to Europe to practice law. It was really traumatic for the three of us partners to have to split up because we really loved each other. We fed off each other. I missed her personally and professionally. The day after the night she left, I came to the office and on my desk was a big manila envelope. Inside was the dog-eared, beaten up old copy of the *Bill of Rights* that I had seen my partner keep with her in her briefcase over the time we had worked together. She had enclosed a nice little farewell note—"I'm giving you this, I want you to keep it." And she signed it,"Protecting the *Constitution* I remain...your loyal law partner."

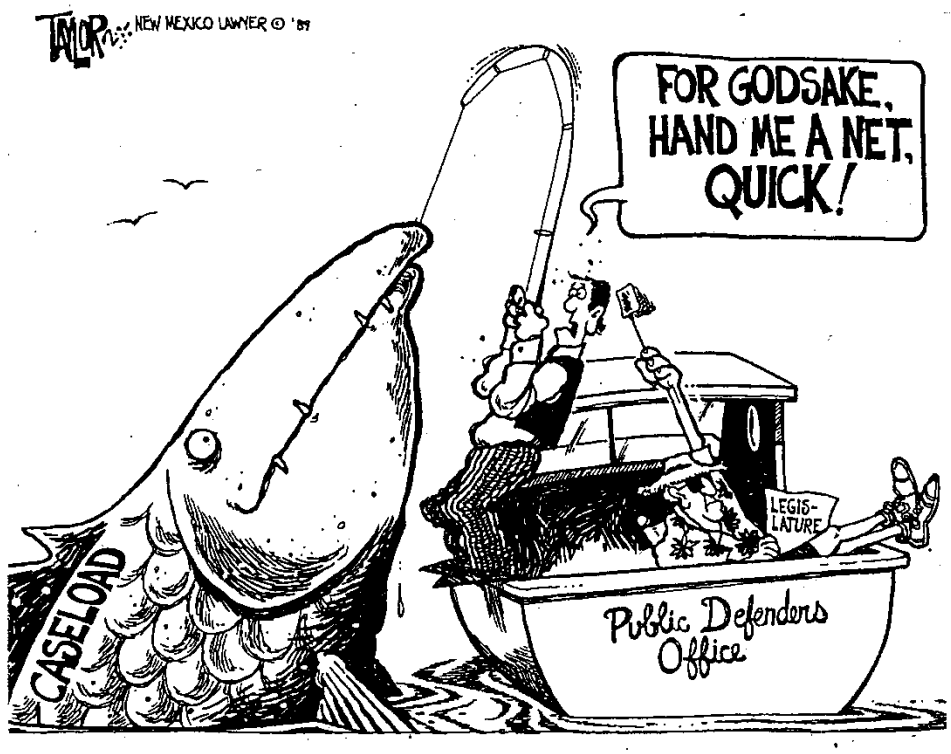
I think sometimes when we do criminal defense work that we forget that the *Constitution* is our foundation for our work and for our efforts. Those constitutional guarantees that we seek to preserve and protect and defend on behalf of the people we represent are the essence of our work. I sense all too often that I lose this Constitutional focus in the midst of the haranguing and badgering by prosecutors and crowed trial schedules.

The way I see this or my interpretation of the system and which I guess is the reason I am not on the United States Supreme Court, is that I don't recall the Sixth Amendment giving the government anything. The Sixth Amendment gives those rights, those guarantees, those privileges to the defendants that we serve. The Sixth Amendment gives those protections to the individuals charged with criminal defenses. The Sixth Amendment does not give anything to the State.

It is my very subjective opinion that the *Constitution* and the government and state of South Carolina, my personal jurisdiction, are always served and protected when an individual is afforded a fair trial. It is not, in my very humble and subjective opinion, their criminal justice system at all. These are *our* guarantees, *our* rights, *our* protections, not George Bush's. I believe we are the true conservators and protectors of the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the *Constitution*. We are the real law enforcement officers, not just those colleagues of ours that wear badges and service revolvers on their hip. We are "law enforcement" and those are the rights and guarantees we protect.

In my continuing love affair with constitutional guarantees, I am reminded that the *Constitution* has its basis, in some small part, in Judeo-Christian theology. "For lo, ye who have done it unto the least of my brethren, ye have done it unto me." Go to the hospitals; visit the prisoners. For isn't that what the *Constitution* does? It gives us guarantees for the very least of these, our fellow citizens, and requires the State to prove beyond every reasonable doubt that exists in the minds of 12 people their guilt alleged by the state. And then, when the *Constitution* gives these rights to the poor, the powerless, the least of these. . . it gives then to the rest of our citizens. Only when the guilty get a fair trial do the innocent receive justice: only when the defenseless are defended do the innocent receive fairness.

Ever since *Gideon v. Wainwright*, it is *our* criminal justice system and we must begin to look at it in the sense: it is *ours*,



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not theirs. They simply carry out enforcing the law. In a superior way we enforce the law because we are the strict constructionists and the real protectors of the *Constitution* and the 1st, 4th, 5th, 6th, 8th and the 14th Amendments.

But beyond these constitutional guarantees, why do we do this? We do this because we love it, as silly as that may seem, to somebody who doesn't understand. We love a fight. We don't go out of the way to have them but we love a fight. And more importantly, we love a fair fight. That's what we've been doing together for the past few days at this Institute: learning to maximize our skills so we can fight on behalf of our clients.

I'm reminded of our national motto,"In God we trust." Actually that was a compromise motto because in 1776 Thomas Jefferson had proposed the motto,"Rebellion to tyrants is obedience to God." I think that has more of a fighting spirit to it and that to me epitomizes the spirit of our work and why we practice criminal defense.

What we do in our work is we rebel against the tyrants that parade in judicial robes and against a mob mentality that convicts our clients simply because they are accused. "If they're not guilty what are they doing here?" That is who we fight and what we fight and we love doing that.

But more importantly, we love those poor, powerless individuals that come to us asking for assistance. We love them because we know that with them we still have a bond. This country has taken a definite turn within the past 20 years. The bond we try to create in our relationships with our clients is more difficult now because of the tide of anti-intellectualism. The flame flickers. Still we must nurture the bond of commonality that exists in each individual that comes to us frightened, scared, very possible wrong in their actions, maybe having done some horrendous thing, but we love them nonetheless. We continue to love them no matter what because that is our professional and constitutional obligation, and, for this South Carolina lawyer, it is his personal significance. It is the way he continues to help define his life.

It is hard to talk about love and criminal defense work isn't it? But maybe that is what we do, what we are. You know it's damn lonely to have to love some of these poor folks that we have to love—that nobody in hell loves. They've done everything in the world and nobody in hell loves them. They're looking at us, they're looking to us. They're scared, and want to know what's going to happen to them. And because they personally look to us for help and guidance, we find that higher calling, the noble essence that continues to keep that flame burning. The *Constitution* and the *Bill of Rights* says to us that we will protect them and advocate for them. In the *Constitution* we find that higher calling, that noble essence that continues to keep the flame burning. But it is so lonely, isn't it?

I don't know how many times it happened when I was a public defender: I would go into the jail and meet a new client and shortly thereafter they'd say,"Well I don't want a public defender, I want a real lawyer" and I'd think "Oh God. I've worked three years in that hell hole of law school for this and you want a real lawyer? I am a real lawyer !" Isn't it lonely? Sometimes our clients don't understand how lonely they make us.

Because they're inarticulate, because they're fearful, because they don't have those skills, our clients sometimes can't tell us"Thanks I really appreciate what you did,"so they leave us and we think"Why did I pour out all this blood from my soul for this client ? They didn't thank us, we didn't get anything."

Nobody really loves us. *Except* at times like this when it comes down to just us. That's why I love doing these seminars. I get the energy to continue that fight. Monday at 11:30 a.m. in the South Carolina Supreme Court I argue for a client. I will be able to do that better now because of the energy, love and respect we have shared among ourselves here. That is what has to enable us to carry on our fight.

It is lonely. We got everybody pointing fingers at us and so we may have only ourselves to call on for support. The comraderie between us in this common struggle can sustain us, give us the strength to endure because on Monday morning five or more of us will start a jury trial somewhere. From this lawyer to you all, by God, I'll be thinking about you. I hope you'll be thinking about me at 11:30 because I'm going to be alone up there in the Supreme Court.

We may only have ourselves for ourselves. That is why, we split up going back to wherever we've from, we'll retain that comraderie. That trust and love is going to sustain us. And hopefully, continue to show us that what we do is noble, that it has a purpose, and it is the highest calling of our profession.

I'll remember you.

JOHN DELGADO
Furr & Delgado,
1913 Marion Street,
Columbus, South Carolina 29201,
(803)771-8774.

John has been practicing criminal law in South Carolina since 1975. From 1975-1978 he was a Richmond County public defender; 1978-1980 he was Executive Director of the local Legal Aid office, and since 1980 he has practiced criminal law in the firm of Furr & Delgado, 1913 Marion Street, Columbus, South Carolina 29201,(803)771-8774.

ALTHOUGH KENTUCKY DOESN'T RECOGNIZE A SPECIALTY- YOU'RE IN A SPECIALTY PRACTICE.

If lawyers generally are held in low regard, it is true that criminal defesne lawyers consistently rank at the bottom of the list of lawyers, spurned even by many of our colleagues in the civil bar. ...Of the 725,574 actively practicing lawyers, it's estimated that fewer than 50, 000, including public defenders, are criminal defense lawyers.

Neal R. Sonnett, then President of NACDL in The Champion, The President's Page, January/Febraurary 1990.

BILL OF RIGHTS QUOTES

"In thirty-eight years of practice, I have never been as fearful for the sanctity of individual rights and liberties as I am today. While we applaud and celebrate the exercise of individual freedoms in other countries around the world, we are apathetically allowing the rapid erosion of the rights and liberties protected by our own federal and state Constitutions. The ordinary citizen is no longer safe from unwarranted governmental intrusion, much less the criminal defendant. This should give every citizen in the United States pause to consider the value of individual freedom, and the resolve to not let our freedom be further curtailed."

FRANK E. HADDAD, JR.
ATTORNEY AT LAW
KENTUCKY HOME LIFE BLDG.
LOUISVILLE,KY
40202

HE WAS FAITHFUL

When this cause shall have been committed to you, I shall be happy, indeed, if it shall appear that my only error has been, that I have felt too much, thought too intensely, or acted too faithfully.

William H. Seward, jury closing

William H. Seward is remembered by even casual students of American history as a distinguished governor, and then senator, from New York, the principal founder of the Republican Party, the upset loser on the third ballot at the 1860 Republican Convention to Abraham Lincoln, Secretary of State in Lincoln's cabinet and, toward the end of his career, the man who almost singlehandedly engineered the purchase of Alaska, derisively called at the time, "Seward's Folly."

But if we turn the clock back to a cold, blustery morning in early March, 1846, we are introduced to a less well-known facet of this distinguished American's career - Seward the trial lawyer. The setting was Auburn, New York, a quiet farming community not that far from Syracuse nor far enough south from Lake Ontario to be spared the bone chilling wind from the Canadian plains and across that great lake. John VanNest, a respected local farmer, his pregnant wife, his elderly mother, and a sleeping child were viciously attacked and fatally stabbed in their home without provocation or evident motive.

The assailant was promptly apprehended, returned to the scene of the crime, readily confessed, showed not the slightest remorse, freely avowed to the police and all within his hearing that he would kill others if he could. The defendant was also known in the community as a convicted thief. He also suffered two other disabilities at the time he was brought to the Bar of the court - he was deaf and he was black.

When he was brought to the courthouse to be arraigned on multiple charges of murder, he barely escaped summary justice by the crowd. The District Attorney, shouting in the prisoner's ear, was unable to obtain an intelligible response to his inquiries as to whether the accused had any counsel or was ready for trial. The court inquired, "Will anyone defend this man?" There was a prolonged silence. Finally, William H. Seward, who was in court that day, arose. "May it please the court, I shall remain counsel for the prisoner until his death."

There was no public defender nor any source of funds to pay for legal representation. Seward, driven by a fierce sense of commitment and principle which characterized his entire career, investigated the case, checked into the defendant's background, obtained medical testimony, and developed an overwhelming factual scenario in support of a defense of insanity.

The prisoner was William Freeman. Some years previous, as a bright and hard-working young man, who had worked as a common laborer, he had been arrested on the charge of stealing a horse, tried and convicted, solely upon the testimony of another young black who afterward turned out to be himself the thief. Nevertheless, Freeman served five years in prison. Upon his release from prison, when offered the customary few dollars to which released inmates were entitled in those days, he declined. "I've worked five years for the State, and ain't going to settle so."

But it was too late for William Freeman's mind. During his imprisonment, in response to his endless protestations of innocence, he had been repeatedly beaten and flogged. In one incident, his head was split open by a board, which left him forever deaf. At the time of the trial, he was unable to utter an intelligible sentence. Throughout, he sat with a fixed grin on his face.

When William H. Seward addressed the jury at length in his closing remarks, he faced head on the disability that was his in representing a black man charged with a heinous offense against a respected local white family, before an all-white jury in the midst of crowds in the courtroom calling for revenge:

> The color of the prisoner's skin. . .is not impressed upon the spiritual, immortal mind which works beneath. In spite of human pride, he is still your brother and mine, in form and color accepted and approved by his Father, and yours, and mine; and bears equally with us the proudest inheritance of our race - the image of our Maker. Hold him, then, to be a man. . .and make for him all the allowance, and deal with him with all the tenderness, which, under the like circumstances, you would expect for yourselves.

Seward knew that there was no chance for an acquittal, but he would have his say as a proud lawyer and advocate:

> I am not the prisoner's lawyer. I am, indeed, a volunteer on his behalf. . .I am the lawyer for society, for mankind; shocked, beyond the power of expression, at the scene I have witnessed here, of trying a maniac as a malefactor. . . .

It was late in the day when Seward concluded a summation of more than two hours' length:

> I remember that it is the harvest moon, and that every hour is precious while you are detained from your yellow fields. But if you shall. . .in the end have discharged your duties in the fear of God and in the love of truth justly and independently, you will have laid up a store of blessed recollection for all your future days, imperishable and inexhaustible.

The jury promptly returned a verdict of guilty, and the following morning the judge sentenced William Freeman to be hanged. The Supreme Court of New York reversed the conviction. Freeman was never retried. He died in his cell in chains in August, 1847. Seward survived his client by 25 years, dying in his home in Auburn. A three-word epitaph was inscribed on his tombstone in accordance with a request he had made in remarks to the jury in the *Freeman* case:

> In due time, gentlemen of the jury. . .my remains will rest here in your midst. It is very possible they will be unhonored, neglected, spurned! But, perhaps, years hence, when the passion and excitement which now agitate this community shall have passed away, some wandering stranger, some lone exile, some Indian, some negro, may erect over them a humble stone, and thereon. . . "He was faithful!"

Seward the trial lawyer tells us all we need to know on the subject of the commitment we owe to our clients, our profession, and our system of justice. He was faithful.

DAVID S. SHRAGER
President, ATLA

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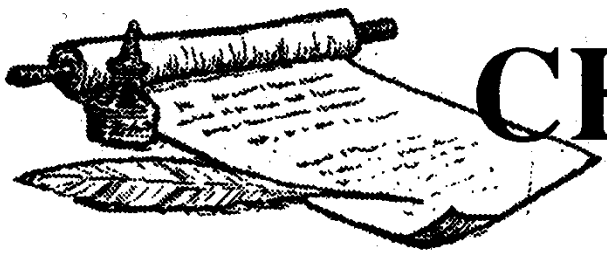
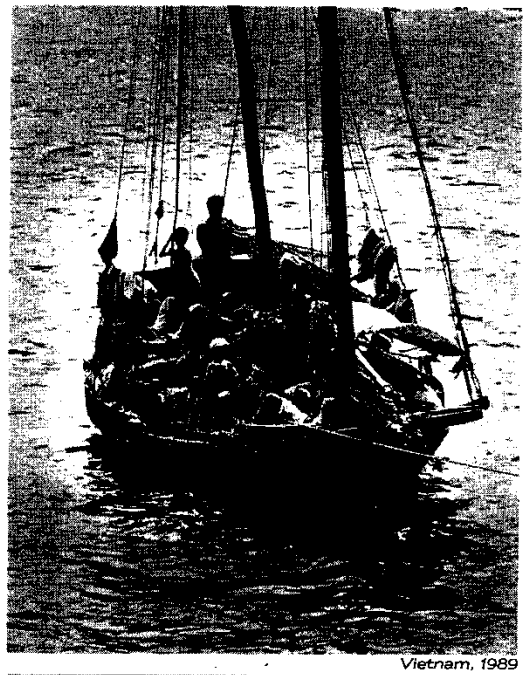


CHAPTER 13

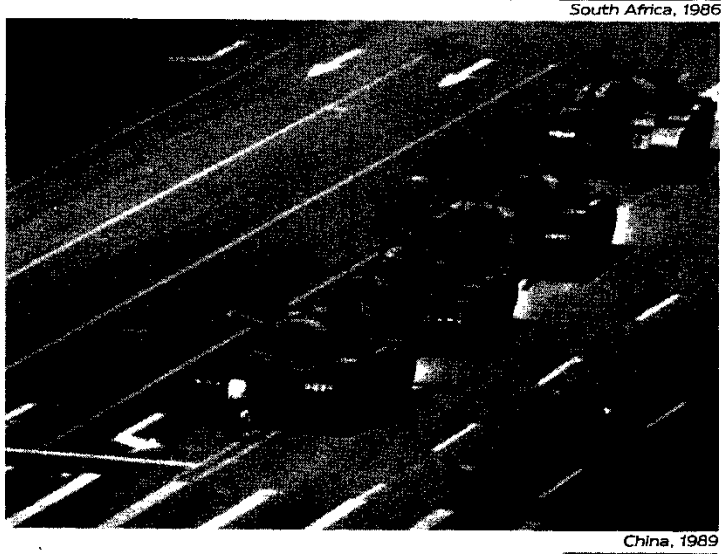
Almost 1 in 4 Black men in the age group 20-29 is either in prison, jail, or probation, or on parole on any given day.

Marc Mauer
The Sentencing Project
1990

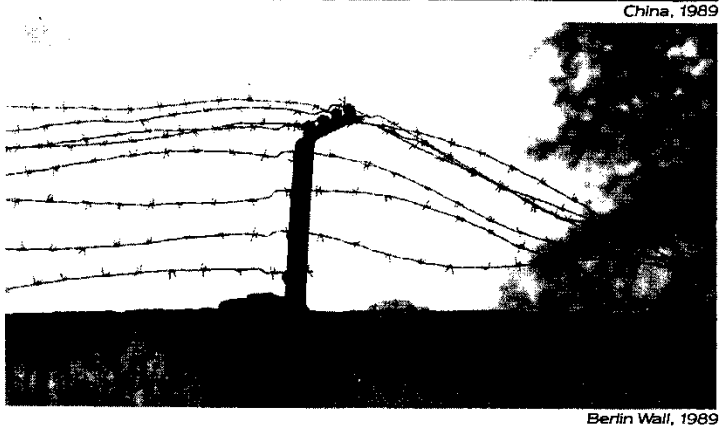
South Africa, 1986



Vietnam, 1989



China, 1989



Berlin Wall, 1989

Czechoslovakia, 1989

BEFORE YOU TAKE YOUR RIGHTS FOR GRANTED CONSIDER THERE ARE OTHERS DYING TO HAVE THEM.

All over the world people risk everything for a chance to have the same rights the Bill of Rights and its amendments have secured for Americans for more than 200 years. So feel lucky you live in a country where voting, protesting and just relaxing in the privacy of your home are guaranteed rights. Instead of just dreams.

THE CONSTITUTION. THE WORDS WE LIVE BY.

The Commission on the Bicentennial of The United States Constitution invites you to celebrate "The Bill of Rights and Beyond" in 1991. For more information write: The Constitution, Washington, D.C. 20006-3999. No orders after 12/16/91.

Ad Council

CHANGING THE SYSTEM: RACISM AND CRIMINAL JUSTICE

THE CRIMINAL JUSTICE SYSTEM IS RACIST

I have been wearing a bow-tie for the past few months and the reaction has been interesting. At first I thought I would be accused of being a rocket scientist or perhaps a law school Dean or maybe even confused with Senator Paul Simon. But, that wasn't the case; instead many people inquired whether I was doing an imitation of Minister Louis Farrakham. Was that racism? Maybe.

A few years ago, I appeared in a suburban Cook County courtroom. My client was late and when the case was called, I stepped up to the bench. The judge looked up from his papers and asked me where was my lawyer; he assumed that I was the defendant. Was that racism? Probably.

I wrote, as Public Defender, articles in the *Chicago Defender*, a local newspaper serving the African-American community. In response to my articles, readers wrote in with questions. I received a letter from a mother of a defendant who had been charged with a felony. When she appeared in court she noted that the judge was white, the clerk, the court reporter, the sheriffs were white. Her question: whether the criminal justice system was racist, since the only black people in the courtroom were either defendants or victims. The answer to that question is yes, there is no doubt about it: *the criminal justice system is racist.*

In fact, the criminal justice system of the United States looks more and more like that of South Africa's every day. As the Sentencing Project has pointed out in its latest report, here in the land of the free and the home of the brave, black men are incarcerated at a rate of four times the rate of black men in South Africa, a tragic and revealing statistic.

LEGAL SYSTEM'S FAILURES

Unfortunately, the legal profession has not responded to the racism and crisis in the criminal justice system. Although there are approximately 800,000 lawyers in this country, fewer than 1% are in any way involved in defending the indigent and perhaps only 4% or 5% are concerned with criminal law or criminal justice.

Law school admission requirements and costs excluded many minorities who may be interested or inclined to deal with the criminal justice system. Our major law schools are turning out those content to write memos but unprepared or uninterested in defending liberty. More and more lawyers are representing a smaller percentage of monied clients, while those persons most in need of legal services are going unrepresented.

Legal education is not immune from racism. The complexion of most law school facilities remain devoid of color. It's only been in the fairly recent past that the ABA and the New York Bar, admitted African-Americans into their ranks.

CRIME'S DEBT

But the crime problem, as Earl Warren pointed out years ago, is largely the result of an overdue debt that our society has been unwilling to pay. It is clear, however, that our society is willing to pay some debts. For example: the billion dollar bail-out to the savings and loan industry and the six hundred dollars an hour the FDIC is paying private law firms to work on the saving and loan crisis; the massive resources the government was willing to devote to the Persian gulf war. Most commentators suggest that we will never know the total cost involved in that effort. So we choose to pay some debts and ignore others.

We have ignored the conditions that have created the problems of crime in this society. Those conditions which breed crime include the lack of meaningful employment opportunities, a failing public education system in our urban areas, poverty with all its ramifications and racism.

Today we have one million people locked up in jails and in prisons in this country. Over 50% are African-American males. We have more black men in our jails and prisons than in our colleges and professional schools. 45% of African-American children live in poverty. The number one cause of death for black men between the ages of 15 and 30 is murder.

Despite the fact that the average drug abuser, according to our former drug czar William Bennett, is a white male suburbanite, the "war on drugs" is concentrated in the African-American community, not for prevention and treatment but for enforcement and incarceration. Our failed policies are dramatically illustrated by the AIDS epidemic: 52% of the women with AIDS in the United States are African-American; AIDS is now creeping up to be the fourth and fifth leading cause of death for African-American women of child-bearing age; 53% of children in this country with AIDS are African-American.

THE NEW SLAVE CATCHERS

Back to the legal profession: I attended a recent conference discussing the American Bar Association's proposals for new sentencing standards and someone pointed out the need to reexamine the philosophy of the standards in light of information that the United States now leads the entire world in its rate of incarceration, in light of the fact that prison construction is becoming the number one domestic growth industry, that we are spending more money on constructing more prisons than new homes, that we have one correctional officer for every three inmates versus one teacher for every thirty students in our urban public schools, that the costs of our crime control/in-

carceration binge is now at about 16 billion dollars a year. And the response was"well, so what? The United States also leads the world in violent crimes." Although not often articulated, the sentiment among many is that African-Americans commit a disproportionate share of the crime and therefore deserve to be locked-up and incarcerated disproportionately.

I'm often asked why there is this disproportionate impact on and in the African-American community? The answer to me is obvious, particularly when you look at the historical, systematic and continuing oppression of entire generations and communities. In fact, I often wonder why more African-American, particularly in our urban areas, are not"criminals." Remember, it used to be a crime for an African-American to learn to read or write, a crime to marry, a crime to move or relocate from one community to another, a crime to speak the native language or to keep families intact.

The badges of slavery are not easily disposed of without lingering effects, especially in light of persistent and continuing racism as evidenced by police brutality, segregated housing, inadequate education and lack of meaningful employment opportunities. Today, it seems as though equal employment opportunity for African-American men exists only in the military and in jails and prisons. Don't forget inadequate medical care in our urban areas, lack of treatment and pre-natal care, hospitals failing all over inner city communities, an infant mortality rate for some African-American communities exceeding that of most third world countries. Given the historical perspectives and the odds, sometimes I marvel at the success rate of many African-American families and individuals.

Although one out of four young black men is under the control of the criminal justice system, either on parole, in jail or prison, or on probation, that means that somehow three out of four are managing to escape the dragnet, the new slave catchers. But it's not easy.

About a year ago, two young boys in a middle-class community in Chicago were on their way to the barber shop one Saturday morning. Suddenly a police car pulled up, called them over, slammed them against the car, verbally abused them, searched them, went through their clothes and wallets and, finding nothing, drove off. One of the young boys happened to be my son. I was stunned but he was not outwardly affected because he says he sees instances like this frequently.

Last fall two teenagers were waiting for a bus after a baseball game outside Comisky Park. A police car pulled up, ordered them into the car, drove them into one of the more racially hostile areas of the city, dropped them off where they were attacked, beaten and chased out of the community. I have just learned that the two police officers alleged to have committed this act were tried and acquitted at a bench trial.

WHAT DO WE DO?

So what must we do as lawyers and advocates in the criminal justice system, recognizing that at the sentencing stage it's almost too late? Clearly we must devote some efforts outside the courtroom to educate the public, change priorities and challenge the status quo. Inside the courtroom we must do the same and get creative; educate the judges, change priorities and, once again, challenge the status quo.

STRETCH THE LAW TO ACHIEVE JUSTICE

A few years ago I had a death penalty case where two black men were charged with murder of two white businessmen. The case was tried twice and both times the jury was hung. At the third trial the prosecutors excused all the blacks from the jury venire. This was pre-*Batson* and when I argued to the judge that this was unfair, he relied on the state of the law as it existed at that time. I argued that the law is living, breathing and subject to change; that generations ago it would have been illegal for me to even be in the courtroom arguing the case. He didn't buy my argument but eventually the case was reversed.

The point is we must stretch the limits of the law and make it change to provide justice for our people.

A good example is the Minnesota judge who declared the narcotics law in Minnesota unconstitutional for the disparate effect they had on African-American in that the penalties for those dealing crack were far more harsh than those dealing powder cocaine. She recognized in a courageous decision that "crack" was a drug largely confined to the African-American community because it was cheaper, while powder cocaine is used more often in the white community.

VICTIMIZATION OF THE DEFENDANT

I think we must point out that often there are two victims in the courtroom; not always, but often the defendant is also a victim and we must discover, point, and portray the environmental conditions that contribute to an individual's behavior. We must educate the judges about the defendant's community, the lack of resources, drop out rate in the high schools, lack of employment opportunities, *etc.*

PERSONAL WORRIES

For me, these issues are personal as well as professional. I have a sixteen-year-old son and I'm concerned that statistically he may have a better chance of being murdered or incarcerated than being educated and becoming a productive member of our society. I know that my eighteen-year-old daughter's life may be threatened by the AIDS epidemic and that her quality of life may be impacted by the generations of young black men incarcerated and on death row.

ADVOCATING FOR THE MARGINALIZED

We have the privilege and the responsibility of speaking for the voiceless, the restrained, the confined and the deprived. We must be clear and forceful.

RANDOLPH M. STONE
Professor of Law
University of Chicago
6020 South University Ave.
Chicago, Illinois 60637-2786
(312) 702-9611

Randolph N. Stone, former Cook County Public Defender, now Clinical Professor of Law and Director of the Edwin F. Mandel Aid Clinic at the University of Chicago. Originally presented at the National Conference on Sentencing Advocacy in Washington, D.C., April 19, 1991. He will present at the KBA Annual Convention in Lexington on June 6, 1992 on Racism and sexism, and funding in the criminal justice system.

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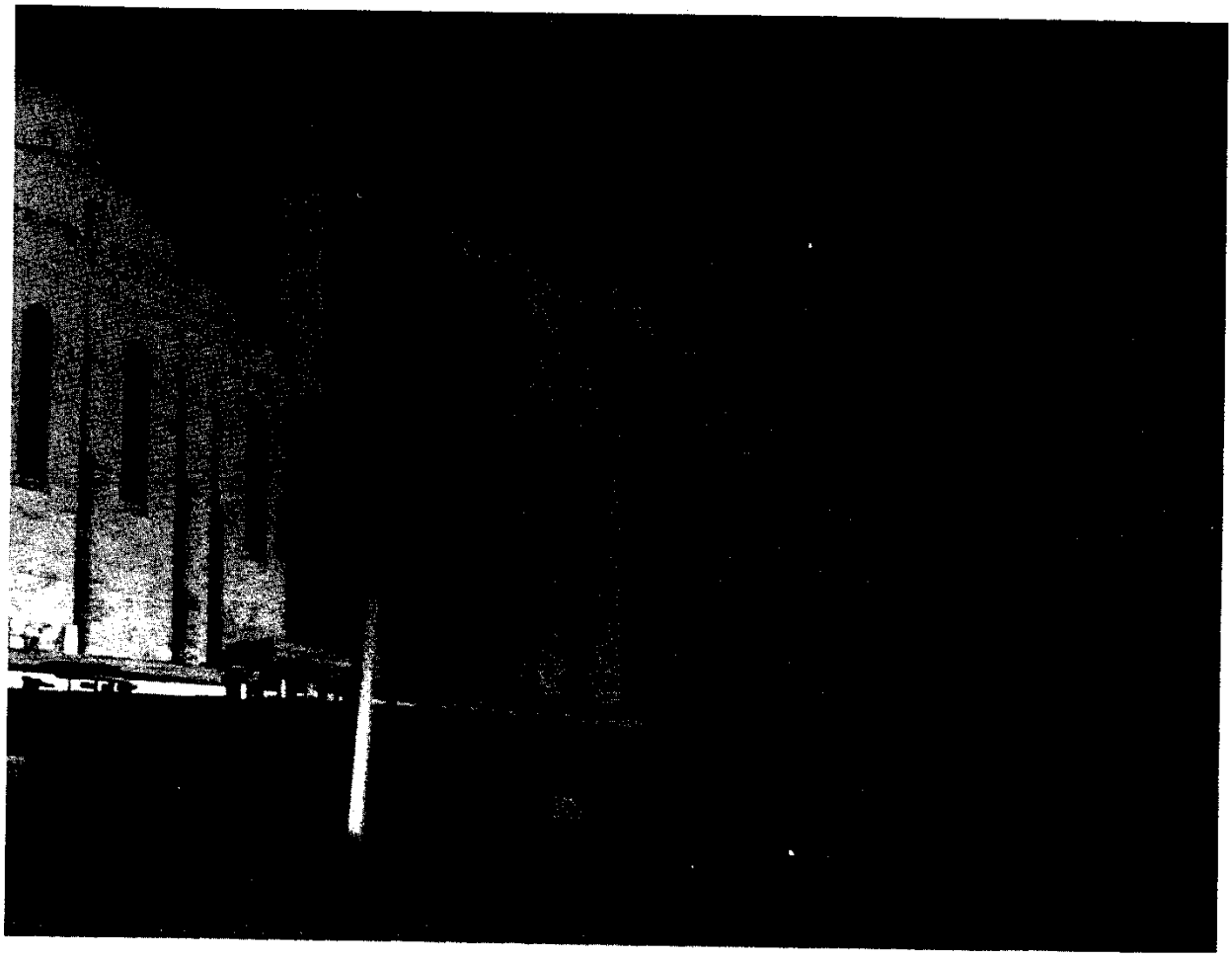
REFORMING A DISCRIMINATORY CRIMINAL JUSTICE SYSTEM



Maximum Security, Kentucky State Penitentiary. Eddyville, Kentucky

The statistics have the feel of a history book, describing a shameful, unenlightened time:

*One in four young black men in America is imprisoned, on parole or otherwise under the control of the criminal justice system— more than are in college. For whites, the figure is one in sixteen.[1]

*The United States incarcerates black males at a rate four times that of South Africa.[2]

*Blacks make up 12 percent of the drug users in the country,[3] but account for 44 percent of all drug possession arrests.[4]

*The disparity in drug cases is rapidly worsening: Between 1984 and 1989, the rate of drug arrests for black youth increased by 200 percent, while the rate for whites declined slightly.[5]

*The race of the victim counts too: In Dallas, the rape of a white woman results in an average sentence of 10 years, while the rape of a Hispanic gets 5 years, and the rape of a black gets two.[6] Nationally, murderers with white victims are up to 4.3 times more likely to be sentenced to death than murders with black victims.[7]

*Sentences are often longer for black offenders: Nationally, black inmates serve a longer percentage of their prison terms before being released on parole than do whites inmates.[8] In Dallas, blacks serve an average of 2.3 years longer in prison than whites for aggravated assault, and 13 years longer—140 percent longer than for whites—for attempted murder.[9] In California, a study found that whites get better plea bargains than Hispanics or blacks for similar offenses, and that whites get more lenient sentences and go to prison less often. In New York, a state commission found that for misdemeanor offenses that would land a black in jail, a white is more likely to be fined.

"This is scandalous," says the Sacramento District Attorney. The Superior Court Presiding Judge pronounces the situation "at least as serious as the Jim Crow conduct was 30 or 40 years ago."[10]

And the situation is no better at the federal level. "Sentencing reform"— both the guideline sentencing system and mandatory minimums—has simply driven arbitrariness and discrimination called "a massive, though unintended, transfer of discretion and authority from the court to the prosecutor."[11]

Drug offenders account for 80 percent of the vast increase in the federal prison population in recent years, and 65 percent of those sentenced in drug distribution cases are black or hispanic.[12] Virtually all of these cases are controlled by mandatory minimums, yet not a single white collar criminal—no insider trader, no death-dealing environmental polluter — has ever been imprisoned under a mandatory minimum.

Some mandatory minimums seem almost designed to discriminate. Late last year, a Minnesota judge ruled that it was unconstitutional to punish crack users more severely than powder cocaine users, because crack users are overwhelmingly black while powder cocaine users are overwhelmingly white.[13] Yet under federal law, simple possession of 5 grams of crack cocaine means a 5- year mandatory minimum, while simple possession of any amount of powder cocaine, or any other drug, is a misdemeanor, punishable by a maximum of one year.

Both Houses of Congress have approved new measures which would take this disparity even further: the amount of powder cocaine that would trigger its proposed death penalty for drug dealing would be 100 times the quantity threshhold proposed for crack cocaine (1.5 kilograms). The final bill is currently bogged down in a Senate filibuster over gun control issues.

And discrimination on the basis of race is only part of the problem. Look under any rock in the criminal justice system and you can find discrimination based on indigence, mental impairment, gender or age.

It is time for a serious legislative response—and not a piecemental one. Because the discrimination is comprehensive and systemic, so must the solution be.

It is time for a Comprehensive Anti-Discrimination in Criminal Justice Act.

It may seem unrealistic to imagine one bill making much of a dent in the problem so large and deep-rooted. But like the law-and-order conservatives in Congress who are always dreaming of wiping out crime with a single, sweeping, Be-Careful-Not-To-Drop-It-On-Your-Foot crime bill, we must start to dream too. What follows is a blueprint for a beginning of that dream.

1. Race discrimination in capital sentencing. A society which tolerates racial discrimination in the imposition of the death penalty makes discrimination not just thinkable, but inevitable, whenever any lesser individual interest is at stake. A bill which passed the U.S. House of Representatives in 1990, the Racial Justice Act, would permit a challenge to a federal or state death sentence which furthers a racially discriminatory pattern of capital sentencing, in terms of either the race of the defendant or the race of the victim, based on statistical evidence.[14]

2. Increased spending for indigent defense. A United Nations report rates the United States behind 12 other nations in the freedoms enjoyed by its citizens, identifying as a key shortcoming the inadequacy of legal representation for the poor.[15] Rates for appointed counsel should cover reasonable overhead expenses and a reasonable hourly fee, with no arbitrary caps on total per case compensation.[16]

3. Repeal mandatory minimums.[17] At the very least, give the sentencing judge athority to consider the same range of relevant factors, as is provided generally under sentencing guideline systems. Eliminate unwarranted sentencing differentiation between crack and powder cocaine.

4. Make sentencing guideline systems presumptive rather than mandatory. Anarchy would not result. A test program in Virginia indicates that departure rates are only slightly higher under non-compulsory guidelines than under the compulsory federal system.[18]

5. Equal availability of nonincarcerative sanctions to indigent and non-indigent defendants. Non-indigent defendants can often, in effect, buy their way out of prison time through an array of valid sentencing alternatives, including fines, restitution and enrollment in drug treatment or other rehabilitative programs. Sentencing speciallists to help design effective, individualized, alternative sentences are commonly unavailable to indigent defendants. Home detention, generally requiring a fixed address, a telephone, and a history of stable employment, usually excludes low income defendants.

Treatment and other rehabilitative programs should be publicly funded and available to all defendants regardless of ability to pay. Alternative sentencing planning services should be provided in every public defender office, and funding should be authorized for sentencing specialists to assist appointed cousel. Where indigence would otherwise disqualify a defendant from sanctions such as home detention, fines or restitution, courts should have flexibilty to tailor other non-incarcerative sentences which meet the purposes of sentencing while ensuring proportionality in the availability of non-incarcerative sanctions to indigent and non-indigent defendants convicted of comparable offenses.

6. Discriminatory suspicionless stops. Drug interdiction enforcement efforts featuring vague drug profiles not only suffer from Fourth Amendment problems, but can violate Equal Protection guarantees as well. Under a program at the Port Authority bus terminal in New York City, only lower-income blacks and Hispanics, who could not afford more expensive means of transportation, have been stopped. Of 210 people arrested in 1989, only one was white. In 31 of 51 cases where the suspect allegedly consented to a search after questioning, judges suppressed the evidence.[19]

Prohibit suspicionless stops. Prohibit use of racial or ethnic factors in drug courier profiles. Permit "pattern or practice" civil rights actions against law enforcement entitiles using drug profiles which have a discriminatory effect.

7. Reversed stings. Reverse stings are disproportionately used in black neighborhoods where drugs are sold openly. (They also put police in the unseemly position of manufacturing crime; in Broward County, Florida, the police were even manufacturing the crack they sold, until a court made them stop.) In a study in California, it was found that 83 percent of the people caught in reverse stings are black, and the amount of drugs involved is usually "very small."[20]

Prohibity the use of reverse stings to arrest drug users.

8. Pretrial detention. Black and hispanic drug arrestees are far more likely than whites to be detained before trial. In Florida in 1989-90, blacks consututed 39 percent of felony marijuana cases, but made up 58 percent of those detained before trial for that charge.[21] Moreover, defendants who are incarcerated pretrial are more likely to be convicted and to be incarcerated upon conviction.[22]

To allow equal access to bail for all socio-economic classes, require that the amount of bail set be rationally tied to an individual defendant's actual resources; if a defendant has no meaningful resources, impose the least restrictive possible combination of conditions reasonably necessary to secure the defendant's appearance at trial.

9. Battered woman syndrome. Amend evidence rules to allow use of battered-woman-syndrome testimony in court. Legislation allowing such evidence has already been aproved in Ohio, Lousiniana and Missouri, and is under consideration in Texas, Vermont, California, Washington, Wyoming and Michigan. Governors in Ohio and Maryland have commuted the sentences of women convicted of violence against abusive husbands or boyfriends.

10. Eviction from public housing. Federal forfeiture law is broad enough to allow forfeiture of public housing leasehold and eviction of an entire family because of the drug use of one member of the family. In March, federal housing authorities in New York sought to evict a 51-year old grandmother and her 18 family members, including two great-grandchildren, because of her granddaughter's drug activities.[23]

Permit forfeiture of a public housing leasehold only on the basis of the drug activity of the leaseholder, as is currently recommended in non-binding Justice Department guidelines; encourage alternative sanctions in consideration of adverse effects on innocent family members.

11. Victim impact statements. Victim impact statements threaten the fundamental fairness of the entire sentencing process, polluting it with arbitrary consideration of class and race, by inviting judges to value some victims' suffering more than others.

Prohibit consideration of victim impact evidence at sentencing in all cases, capital and non-capital alike, except to the extent they were known to the defendant at the time of committing the crime.[24]

12. Habeas review of bias claims. Recent Supreme Court decisions have raised insurmountable procedural barriers to the consideration of meritorious constitutional claims raised in habeas corpus petitions, if not properly raised and preserved earlier.[25] Amend federal habeas corpus statutes to provide that procedural default, retroactivity and successive-petition restrictions shall not apply to claims alleging discrimination on the basis of race, religion, or other constitutionally suspect category, unless the claim was deliberately withheld.

13. Sentencing. Some measure of discretion must be afforded to sentencing judges, consider the possible discriminatory effect, inequity or irrationality of a sentence they might otherwise impose. This authority can be conferred without upsetting the fundamental mission of determinate sentencing—the elimination of "unwarranted sentencing disparity." Adjustments and departures to avoid discrimination would be "warranted," in the strictest sense of the word, by the need to maintain proportionality, fairness and the integrity of the process of criminal punishment, and would be required to be rationally justified on the record by the sentencing judge.

A. Race proportionality. Permit the sentencing judge to consider, in sentencing minority defendants, patterns of offense conduct (*i.e.*, not limited solely by the offense of conviction, since disparities can emerge through manipulation of charges, or through fact or plea bargaining). Allow similar proportionality review based on the race of the victim.

B. Mental illness. One of the reasons that the U.S. was ranked behind 12 other nations in individual liberties, according to the United Nations reported referred to above, was the incarceration of the mentally ill. The federal sentencing guidelines specifically provided to "mental and emotional conditions are not ordinarily relvant" in deciding whether to impose a sentence outside the guidelines. Yet studies have shown that mentally ill inmates incarcerated without tratment have a recidivism rate of nearly 100 percent, while diversion into a community-based psychiatric treatment program can reduce recidivism to only 15 to 24 percent.

Permit mental illness to be considered at sentencing, and permit commitment to appropriate non-prison treatment facilities.

C. Age. Justice Department research indicates that offenders over age 45 are one-half as likely to recidivate as offender under age 25, and they cost far more to incarcerate because of greater health problems.[26] Yet the federal sentencing guidelines provide that age, like mental illness, is "not ordinarily relevant." Permit the sentencing judge to consider age and likelihood of future dangerousness. For non-violent offender of advanced years, define imprisonment to include home detention.

D. Gender. Women tend to commit drug-related and economic crimes rather than crimes of violence, yet while in prison, they have less access than male inmates to programs that could help them avoid recidivism, such as drug treatment, education and job training.[27]

Permit sentencing judges to consider all individualized offender characteristics, such as whether female offender is single mother with young children who would be effectively be orphaned by her incarceration. Also, improve the classification of inmates, both male and female, to ensure equal access to appropriate programs—as well as adequate funding for such programs. Guarantee equal access to health care for women inmates, particularly for pregnancy and other gender specific health conditions.

14. State commissions on the overincarceration of minorities. California probation officer Paul Morton tells the story of a man who jumps into a river to save a baby floating by. No sooner does he save it than one baby after another comes rushing by, more than he can possibly save. The moral, says Morton, is that "at some point, you're going to have to stop, run upstream and find out who's throwing them in and why."[28]

There is no single place where discrimination and injustice lurk in America's criminal justice system. They are everywhere, and the evidence grows daily more obvious and painful. Now is the time for comprehensive solutions to what has become a comprehensive national disgrace.

SCOTT WALLACE
NACDL Legislative Director

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NOTES

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

[2] Mauer, "Americans Behind Bars: A Comparison of International Rates of Incarceration," The Sentencing Project, January 1991.

[3] "National Household Survey on Drug Abuse," National Institute on Drug Abuse, 1989.

[4] "Critics Say Bias Spurs Police Focus on Blacks," USA Today, December 20, 1990, at 6A (based on 1989 FBI figures).

[5] "Arrests of Youth, 1990," U.S. Department of Justice, Office of Justice Programs, January 1992, at 10-11.

[6] "Race Tilts the Scales of Justice," *Dallas Times Herald*, August 19, 1990, at A-1.

[7] The U.S. General Accounting Office reviewed 28 studies of racial factors in capital sentencing from all over the country, and

found that in 82 percent of the studies, "those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods and analytic techniques." *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, GAO/GGD-90-57, February 1990, at 5-6. The Georgia study reviewed by the Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987), found that a person convicted of murdering a white was 4.3 times more likely to be sentenced to death than a person convicted of murdering a black. The study, conducted by Professor David Baldus of the University of Iowa, also found that prosecutors sought the death penalty for 70 percent of black defendants with white victims, but for only 15 percent of black defendants with black victims, and only 19 percent of white defenents with black victims.

[8] *NCJA Justice Research*, November/December 1990, at 7, citing recently released statistics from the National Corrections Reporting Program run by the U.S. Department of Justice Bureau of Justice Statistics. According to the statistics, blacks serve an average of 35 percent of their maximum sentences before being parolled, while whites serve 29 percent.

[9] "Race Tilts the Scales," *supra* n.8.

[10] Reforming a Discriminatory Criminal Justice System "Drugs in Our Midst," *supra* n.7, at A1.

[11] Final Report of the Federal Courts Study Committee, April 2, 1990, at 138.

[12] "Ten Years For Two Ounces," The American Lawyer, March 1990.

[13] *Minnesota v. Russell*, Minn. 4th Judicial Dist., No. 89067067, Dec. 27, 1990 (Alexander, J.); upheld on appeal by the state Supreme Court, December 13, 50 Cr.L. 1296. According to the National Council on Crime and Delinquency: "Drug enforcement has been narrowly focused on crack, the drug of choice among the underclass, which is also disproportionately Black and Hispanic." "The Impact of the War on Drugs," NCCD, December 1989, at 5. In Los Angeles, 96 percent of the defendants arrested for crack distribution are black. "Whites, Not Black, Are the Core of the Drug Crisis," USA Today, December 20, 1990, at A1.

[14] "Land of the Semi-Free? America Ranks 13th in Liberty, U.N. Says," Washington Times, May 25, 1991, at A1 (describing the Human Freedom Index ratings for 88 nations, as contained in a report of the U.N. Development Program; other U.S. problem areas include freedom from governmental coercion and torture, freedom from capital punishment, counsel of one's choice, economic equality for minorities, and imprisonment of the mentally ill).

[15] This recommendation has been endorsed by the Congress, in setting up a committee of the Judicial Conference to study federal indigent defense progams and mandationg that among its recommendations should be a proposed formula for indigent defense compensation at the federal level "that includes an amount to cover reasonable overhead and a reasonable hourly fee." Judicial Improvements Act of 1990, P.L. 101-650, 318 (c) (2).

[16] Recommended by the Federal Courts Study Committee, the American Bar Association, the Judicial Conference and four Circuit Conferences, the Judicial Conference's Committee on Criminal Law and Probation Administration, George Bush (when a U.S. Congressman), and the U.S. Sentencing Commission, in its massive *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, August 1991, including negative comments on mandatory minimums even from half of the prosecutors surveyed.

[17] The U.S. Sentencing Commission reported on June 27, 1989 that federal judges stayed within the guideline sentencing ranges 82.3 percent of the time, thus demonstrating that the guidelines are "an overwhelming success." Under the pilot project in Virginia, 78 percent of the sentences fell within the recommended guideline range. *Voluntary Sentencing Guidelines*, Report of the Judicial Sentencing Guidelines oversight Committee to the Judicial Conference of Virginia, September 1989, at 7-8. The report observed that "compliance rates of 75 to 80 percent have been judged successful in reducing guidelines progams which have been judged successful in reducing disparity," and concluded that the voluntary guideline system should be spread statewide and made permanent. *Id.* at 42. Similarly, the Federal Courts Study Committee, at pp. 135-39 of its Final Report, *supra*, urged Congress to give serious consideration to making the federal guidelines non-compulsory.

[18] Messina, "Judges Limit All-Out War," National Law Journal, April 15, 1991, at 14.

[19] "Drugs in Our Midst," *supra* n. 7 (29 of 35 arrestees in reverse stings were black, and one was hispanic; a superior court judge observes that "I see a lot of reverse stings in the minority communities, but I haven't seen any in predomintly white areas.")

[20] Florida Bias Study Commission, *supra* n.5, at 68.

[21] Clarke and Kurtz, "The Importance of Interim Decisions to Felony Trial Court Dispositions," *The Journal of Criminal Law and Criminology*, Vol. 74, No. 2, 1983.

[22] With *pro bono* assistance from a team of Sullivan and Cromwell lawyers, a federal district judge threw the case out on "innocent owner" grounds, expressing concern about making the entire family homeless, and expressing admiration for the grandmother's efforts to hold the family together and discourage drug activity. "Family Cannot Be Evicted Because of One's Drug Sale," *New York Times*, March 27, 1991, at B1.

[23] This was the test used by the Supreme Court in barring victim impact testimony in capital cases until the *Payne* decision. *Booth v. Maryland*, 107 S.Ct. 2529 (1987) (the focus "on the character and reputation of the victim and the effect on his family ... may be wholly unrelated to the blame worthiness of a particular defendant ... unless known to the defendant before he committed the offense").

[24] *Teague v. Lane*, 489 U.S. 288 (1989), and various subsequent cases, broadly and confusingly defining the types of changes in the law—"new rules"— which will not be available to habeas petitioners; *McCleskey v. Zant*, 49 Cr.L. 2031 (April 16, 1991), changing the standard governing dismissal of successor habeas petitions from "deliberate abandonment" to the more stringent "cause and prejudice" test.

[25] "Group Aims to Stop Use of Jails as Shelters for Mentally Ill," *Criminal Justice Newsletter*, February 1, 1991, at 2.

[26] "Expense of Housing Aging Prisoners Taxes the System: Number of Elderly Inmates Rising Nationally," *Houston Chronicle*, May 12, 1991, at 6A.

[27] See Report of Florida Supreme Court's Gender Bias Study Commission, cited in "Drug Crimes Put More Women in State Prisons," *St. Petersburg Times*, December 30, 1990, at 16A.

[28] "Drugs In Our Midst," *supra* n.7.

"...Our forefathers, who brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal."

--Abraham Lincoln

CONSTITUTION CAME UP SHORT ON MATTER OF EQUALITY

By Eleanor Holmes Norton

Ours is the oldest constitutional democracy on Earth, giving Americans cause for celebration in this bicentennial year. But surely the pragmatic American mind can convert at least some of that celebratory energy to good national use. We celebrate our *Constitution* best when we take note of our successes and pledge to correct our deficiencies in meeting our own constitutional ideal. The bicentennial shall have served the nation well if it re-energizes the commitment to equality, the most conspicuous omission from the *Constitution* in the 18th century and the most important constitutional reform of the 20th.

Equality has been one of the discordant themes in the American symphony. The sour note, of course, was slavery, and it was there from the start, marring the lofty New World enterprise. When slavery became embedded in the *Constitution*, a struggle of tragic proportions was guaranteed. We are still playing out that struggle, still trying to harmonize the original dissonance.

It took decades to address racial discrimination, but progress since World War II has been dramatic when compared with the entire preceding period of constitutional government. Out of this struggle not only the first American consensus on racial equality. The meaning of equality itself has been deepened and broadened.

What began as an effort to erase our most conspicuous constitutional flaw has developed into that and much more. Constitutional interpretation has brought an extraordinary array of Americans under the constitutional umbrella-from women and handicapped people to illegal aliens and welfare recipients. The post-Civil War equality amendments have been interpreted to include people and to bar practices impossible for the founders to have foreseen and for some-blacks and women, for example-they specifically excluded. The sensitive interpretation of the *Constitution* calibrated to meet both the spirit of the document and the challenge of change in a dynamic society is a major reason that our country, despite its polyglot nature, has remained a stable constitutional democracy for 200 years. Yet the curious idea has become fashionable that the *Constitution* is anchored like a rock to the original intent of its authors, who could have had no sense of today's world. In a recent controversial address, Associate Justice Thurgood Marshall sought to refute this notion.

He reminded us that the *Constitution* we revere is not the same one the founders created. He argued for "a sensitive understanding of the *Constitution's* inherent defects, and its promising evolution."

The fact is that even the *Bill of Rights* was added to the *Constitution* after a fierce political struggle, and was not part of the founding idea. The guarantees of equality were inserted painfully 80 years later. Equality has been an acquired taste in this country.

The Marshall speech may have been the warning the country needed to avoid the kind of revisionist history that is un-American. It is the best reply to those who would embalm the *Constitution* in "divine intent," as Chief Judge Sol Wachtler of the New York Court of Appeals has called the original intent notion popularized by Attorney General Edwin Meese and others. How, after all, could a document written in 90 days survive for 200 years? Only because Americans have had the good sense to look with Justice Marshall not only at what he calls "the birth of the *Constitution* but its life."

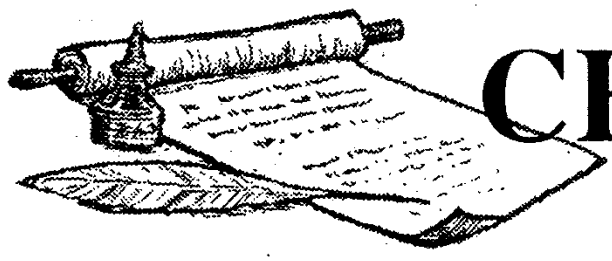
Neither the *Constitution* nor any law is ever set upon a fixed, unerring path. The law is neither noble nor base. It can be neither. It has been both.

The law was base when it rationalized slavery. In its statutes and decisions, the law built an evil tower of jurisprudence to justify and cement slave status. And when war overturned the slave system, our law invented Jim Crow and separate but equal, an intricate embroidery of inequality whose effects we are still trying to root out.

The law was noble when it applied its own self-corrective and overturned doctrinal segregation. Lawyers and judges applied the same *Constitution* to lead our country to an entirely different notion of equality not embraced by the majority of Americans.

That the same *Constitution* could yield results as antithetical as segregation and integration should be a warning of the need for permanent self-criticism and continuing readjustment to the needs of society. It is a system always in search of values. It is we who bear responsibility for the quality of our justice, not our founding document.

Featured in the *Lexington Herald-Leader*, Lexington, KY, October 1,1987



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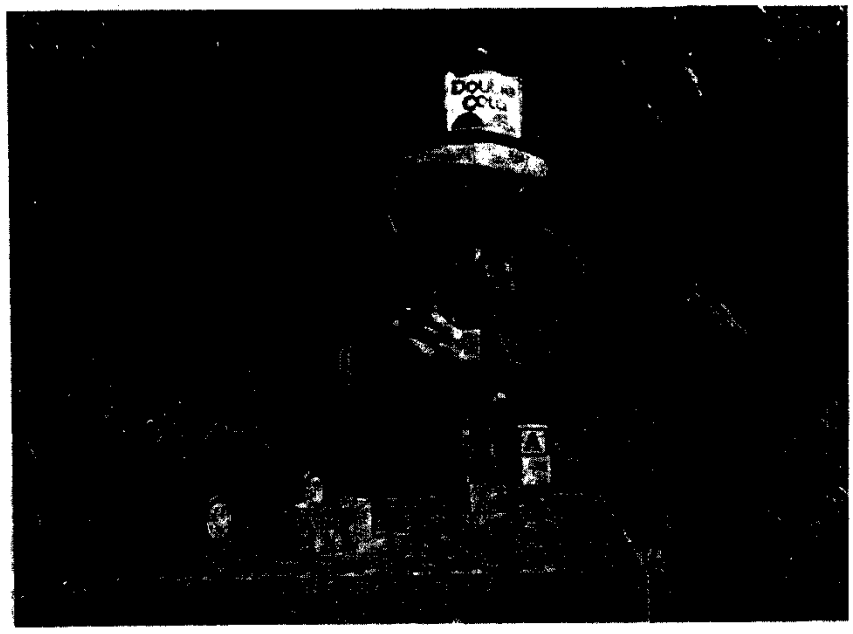

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Valerie Bryant & Jennifer Kerr

Western Kentucky University

CHILDREN & THE CONSTITUTION

Barbara Holthaus

"What shall the world do with its children?" - Robert Bly

Imagine that you are a bored fifteen year old in a small town. You and a friend make a crank call to a neighbor lady. Imagine that she calls the police. You don't know exactly what she tells them. The police come and take you to a detention home. Your parents are both at work so they don't know where you are. The next day you go to a courtroom and the judge starts asking you questions. You're not sure why you're there. You are scared and you want to go home. You think maybe if you tell him what he wants to hear, you'll go home. Your mother is there. She wants to know why the neighbor lady isn't there. She wants to know how she knew it was you and exactly what she said. The judge tells her that she doesn't have to be there. Instead a police officer gives the judge a summary of a single conversation he had with her. The judge thinks he remembers hearing that two years before you stole another kid's baseball glove, although you were never charged and never came to court about it. He tells you you are guilty of being a habitually immoral delinquent and sends you to a state-run home until you turn twenty-one. No one records any of this so there's no record of what happened that day. You are told there is no appeal - the judge's decision is final. You're not even sure what you did or said that was wrong.

Now imagine that you made that phone call but you're eighteen years old. The woman would have to come down and swear out a warrant and have you arrested. You would have been entitled to post a $200 bond and go home the same day. The judge would have informed you exactly what the charge was against you. He would also tell you that you didn't have to answer any questions or say anything about the phone call. You would have the chance to talk to a lawyer. The lawyer would have come to court to help you. You could request a jury trial if you wanted one. The neighbor lady would have had to come in and testify under oath. Your lawyer could have questioned her to see how she knew you were the voice over the phone. The jury wouldn't be allowed to hear about the baseball glove you took two years ago. If convicted, the longest you can be jailed is two months. You could appeal your sentence to a higher court. A record would be made that you and your lawyer could comb for mistakes.

Does this seem fair to you? It didn't seem fair to Jerry Gault, the fifteen year old boy, who faced six years in a state boys home for making a phone call. His lawyer filed a petition for habeas corpus that ended up in the U.S. Supreme Court and changed the juvenile justice system.

THE DEVELOPMENT OF DUE PROCESS FOR JUVENILES

Until the U.S. Supreme Court issued its court ruling in *Application of Gault*, (1967) children were routinely faced with such kangaroo courts. Since children were considered to be in the custody of their parents, they were not entitled to any liberty interests under the federal constitutions. Instead, juvenile courts were considered to be "civil" not "criminal" and the *Bill of Rights* simply didn't apply.

Juvenile courts were very informal and usually very unfair. The idea was that children received "treatment" rather than "punishment" and were exempt from the protection that the *Constitution* affords to adults accused of crimes. The proceedings in juvenile court were characterized as "civil" rather then "criminal." The problem was that treatment often equalled punishment and informality equalled arbitrariness. Children could be shut away for long periods of time in state run institutions where the conditions were often worse than those in adult prisons.

As the U.S. Supreme Court put it "there is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections afforded adults nor the solicitous care and regenerative treatment postulated for children." *Kent v. United States*, 383 U.S. 550, 86 S.Ct. 1045 (1966).

In *Gault*, the Court held that the due process clause of the Fourteenth Amendment to the U.S. *Constitution* at the very least entitled children to "fundamental fairness" when faced with delinquency charges. This "fairness" was deemed to include the right to notice of the charges (a Fourteenth amendment right), the right against self-incrimination (a Fifth amendment right) and the rights to counsel and to confront and cross-examine witnesses against them (Sixth amendment protections).

Gault and a subsequent case, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970) recognized that the consequences of an adjudication of delinquency in a children's court were roughly equivalent to an adult criminal conviction. Children were often confined to state homes for long periods of time. The homes were locked and often run like prisons. *Winship* confirmed the Court's ruling in *Gault* and required a standard of proof beyond a reasonable doubt of every element of the crime constituting delinquency before an adjudication could be had.

A third case, *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779 (1975), completely abolished the concept that juvenile proceedings were "civil" in nature. *Breed* recognized that a finding of delinquency carries such stigma and the possibility of harsh consequences that jeopardy attaches once the finding is made. The thrust of *Breed* was to prevent children from being adjudicated as delinquent in juvenile court and then facing the same charge as adults in the circuit court.

Even before *Gault*, the Court recognized that the transfer of jurisdiction from juvenile to adult court was so serious that children were entitled to due process during the transfer hearing. See *Kent v. United States, supra.*

THE EBB AND FLOW OF CONSTI-

TUTIONAL PROTECTION FOR CHILDREN

Following *Gault*, a series of U.S. Supreme Court cases began to explore and define the parameters of juvenile rights under the federal constitution.

In *McKeiver v. Pennsylvania*, 403 U.S. 552, 91 S.Ct. 1976 (1971), the Court found no constitutional right to a jury for children hearkening back to the concept of juvenile court as an intimate, informal proceeding. The *McKeiver* Court retreated from *Gault* and *Winship's* expansive idea of a more formal adversarial juvenile justice system, refusing to label it as either criminal or civil.

The Court found the juvenile Due Process standard developed by *Gault* and *Winship* to be one of fundamental fairness - emphasizing the fairness in the fact finding procedure. "The requirement of notice, counsel, confrontation, cross-examination and standard of proof naturally flowed from this emphasis." *McKiever*, 403 U.S. at 544, 91 S.Ct. at 1985. The *McKiever* Court seems to be saying a jury is not required for fairness or accuracy of the fact finding process.

In *Schall v. Martin*, 467 U.S. 25, 104 S.Ct. 2403 (1984) the Court okayed preventive detention of juveniles prior to trial as long as the detention process satisfied due process in the form of an expedited adversarial probable cause hearing and served some "legitimate state interest." Preventive detention loosely translates to preventing the detained child from committing more offenses. It appears to be permissible for any purpose except punishment. The Court fell back on the pre-*Gault* concept that children have no great liberty interest and that pretrial detention is simply the substitution of state control for parental control. (This is commonly known as the concept of *parens patriae*.)

The Court has never expressly ruled that Fourth amendment expressly applies to juveniles in court. However, in *New Jersey v. TLO*, 105 S.Ct. 733, 469 U.S. 325 (1985), the Court did rule that the Fourth amendment applies to warrantless searches of high school students by public school officials although the Court applied a lower standard than the adult criminal "probable cause to believe a crime has occurred" standard. The Court instead held that the legality of the search depends on "the reasonableness of the search under all circumstances." 105 S.Ct. at 742. In *TLO* "all circumstances" included the purpose of the search and age and sex of the student.

There should be no question that children are generally entitled to the benefits of the Fourth amendment and the exclusionary rule since the amendment protects *persons* (not just adults) and is not limited to criminal prosecutions.[2]

In passing, it should also be noted that children have specifically been held to be *persons* under the Federal *Constitution*. In *Tinker v. DeMoines*, 393 U.S. 503, S.Ct. the Court recognized that high school students are persons under the federal constitution and entitled to fundamental rights which the state must respect, including freedom of expression under the First Amendment.

For all its willingness to exempt juveniles from adult criminal protections, the Court refused to find special protection against the application of the death penalty to children. In *Stanford v. Kentucky*, ___ U.S. ____, 109 S.Ct. 2969 (1989), the Court found no Eighth Amendment prohibition against the execution of sixteen and seventeen year olds.

However, the Court has required that statutes making children eligible for death following a transfer to adult court must set a minimum age. *Thompson v. Oklahoma*, 487 U.S. ___, 108 S.Ct. 1987 (1988) (Kentucky's minimum age for the imposition of death is sixteen. KRS 640.040).

KENTUCKY & CHILDREN'S RIGHTS

Most of the *minimum* protections guaranteed to children under the Federal *Constitution* are incorporated into Kentucky's Unified Juvenile Code KRS Chapter 600. However, the Kentucky Courts have not shown any special interest in the expansion of the rights of children under the code or through Kentucky's *Constitution*.

As the Kentucky Supreme Court noted, not all constitutional rights are afforded to children, only fair treatment. *Jefferson County DHS V. Carter*, Ky., 795 S.W.2d 59 (1990).

Traditionally, juvenile matters have been treated differently than adult offenses. The state is considered to be acting as parens patriae rather than as a prosecuting authority. It has been a principle theory of juvenile law that an individual should not be stigmatized with a criminal record for acts committed during minority. By providing young people with treatment oriented facilities rather than simple punishment, antisocial behavior can be modified and the offenders will develop as law abiding citizens. However, such treatment does limit the constitutional rights that are traditionally provided for adult offenders. *Carter* at 56.

However, due process demands that the rights that are afforded to children either through statute or case law must be enforced. Kentucky has specifically recognized that the elements of due process must be met in juvenile proceedings in state court. *Workman v. Commonwealth*, Ky., 429 S.W.2d 374 (1968). The Court of Appeals has ruled that the violation of any statutory provision designed to protect children requires the dismissal of the juvenile petition. *Davidson v. Commonwealth*, Ky.App., 613 S.W.2d 431 (1981).

In addition, there are some circumstances where the Kentucky courts have found some measure of special protection for juveniles under both the Kentucky and Federal *Constitutions*.

In *Elmore v. Commonwealth*, 138 S.W.2d 956, 961 (1940), a mother had acquiesced to a warrantless search for evidence against her seventeen year old son. The Court found that the mother could not waive her son's rights because the Court noted "we are dealing with an infant, one about whom the law throw every reasonable protection and in whose favor the tendency is to resolve every doubt." The Court upheld Elmore's right to be free from warrantless searches under both the federal constitution and Section 10 of the Kentucky *Constitution*.

The idea of extra protection for juveniles was held to transcend the freedom of the press granted under the first amendment of the U.S. *Constitution* and Section eight of Kentucky's *Constitution* in *FTP v. Courier Journal*, Ky., 774 S.W.2d 444 (1989). In *FTP*, the Kentucky Supreme Court found that a juvenile's special right to confidentiality in all court proceedings outweighed the First Amendment interest of the press in covering a circuit court proceeding concerning the constitutionality of the juvenile waiver statute.

In other matters, Kentucky recognizes about the same level of protection of the U.S. Supreme Court - see *Davidson v. Commonwealth*, 613 S.W.2d 431 (1981) fifth amendment right against self incrimination recognizing *Gault; Dryden v. Commonwealth*, Ky., 435 S.W.2d 457 (1968) no right to jury trial in juvenile court under U.S. *Constitution*. *Baker v. Smith*, Ky., 477 S.W.2d 149 (1971) no right to bail in juvenile court under 16 of Kentucky Court because children are not "prisoners."

WHERE DO CHILDREN GO

FROM HERE?

While it is apparent that children have benefited from an expansion of rights under the state and Federal *Constitutions* since *Gault*, they still have less protection than adults who fact criminal charges. There appears to be an increasing trend in society to see children who commit crimes as little adults who should pay for their crimes. This may lead to a juvenile system that more closely resembles the adult adversarial judicial system. One can only hope that we don't lose sight of the fact that even juvenile delinquents are still children. Perhaps in time we can develop a system that recognizes the particular disabilities of childhood and balances the special needs of the juvenile defendant with the need for fairness and respect for all individuals who become involved in the criminal justice system.

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The journal of the National Council for the Social Studies, *Social Education*, featured issues on International Human Rights in September 1985, Religious Liberty in September 1990, and the First Amendment in October 1990. Additional issues in 1991 are devoted to the Bill of Rights.

American Bar Association
Special Committee on Youth
Education for Citizenship
541 North Fairbanks Court
Chicago, IL 60611-3314
(312) 988-5735

Update on Law Related Education, a periodical for teachers of students in grades 5-12, is one of a number of excellent resources available from the ABA.

American Civil Liberties Union
132 W. 43rd Street
New York City, NY 10036
(212) 944-9800, ext. 607

The ACLU has a directory of briefing papers, books, pamphlets, and posters on Bill of Rights cases.

American Historical Association
400 A Street, SE
Washington, DC 20003
(202) 544-2422

The AHA has a catalog of publications pertaining to the Bill of Rights which is available upon request.

American Newspaper Publishers Association Foundation (ANPA)
The Newspaper Center
P.O. Box 17407 Dulles Airport
Washington, DC 20041
(703) 648-1000

The ANPA Foundation cosponsored Newspaper in Education Week with the International Reading Association. The 1991 observation focused on and encouraged students to read newspapers to learn about the Bill of Rights. Teachers interested in NIE Week or other educational efforts by newspapers should contact the educational services department of their local papers.

Center for Civic Education
5146 Douglas Fir Road
Calabasas, CA 91302
(818) 340-9320

The Center for Civic Education offers an extensive program to foster civic competence and responsibility: the National Bicentennial Competition on the Constitution and the Bill of Rights (with new materials for 1991 emphasizing the Bill of Rights). Texts for the classroom study of the Constitution and Bill of Rights are available.

Center for Research and Development in Law Related Education (CRADLE)
Wake Forest University School of Law
P.O. Box #7206, Reynolda Station
Winston-Salem, NC 27109
(919) 759-6061

CRADLE, housed at Wake Forest University, has been designated by the Commission as a repository for teacher-developed lesson plans and materials on law and the Constitution for grades K-12. Catalogs of lesson plans are available.

Reflecting Upon the Tension Between Individual Rights and Community Needs

Activity 11 (7-8): Have students study synopses of court cases which resulted in important interpretations of rights. Use the resources suggested in Activity 9, as well as encyclopedia entries under the names of the cases themselves. We suggest the following cases:

The Trial of John Peter Zenger (established right of the press to criticize public officials, 1735)

Marbury v. Madison (established power of judicial review, 1803)

United States v. Burr (trial of Aaron Burr; strictly interpreted the Constitution's definition of the crime of treason, 1807)

Barron v. Baltimore (declared first ten amendments binding on the national government but not limiting states' power, 1833)

Dred Scott v. Sandford (supported right of property in slaves held in U.S. territories, 1857; later overruled)

Plessy v. Ferguson (established "separate but equal" principle, 1896; later overruled)

Brown v. Board of Education of Topeka (overturned "separate but equal," 1954)

West Virginia State Board of Education v. Barnette (outlawed statutes requiring public school students to salute flag, 1943)

Baker v. Carr (established "one person, one vote" principle in state legislatures, 1962)

Miranda v. Arizona (elucidated rights to remain silent and to have an attorney, 1966)

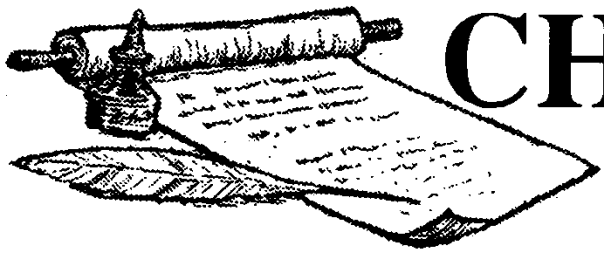
Near v. Minnesota (ruled that a state cannot prevent in advance publication of materials, 1931)

Engel v. Vitale (ruled that public schools cannot require prayer, 1962)

Wisconsin v. Yoder (prevented Wisconsin from requiring Amish parents to have children formally educated, 1972)

Richmond Newspapers, Inc. v. Virginia (ruled that press should have access to trials, 1979)

Griggs v. Duke Power Co. (expanded employment rights for minorities, 1970)



CHAPTER 15

Constitution of The United States
Fifth Amendment

No person shall be compelled in any criminal case to be a witness against himself....

Constitution of Kentucky
Section 11

In all criminal prosecution the accused cannot be compelled to give evidence against himself.

THE FIFTH AMENDMENT

"A prisoner is not to be made the *Deluded Instrument of His Own Conviction.*" -Hawkins, Pleas of the Crown 595 (8th ed. 1824)."

The Fifth Amendment right against self-incrimination is one of our most cherished constitutional provisions. This right has probably been with us since the beginning of civilized society. Those who wrote our *Constitution* were well aware of the dangers of an inquisitorial system where prisoners were tortured until a confession was rendered as in the Star Chambers of England. *See* Lowell, The Judicial Use of Torture, 11 Harv. T. Rev. 220, 290 (1897). Since the mid twentieth century in America, we have benefitted from rapid development of Fifth Amendment litigation. Nevertheless, as we approach the latter part of the twentieth century, we witness the gradual erosion of this treasured right.

The roots of the Fifth Amendment privilege against self-incrimination can be traced all the way back to the Bible, "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree." (Maimomides, Mishmeh Torah [Code of Jewish Law], Book of Judges, Laws of Sauhedrin, C-018, para. 6, II Gale Judacia Series 52-53).

In *Zing Sung Wan v. U.S.*, 266 U.S. 1, 45 S.Ct. 1, 69 L.Ed.2d 131, the Supreme Court held that a self-incriminatory statement would be admissible if it was found to be reliable and voluntary. However, in *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed.2d 682 (1936), the Court held for the first time that a confession obtained by brutally beating one of the suspects was inadmissible. In *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 99 L.Ed.2d 1192 (1944), the Fifth Amendment privilege was develop-ed even further. The Court held there that the isolation of Ashcraft, for thirty-six hours prior to his confession in a room at the jail, with a light over his head, while he was questioned in relays by law enforcement authorities, amounted to compulsion. Thus, the confession was not made voluntarily. In *Spano v. New York*, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.ed 1265 (1963), police use of deceit to play upon the sympathy of the suspects and win a confession, was rendered involuntary and therefore unconstitutional. The taking of a suspect into an officer's private office and stripping him of his clothes prior to questioning has been found to be involuntary. *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed.2d 568 (1897).

In 1967 and again in 1972 the Supreme Court twice overturned the death sentence of Johnny Beecher, a black man accused of killing a white woman because the prosecution introduced involuntary confessions. However, both of these cases were premised on 14th Amendment jurisprudence. The facts were horrendous. The suspect, an escaped convict, was shot in the leg while fleeing. As he lay in a field, the Chief of Police pressed a loaded gun to his face and asked him if he had killed the woman. Beecher denied it. The Police Chief threatened to kill him and another officer fired a loaded gun near his head. Beecher confessed. The confession was introduced along with two detailed statements prepared by Alabama investigators. Beecher signed these statements within an hour after receiving a morphine injection for pain in his leg. The statements were obtained a week or so after Beecher was arrested. A medical assistant, attending Beecher told the investigating officers to let him know if Beecher did not tell them what they wanted to know. He then left Beecher alone with the officers. In *Beecher v. Alabama*, 389 U.S. 35, 88 S.Ct. 189, 19 L.Ed.2d 35 (1967) the Supreme Court held that the confession and detailed statements violated the due process clause of the 14th Amendment as they were the product of gross coercion.

On retrial, the state of Alabama won a conviction by introducing yet another statement. This confession was obtained an hour after Beecher's arrest and after he had received two large injections of morphine. Upon being questioned by a doctor, Beecher then confessed. In Beecher II, *Beecher v. Alabama*, 408 U.S. 234, 92 S.Ct. 2282, 33 L.Ed.2d 317 (1972) the Supreme Court held that this statement, just like those introduced at Beecher's first trial were "part of the stream of events beginning with the arrest and were infected by coercion." Again, the Supreme Court found that such statements violated the due process clause of the 14th Amendment.

The Court was especially eloquent in the case of *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961), where it appeared that the accused was mentally defective, easily influenced and subject to intimidation. Culombe was detained in police custody for more than 4 days. He only spoke with police officers, his alleged accomplice, of whom he was afraid, and his wife. She, by prearrangement with the police, asked him to confess. He was never informed of his right to remain silent and his right to counsel was frustrated by the police.

The Supreme Court found that his confession was not voluntary and it violated the due process clause of the Fourteenth Amendment. The Court went on to speak towards the evils and dangers that exist with police interrogations:

> "Persons subjected to interrogations are torn from the reliances of their daily existence and held at the mercy of those whose job it is- if such person have committed crimes, as it is supposed they have- to prosecute them. They are deprived of freedom without a proper judicial tribunal having found them guilty, without a proper judicial tribunal having found even that there is probable cause to believe that they may be guilty. What actually happens to them behind closed doors of the interrogation room is difficult if not impossible to ascertain. Certainly, if through excess of zeal or aggressive impatience or flaring up of temper in the face of obstinate silence a prisoner is abused, he is faced with the task of overcoming, by his lone testimony, solemn official denials. The prisoner knows this - knows that no friendly or disinterested witness is present -and the knowledge may itself induce fear."

One of the most famous and far-reaching cases concerning the Fifth Amendment

was a collection of four cases, *Miranda v. Arizona - Vigmera v. State of New York - Westover v. United States* and *State of California v. Stewart*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In all of these cases confessions were obtained from suspects who were interrogated *incommunicado* at the police station. In three of the cases, the suspects were not made aware of their right to remain silent and their right to consult with counsel prior to making the confessions. In the fourth case, there was no showing of a waiver of these rights prior to making incriminating statements. The Court recognized that these issues were of recurrent importance in numerous cases and that most custodial interrogations were, by their nature, coercive. The Court perceived the need to establish concrete guidelines for law enforcement agencies and courts to follow. The warnings which must be given in plain and unambiguous terms prior to any questioning consist of:

(1) The right to remain silent;

(2) A warning that anything said can and will be used against the individual in court;

(3) The right to talk with counsel prior to the investigation, and to have counsel present during the interrogation;

(4) If the defendant is indigent, a lawyer will be appointed to represent him prior to any questioning;

(5) Should the defendant indicate in any manner, at any stage of the process, that he wishes to remain silent and/or consult with an attorney, questioning must cease at least until an attorney is present;

(6) The defendant may waive these rights, provided the waiver is made voluntarily, knowingly and intelligently.

In general, *Miranda, supra*, states that warnings are required whenever there is a custodial setting and interrogation.

In *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The Supreme Court held that a waiver of the defendant's right to counsel must not only be voluntary, but also must be knowing and intelligent. The Court also distinguished between the waiver of the right to remain silent and a waiver of the right to counsel. When the right to remain silent has been invoked, that right can be waived by responding to the police initiating questioning. However, when the *Miranda* right to counsel has been invoked, that right cannot be waived until Counsel has been made available; unless, the suspect imitates further interrogation by the police.

In the most recent case of *Minnick v. Mississippi*, 498 U.S. __, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), the *Miranda and Edwards* rule prevailed once again. Minnick, who invoked his right to counsel while being interviewed by the FBI, was allowed by the FBI to end the interview and appointed counsel was provided for him. Petitioner, Minnick, met with his attorney on two or three occasions. Nevertheless, on August 25, Deputy Sheriff, J.C. Denham of Clark County, Mississippi, went to the San Diego Jail, to question Minnick. The jailers told Minnick that he could not refuse to talk to Deputy Denham; Denham advised Minnick of his rights, and Minnick declined to sign a right's waiver form. Minnick gave incriminating statements to Denham; the trial court held that Minnick's confession was voluntary. He was found guilty of murder and sentenced to death. However, the Supreme Court ruled that Minnick's confession was involuntary. The Supreme Court decided the case in accordance with *Miranda* and *Edwards*. Once an individual in custody invokes his right to counsel, interrogation "must cease until an attorney is present." At that point, "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Edwards* was "designed to keep police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Miranda, supra*.

In, *U.S. v. Graham*, 487 F. Supp. 1317 (W.D. Ky.1980) and *Kordenbrock v. Scroggy* 919 F.2d 1091 (6 Cir. 1990) the courts have decided a couple of Kentucky cases involving The Fifth Amendment privilege. *U.S. v. Graham supra* involved three defendants, James E. Graham-Gerald E. Durall-Ronald G. Durall. The Court held that at the time the defendants obligation to notify authorities arose, defendants were engaged in what could reasonably be thought to be criminal conduct; therefore, prosecution of defendants for misprision of felony would violate Fifth Amendment Privilege. One of the elements to prove misprision of a felony was defendant Graham's failure to notify authorities as to the whereabouts of his son, who was attempting to avoid prosecution. Graham argued that to disclose his son's whereabouts would require him to give self-incriminating evidence that could lead to his prosecution for harboring a fugitive. The same ruling was held for defendants, G. Duvall and R. Duvall; "Disclosure of principal offense would compel defendants to give information which might tend to show they had committed a crime."

In another interesting case with a Kentucky defendant, *Kordenbrock v. Scroggy*,919 F2d. 109(6th Cir. 1990), the Sixth Circuit held that use of defendants confession, which was obtained by police in violation of *Miranda*, during penalty phase of trial was not harmless error; and use of confession during guilt phase of trial was not harmless error. The Court found that Kordenbrock's confession which was obtained in violation of *Miranda*, was found to be harmful error. The confession that was introduced at the penalty phase of Kordenbrock's capital murder trial, was the only piece of non-circumstantial evidence in which the state had to prove that the crime was premeditated. The confession tended to undermine the mitigating evidence of diminished capacity due to use of drugs and alcohol. In addition, this same compelled confession was used in the defendants guilt phase of Kordenbrock's trial. The confession was harmful during this phase, because it tended to contradict Kordenbrock's contention that he was under the influence of alcohol and drugs at the time of the shooting and therefore did not intend to cause death.

In the Kentucky Case of, *Creech v. Commonwealth*, Ky. App. 412 S.W.2d 245, 1967; Creech was taken into custody and was advised of his right to remain silent, as well as of the fact that anything he might say could be used against him. Creech informed the officer that he did not desire to make any statements. In spite of Creech having informed the detective that he desired to remain silent, Creech's co-defendant was brought into Creech's presence by the detective and was asked to relate what co-defendant had therefore confessed; Creech's co-defendant's confession had implicated Creech fully. His co-defendant asserted that Creech had delivered to him the pistol used in the attempted robbery. At this point the detective inquired of Creech:,"Bill is that right?" *Creech, supra* at 246. Creech responded:,"OK, Pat. Giving him a gun would be like putting a pack of matches in a kid's hand," *Id.* In the event of a retrial, the Court directed the lower court to refrain from using the statement, because the statement violated rules of *Miranda, supra*, and *Escobedo, supra*.

Recently, Rodney McDaniel, Appellate Attorney, Department of Public Advocacy, was successful in winning a very important Kentucky case relating to the Fifth Amendment Privilege. The case of *Todd Anders Paulsell v. Commonwealth of Kentucky*, No. 90-SC-015-MR, Ky.,(Sept. 26,1991). Paulsell was charged with the murder of his housemate; he was placed in custody by the police, and he was given *Miranda* warnings. He voluntarily accompanied Det. Galloway to the location of the body. He then stated that he did not desire to say anything further before consulting an attorney. Upon being transported to City Hall, Paulsell allegedly "blurted out" that Almon had been using his food and utilities, and he was glad Almon was dead.

After arriving at City Hall, at approximately 5:00 AM, Det. Galloway asked Paulsell to sign a right's waiver; Paulsell refused. Det. Galloway then held Paulsell handcuffed to a chair to be interviewed by other detectives. At 7:30 AM, Det. Dodd arrived at City Hall. Unaware of Paulsell's earlier request to see an attorney, Det. Dodd "explained" the waiver of rights to Paulsell, obtained a signed rights waiver at 7:39 AM, and took oral and written statements. The Ky. Supreme Court held in accordance with, *Edwards v. Arizona, supra* and *Mimnick v. Mississippi, supra.* When Paulsell informed Det. Galloway that he wanted to say nothing more before seeing an attorney, questioning should have ceased unless Paulsell had a change of mind. The Court went on to say that despite Paulsell's assertion of his right to counsel, and his initial refusal to sign the rights waiver, he was held 2 1/2 additional hours waiting to be interviewed by other detectives. It must be understood that Paulsell signed the waiver of rights at 7:39 AM, following an evening at a bar and a night of crime, arrest, and detention-all without sleep. Considering all of the circumstances, the court concluded that the statements should have been suppressed by the lower court and Paulsell did not knowingly and voluntarily waive his previously asserted right to have counsel present during questioning.

THE HOBSON'S CHOICE

The Supreme Court has also recognized that a statement may be compelled when the accused will be penalized if he opts to remain silent. This penalty exception as it has come to be known is illustrated in the case of *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 19 L.Ed.2d 562 (1967).*Garrity* involved allegations that several law enforcement officers fixed traffic tickets. During the investigation, the officers were given the option to give statements concerning these allegations or lose their jobs.

The prosecution introduced these statements at a later trial wherein the officers were convicted. The United States Supreme Court reversed the convictions holding that:

> The choice given petitioner was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent. That practice, like interrogation practices we reviewed in *Miranda v. Arizona*, 384 U.S. 436, 464-465, 16 L.Ed.2d 694, 718, 86 S.Ct. 1602, 10 ALR 3d 974 is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our decisions.

Further discussion of this penalty exception can be found in Hirsch, Milton, *"The Road Not Taken"* The Champion Vol. 25, No.3, April 1991.

DECLINE OF THE PRIVILEGE

In spite of the numerous cases that advanced the great Fifth Amendment Right to be free from compelled self-incrimination, the recent cases of *Arizona v. Fulminante*, 499 U.S. __, 111 S.Ct., 111 L.Ed.2d 302, and *McNeil v. Wisconsin*, 501 U.S. __, 111 S.Ct. 2204, 115 L.Ed.2d 158 have landed a devastating blow to this ancient principle.

In *Fulminante, supra*, the Supreme Court held that involuntary confessions are now applicable under the harmless error rule. The Court appears to have departed from its long established principle that coerced confessions violate due process in all situations; even if there is sufficient evidence aside from the confession to support the conviction. See *Roger v. Richmond*, 365 U.S. 534, 81 S.Ct. 735 5 L.Ed.2d 760 (1961); *Malinski v. New York*, 342 U.S. 401, 65 S.Ct. 781, 89 L.Ed.2d 561 (1945), *Stroble v. California*, 343 U.S. 181, 72 S.Ct. 544, 26 L.Ed.2d, *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). The Supreme Court seems to think that because the harmless error rule developed in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), has been applied to numerous other trial errors, there is no reason why it should not be applied to an error of this nature. However, what the Court fails to realize is that a coerced confession error is different and more serious than other erroneous evidence that has been admitted in the past.

The *Chapman* case recognizes and indicates that there are some rights that are so essential to a fair trial that a violation of one of them cannot be treated as a harmless error. *Chapman, supra*, clearly noted that there were three constitutional errors that could never be applied to the harmless error doctrine; (1) coerced confessions; (2) depriving one of the right to counsel at trial and; (3) trying a defendant before a biased judge.

Now, the Supreme Court departs from its position in *Chapman, supra*, by ruling that the admission of a coerced confession can be applicable under the harmless error rule. *Fulminante, supra*, goes against years of Fifth Amendment jurisprudence. In addition, such a ruling is oppressive to the human spirit. To admit evidence that was obtained by force and immoral methods, offends and dishonors our justice system.

The Fifth Amendment privilege against self-incrimination suffered a side blow from the Supreme Court in the opinion of *McNeil v. Wisconsin. McNeil v. Wisconsin*, 501 U.S. __, 111 S.Ct. 2204 L.Ed.2d 158 (1991). There the Supreme Court held that McNeil's invocation of his Sixth Amendment right to counsel during a judicial proceeding did not constitute an invocation of right to counsel derived by *Edwards, supra*. The Court's decision appears to be sinister and barbaric in effect.

It was established in the Court's holding of *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), that a defendant who invokes the right to counsel for interrogation on one offense may not be reapproached regarding any offense unless counsel is present. In *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), the Supreme Court held, "that the defendant's invocation of his right to the assistance of counsel at arraignment prohibited the police from initiating a post-arraignment custodial interrogation without notice to his lawyer." With most defendants being layman to the law, it would be ridiculous for the Court to require them to invoke their Sixth Amendment Right to Counsel as well as their Fifth Amendment Right to Counsel. The defendants in most cases, do not know which constitutional right they are invoking. The fact that the accused has requested counsel, should be a clear indication that the accused recognized that he is not capable of dealing with his opponents without help under any circumstances.

Now an accused will face the confusion of having asserted his right to counsel in court before a judge, and having an attorney who represents him; yet, he may be approached by law enforcement officers repeatedly on other charges unless he again asserts his need for counsel. Clearly, the Supreme Court's goal here is to increase those convictions won by confessions. Such decisions may move us from the adversarial system we have come to rely on back to the inquisition of old, that predated the founding of this democracy.

KEITH MOORE,
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Keith is 37 years old, a native of Indianapolis, Indiana. He is currently an inmate of Frankfort Career Development Center, and works with Death Penalty Data here at the DPA office.

THE CONSTITUTION

The words we live by

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