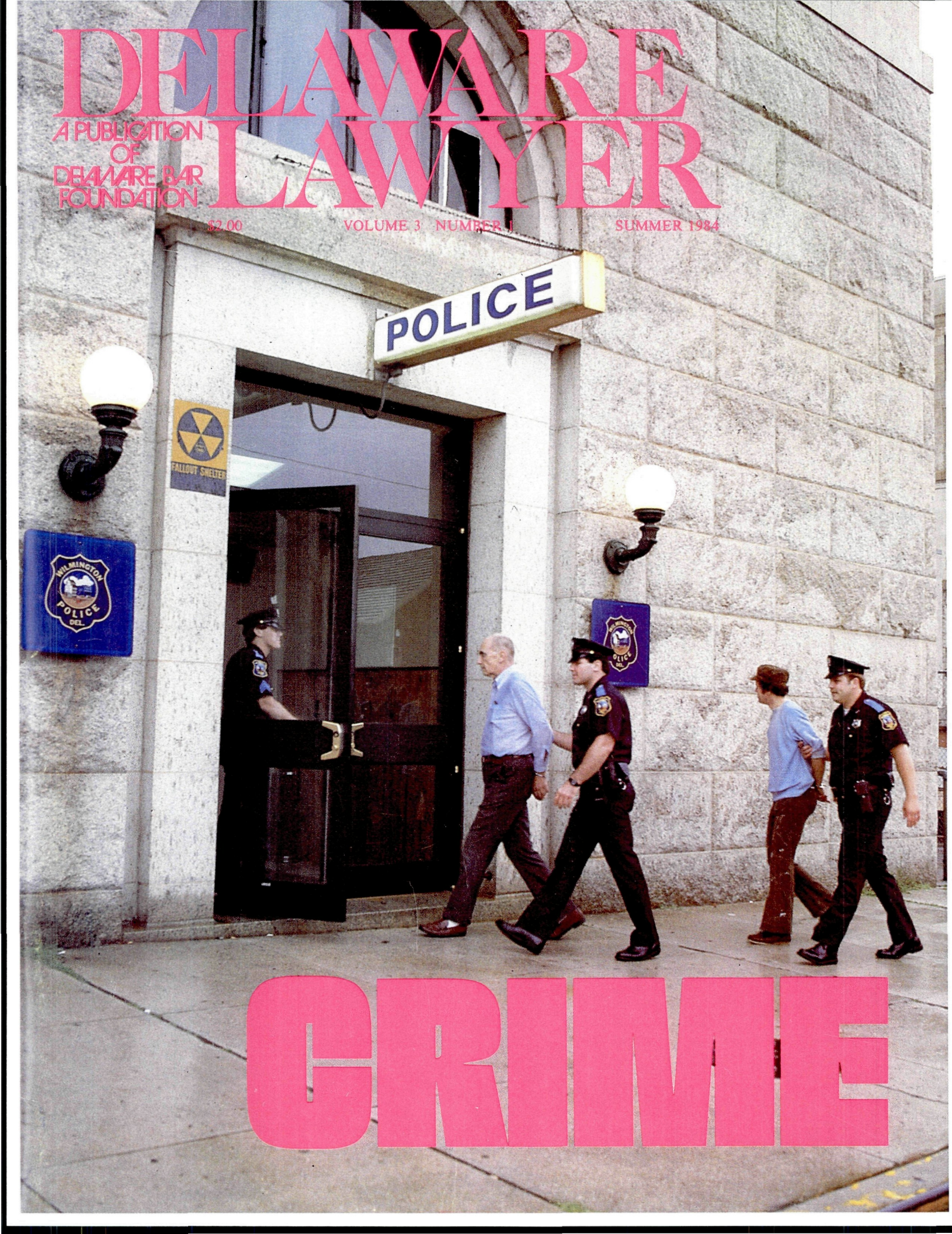

DELAWARE LAWYER

A PUBLICATION OF DELAWARE BAR FOUNDATION

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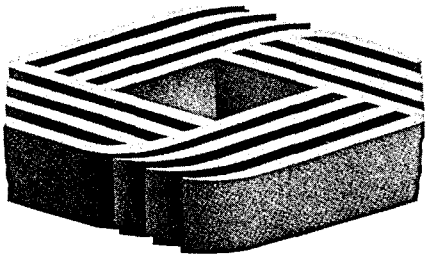
CRIME



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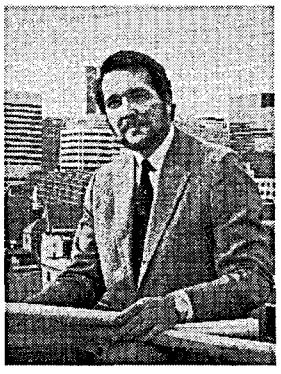
Hunter Lott Industrial parks have been attracting attention for the longer range investor. I like the Southgate Industrial Center at the intersection of I-295 and U.S. 13 just south of Wilmington. Location is excellent and the investor can purchase two or more acres at competitive cost.

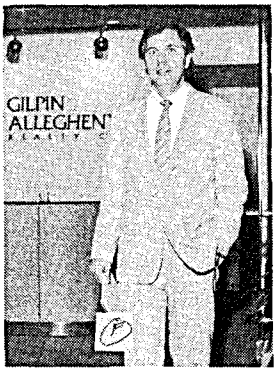


Leigh Johnstone Office facilities in northern Delaware continue to be solid investment opportunities. Of special interest is the planned Blackstone Building at 10th & French Streets...an ideal combination of superb office space and an uncommonly convenient location.

Ray Fox Small commercial buildings in rapidly developing mid-city areas are perfect for the smaller investor. One good example is 833 Washington Street...a classic architectural structure with a variety of potential uses ranging from retail space to offices.

Ed Swift Many serious real estate investors eventually progress to suburban-style garden apartment properties. University Garden Apartments, in Newark, represents just such an investment opportunity.

Mark Undorf Structures specifically designed for retail and office combinations on two levels are unusual in this area. Wawaset Plaza in prestigious west Wilmington is a good example of a fine investment opportunity.



David May Industrial "townhouse" units are a relatively new concept that provide small workspace for a variety of technical, mechanical or laboratory activities. The Christina Commercial Center in Newport, Delaware consists of such units attractively grouped in a bi-level building.

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VOL. 3 NO. 1
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Contents

Our Cover:
Setting the tone for an issue always presents a problem that must be solved on the face of the magazine if the reader is to be lured inside. When we planned our issue on crime we decided that we must commence on a powerful note of grim drama. Editor Wiggin wanted real prisoners and a paddy wagon. Other Editors wanted no law suits for invasion of privacy. Solution? The cover depicts Wiggin handcuffed and in the thrall of Patrolman Anthony Ruggiero, followed by Editor Ambro and Patrolman Thomas L. Liszkiewicz. Sgt. Richard A. Andress stands at the portals of the Wilmington Police Station. All hope abandon ye who enter here!

The police were marvelous to work with. Photographer Eric Crossan snapped dozens of shots until he got the effect he wanted. Our thanks to Capt. Francis T. Monaghan, III for making the cover possible.

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BAR FOUNDATION CORNER

All Those Nasty, Unaristocratic Lawyers!

VICTOR F. BATTAGLIA

(in which Chairman Battaglia pumps a few rounds into one of our contributors)

After practicing law for almost a quarter of a century, I have become increasingly alarmed at those who degrade today's lawyers and lament the passing of the "good old days". Many outside the profession seem quick to condemn the law, lawyers, and the legal system. It is very trendy for corporate officers (some of whom are paid salaries and emoluments in high six and seven figure categories) to complain about the high cost of legal services.

Peter Megargee Brown argued in an article in the last issue of DELAWARE LAWYER that there has been a decline in lawyers' professional independence, and reports that Chief Justice Burger foresees "hordes" of lawyers, hungry as locusts, pouring out of the law schools. The President of Harvard, Mr. Bok, complains that exceptionally talented people are diverted to the practice of law, presumably from "higher things". One can almost hear the articulate Mr. Brown sigh as he quotes Tocqueville's statement that "(I)t is at the bar or the bench that the American aristocracy is found."

Chalk it up to my "narrow" education as a lawyer, but in the face of these recent complaints about my profession—a profession I love—I ask, "What are these people talking about?" Give me specifics. Where is the evidence to support the complaints? It is not my manner to issue challenges to the rich and powerful to detail defects of my profession, but at the same time, I cannot sit by silently while broad-brush condemnations devoid of facts are unloaded on us.

I begin with the proposition that lawyers are human beings—fallible human beings. There are more of us than in the "good old days". Like any group, ours harbors the strong and the weak, the brilliant and the average, some who are dedicated and some who just want to feed the kids. We have no monopoly on virtue. We are fallible human beings, subject to the same pulls and tugs that direct and distract our brothers and sisters. Some of our profession will rise to the top and others of us, whether because of lesser talent or opportunity, will not be so fortunate. Those who rise to the top will reap many rewards: honor, prestige, power, authority, and even wealth. But I doubt that many of our colleagues will achieve the gawdy financial success that we have recently seen in the automotive industry. The captains of industry appear to have reserved unto themselves compensation of such magnitude—the reward of the marketplace. The message seems to be: you take the honor and we'll take the cash.

From my limited point of view, the legal profession has been and is now more than ever the conscience and backbone of a powerful and compassionate country. It is true that most of our founding fathers were lawyers. It is equally true that many of our *preserving* fathers are lawyers—these include our Governor and our two United State Senators. The contributions of the legal community to public service in Delaware are legendary. No

Above: Chief Justice Berger gamely prepares to meet the "horde." Right: Chairman Battaglia on the brink of pontification.

one can deny that the profession has served our state with distinction and honor from its foundation to our orderly and compassionate modern times with an unabated energy and strength of continuity seldom seen in governments.

With deference to Tocqueville, I suggest that there is no place for aristocracy in a democratic society.* What we have strived for and have achieved in good measure is an upwardly mobile society in which every person may reach for position and standing based only on the attributes of character and ability. We are today an egalitarian society, and admission to this precious profession is no longer limited to the old families of wealth and position or to the well-connected. The profession is now open to all. Is this a departure from the "good old days"? It is a departure that strengthens the profession just as it has strengthened every aspect of our society.

Every time I hear a complaint about the increasing numbers of lawyers I wonder why the availability of more lawyers causes so much concern. Legal services are more easily available today than at any time in our history. They are more available to the poor, to the oppressed, and to the unpopular. No one has suggested that the legal and moral obligations that are peculiarly applicable to lawyers have been weakened. If anything, we appear to be on a steady course of increasing self-regulation. It can't be a detriment to our society that lawyers are more available today and that more people have a fair chance to protect their rights and to vindicate their claims. That lawyers are more accessible today and therefore more frequently employed should not upset anyone. The question we should ask is are they *improperly* employed? If the answer is "yes", the case should be made. If not, the case should be closed.

We should not be upset by the numbers of lawyers if more people are now able to turn to them for help. Even the most inattentive observer must admit that legal services for the poor, the unpopular, children, and those generally who cannot provide for themselves have expanded greatly. Those who complain in the abstract about numbers of lawyers do us a disservice. The debate must address the desirability of legal services for more people and our larger awareness of the responsibility to protect our workers, our environment, and as consumers, *ourselves*. In the "good old days" our rivers and the air we breathed were thoughtlessly polluted and workers were exploited. Only now are we assessing the penalties for using lethal materials like benzene, asbestos, and silica. We have to pay to protect the atmosphere and our work force, and we have to pay for years of neglect and the resulting damages. We have to set a price tag fair both to the offender and the offended, and this will require that "horde" of lawyers so deeply distasteful to a Chief Justice whose powers of rhetorical indignation frequently outdistance his capacity for thought.

Inflation has victimized our profession no less than it has victimized everybody else. The $800 Model A is in today's economy a $10,000 automobile. Those searching for a good 5 cent cigar could just as well be dredging for the Loch Ness Monster. Is it surprising that legal services have become more expensive? In 1982, 1.06% of personal income went for legal services. The legal profession generated 27.3 billion dollars in 1982, halfway between the income generated by liquor stores (19 billion) and

* What? No aristocracy of intelligence, hard work, and honor? We quarreled with Victor about this and he cited one of the Oxford English Dictionary definitions of "aristocracy": "That form of government in which the chief power lies in the hands of those who are most distinguished by birth or fortune; political supremacy of a privileged order; oligarchy." In that sense of the word Vic is clearly right, although we remain intransigently dedicated to the notion that work well done is elitist in the best sense.

The Editors

drug stores (35.8 billion). And it is our "greedy" profession that has taken the lead to seek more economical ways to service small claims. The average compensation of lawyers and judges in 1982 was $37,322 per year. This compares unfavorably with the compensation of auto workers during the same period, even before you add the costs of fringe benefits available to industrial workers, but generally not available to lawyers. We are victims of the news reports of the multi-million dollar awards. If those awards were not so rare, they would not be so widely reported. The great majority of lawyers are hard working, honest, conscientious people who give in generous proportion to the communities in which they live.

When Chief Justice Burger expressed his concern about the numbers of law students, I begin to speculate about his perspective. In 1982 there were 252,000 law students. There were three times as many enrolled in Education and Social Sciences; ten times as many in Business. As a matter of fact, in 1982 there were fewer students studying law than in any other branch of higher education except mathematics. Much larger numbers of students seek higher education today. The increase is not limited to law students. Many law students will never practice, but their training will be a valuable asset in business, politics, or administration. The market place has always been the most dependable regulator of numbers in any profession. No reason is cited why it should not work for lawyers. I see far more benefit than detriment in the availability of more lawyer service.

We in the legal profession suffer from many imperfections. If you would help us, point them out to us with specificity in lieu of generalized slanders. We have always been a self-correcting profession and there is no reason why we should not continue to be one. This is not 1900, 1920, 1940 or even 1960. Oversimplified comparisons with those times are useless.

If the nub of complaint is that lawyers no longer stroll to the Courtroom in bowlers and spats or that it is no longer possible to suspend Court business over the summer so that judges and lawyers can make the trip to Saratoga Springs, then criticisms of our profession are valid.

The Delaware Lawyer's Code of Professional Responsibility strictly regulates the practice of law. It and similar lawyers' codes in other states are without parallel in any other occupation. We lawyers practice in the most closely scrutinized profession society has ever known.

If the complaint is that we are now a more democratic profession, and that the courts look to our profession for the diligent assertion of due process and freedom of expression, the criticism is valid.

If the complaint is that some lawyers are acting as businessmen, the criticism is *not* valid, unless the criticism demonstrates that one cannot be a good lawyer and a good businessman at the same time. To those who bemoan the fact that some lawyers have limited their practice to special areas I say: *recognize the obvious.* It is no longer acceptable to be a jack of all trades. The sheer volume of state and federal regulations requires most of us to limit our areas of practice—*for the protection of our clients.*

The Delaware Lawyer's Code of Professional Responsibility strictly regulates the practice of law. It and similar lawyers' codes in other states are without parallel in any other occupation. We lawyers practice in the most closely scrutinized profession society has ever known.

The process by which we are admitted to practice in Delaware fairly reflects the care and regulation to which the profession is subject.

Admission requires a clerkship under the direction of a senior member of the Bar for a period of at least 5 months. The applicant must pass three tests: a multi-state examination, an essay examination, and an ethics examination. The character of each applicant is carefully investigated. These are not devices to protect the vested interests of lawyers; they are designed to insure that those who emerge as lawyers are qualified by character and ability to be entrusted with the care of their clients' interests.

After a lawyer is admitted to the Bar, he can avail himself of an aggressive Continuing Legal Education program to maintain the quality of his services, and to improve them.

A substantial argument can be made that the scholastic quality of law students admitted by law schools has improved steadily over the past 25 years. Unlike President Bok, I view the responsibility imposed on us as lawyers as *requiring* the service of our best and brightest students. I should like to know what pursuit he considers more vital to our people than the practice of law or why he would be concerned that exceptionally talented people are "diverted" to the essential business of maintaining our rights and freedoms.

Certainly, the quality of professional services has not diminished. Over the years many requirements have been imposed as conditions to the privilege of practicing law. These innovations have been formulated *by* the profession *at the expense* of the profession. The bar of this state contributes annually to a fund to reimburse clients defrauded by lawyers. It has paid out tens of thousands of dollars and currently is maintained at a level of approximately $500,000. That kind of protection was not available in the "good old days".

Lawyers are currently required to submit to spot unannounced audits to ensure proper handling of clients' funds.

The bar provides financial support for free attorney services to the poor through Delaware Volunteer Legal Services.

The bar provides financial support for Community Legal Aid Society as well as board assistance.

Committees such as the Board of Bar Examiners, the Board on Professional Responsibility, and the Client Security Trust Fund have been manned by volunteer lawyers, who give large amounts of uncompensated time to see that the public is well served.

In sum, our bar proudly adheres to the traditional obligations of service to client and community. Self-regulation has become more responsible,

democratic and effective. It has become regulation within the bounds of the Constitution.

Good business in the practice of law is not to be condemned. Good business frequently helps service clients, the courts, and our communities.

Each of us has an obligation to maintain the professional standards that were passed on to us. We have endeavored to maintain and improve those standards. There is a natural tendency to retain memories of the pleasant or good things from the past and there is nothing wrong with that. Be careful however if you are going to measure present practice against the past. Remember that context is important. If you see something bad or improper, speak out. But notice also our accomplishments. Notice the enlarged scope of our responsibility. Notice the *innovations* to protect the client. Notice the strength of a legal profession that mirrors the democratic society we enjoy. Do not condemn change just because it's change.

Remember in those good old days of Tocqueville, women had virtually no rights, blacks were slaves, Indians were slaughtered, and except in a few Eastern cities, handguns were more common everyday wear than pocket watches.

The legal profession will always be an easy target for criticism because it assumes greater obligations than do other professions. We seek not popular approbation; we seek what is right. And there are times when it is against the will of the majority to protect unpopular rights. Many did not understand that the protection of the right of the Nazis to march in Skokie was not a protection of Nazis, but a preservation of a system of law.

We as a people have made tremendous strides in this country. Any fair evaluation must credit the legal profession with a continuing leadership role in these advances.

We must be ever vigilant that those not content with the direction of government do not seek an advantage to which they are not entitled by attempting to discredit the legal system. Too often they are eager to categorize the litigation process as a battle of lawyers rather than the process by which the claims of litigants are resolved according to the rule of law. □

EDITORS' COLUMN

Thanks to Judge Vincent Poppiti for bringing together the impressive array of talented experts in matters criminal whose articles appear in this issue. Space limitations made it impossible for us to include Clifford Hearn's most interesting discussion of the Violent Crimes Compensation Board. We console ourselves with the thought that we have something of quality on hand for a later issue.

The most satisfying aspect of this issue is the use to which it will be put: students enrolled in University of Delaware courses in criminal justice will be studying it for the views and revelations of our authors.

As you will see from these articles, there is today a real ferment of criticism and innovation in tackling the long neglected problems inherent in any system of criminal justice. To the extent that the articles below evidence creativity, intelligence, and receptivity to new ideas—and we think that they manifestly do—they constitute in sum a profoundly encouraging account.

The Editors

On March 5, 1770 Redcoats, long abused by the restive colonials of Boston, Massachusetts, fired in self-defense upon an unruly mob. Dishonest patriots promptly transformed "The Boston Massacre" into one of the holy fairy tales of our war of independence. Several British soldiers stood trial for their lives in this hostile venue, and John Adams represented them at considerable risk of contracting his clients' contagious unpopularity. Adams was a brave man and a splendidly clear-minded lawyer: "Counsel ought to be the very last thing that an accused person should want in a free country." Adams saved his clients, and in so doing buttressed the rule of law. He also survived brief odium inflicted by the irrational but potent force of public resentment. Sid Balick's words enlarge upon John Adams's vital, neglected message.

UNPOPULAR GLORY

SIDNEY BALICK

"I share with many the concern that so many of our profession are reluctant to represent people accused of crime. There was a time in our history when lawyers generally could be counted upon to present a militant front, however unpopular, against any invasion or undermining of individual, human or constitutional rights . . . ." Justice William J. Brennan, Jr., United States Supreme Court.

Many years ago when I was a law student, a prominent lawyer from the Philadelphia area came to our law school to speak. He had just defended a group of communists who had been charged with advocating the violent overthrow of the United States government. He told us about the hate mail he had received. Members of his family had experienced verbal abuse in public places. Threatening telephone calls were made to his

home. This lawyer had come to urge the law students to consider the practice of criminal law upon graduation. His experience had caused him concern that lawyers would shy away from the practice of criminal law. He worried that there weren't enough competent lawyers who were willing to take on the representation of an unpopular cause. There is still cause for concern today.

Twenty-five years ago in Delaware there was no office of the public defender. The court maintained a list of most of the lawyers admitted to practice in Delaware, and these lawyers served as court-appointed counsel for those accused of crime who couldn't afford to hire their own lawyers. Usually two defense lawyers were appointed for serious crimes such as murder or rape. Often these lawyers made up for any lack of experience by their diligence in pursuing the client's cause. Experts from other fields such as corporation law or commercial law were called upon to defend those accused of crime.

During these 25 years there has been a proliferation of lawyers in our

Sid Balick is one of the ablest members of the Delaware trial bar. He enjoys an enviable reputation for skill and honor in his defense of the accused. We are grateful to him for his strong utterance of a neglected message.

state. Crime has soared in Delaware, just as it has across our country. Public outcry has justifiably increased. A combination of illegal drugs and the use of deadly weapons has drastically changed the American scene. The criminal trial calendar has clogged the entire judicial system in Delaware. In spite of all this, there are still relatively few competent private practitioners who specialize in criminal law.

Justice Brennan in discussing this subject further went on to say that there must be brought home again to the nation and the profession ". . . the truth that the first office of a lawyer in our society is to protect individual rights, especially those secured to people accused of trespassing society's laws. American lawyers can not be mere private practitioners of the law. They have a public responsibility to maintain a system of government by law. That phrase, government by law, is not empty platitude. It is the essence of a free society. No nation possesses a code better designed to assure the civilized and decent administration of justice, which is a free society's hallmark. But that code will provide only paper protection if our people are more concerned with prosecutions that are overturned than with fundamental principles that are upheld. *Because it is only by upholding fundamental principles, even at the expense of freeing some not very nice people, that the protections for nice people are maintained.*" (Italics supplied.)

"How can you defend a person like that?" "Those drunk drivers must be taken off the roads." "How can you help *them?*" "How can you defend a person you know is guilty?" These are the questions asked of the criminal defense lawyer.

Tax attorneys, corporation lawyers, personal injury lawyers are generally respected members of the legal profession. Lawyers representing those accused of crime are pictured as slick or crafty. Often they are linked with their clients in a way that suggests that they, too, violate the law. Not only is the defendant presumed guilty but, often, so is his lawyer.

It may be necessary to re-educate the public. Even as lawyers we sometimes lose sight of the role of the defense lawyer in the criminal justice system.

Everyone understands that the role of the prosecutor is to enforce the law. What is less widely understood is that this is also the role of the defense lawyer. The keystone of our system is that no one's liberty will be taken without due process of law. The burden of proof placed on the prosecution, proof beyond a reasonable doubt, and the presumption of innocence are designed to protect the wrongfully accused. In defending those accused of crime, the defense lawyer must see that the burden is borne and the presumption enforced.

The courts must be careful to demonstrate respect for defense counsel. There must be trust if the lawyer is to be an effective advocate for the client. The public must not sense any difference in the court's attitude toward counsel for the state or counsel for the accused. Subtle differences in treatment can discourage competent counsel from participation.

Only he can make certain that the prosecutor honors the requirements of due process.

The first loyalty of the defense lawyer is to the client. The client must know that the lawyer will exert every effort possible within the law to protect him.

It has been said that the life of a criminal defense lawyer can be a lonely existence. At times, decisions must be made that will ultimately affect the life or liberty of a client. Even fellow lawyers who practice civil law often fail to understand or relate to the defense lawyer's role as a defender of the accused. It may seem that all hands, including the judge, the jury, the prosecutor, and the general public, seem to align themselves against the defense lawyer and the client from the time of arrest through trial. It is true that the lawyer may become the target of abuse, but the rewards may also be great. There is nothing to match the sense of satisfaction when an innocent person is freed through his lawyer's efforts.

The fundamental point that needs to be stressed is that the practice of criminal defense law is an honorable profession. Counsel for the accused is no less important or essential to the administration of criminal justice than the judge or counsel for the prosecution. He is expected to serve as the accused's advocate with courage, devotion, and to the utmost of his learning and ability and according to the law.

The bar should encourage through every available means the widest possible participation in the defense of criminal cases by experienced trial lawyers. All qualified trial lawyers should stand ready to undertake the defense of the accused, regardless of public hostility toward the accused or counsel's personal distaste for the offense charged or the person of the defendant. Law firms should encourage partners and associates to appear in criminal cases.

The courts must be careful to demonstrate respect for defense counsel. There must be trust if the lawyer is to be an effective advocate for the client. The public must not sense any difference in the court's attitude toward counsel for the state or counsel for the accused. Subtle differences in treatment can discourage competent counsel from participation.

The role of counsel for the accused is a difficult one because it is complex, involving multiple obligations. This is one reason that the challenge of this practice should attract people to it. To the client, the lawyer is counselor and advocate; to the prosecutor he is professional adversary; to the court he is both advocate for the client and counselor to the court.

This field of advocacy is not for the timid or the meek. Our system of justice is inherently contentious, although there are rules of practice and professional ethics. The lawyer can not be half-hearted in fighting for his clients' cause. He is obliged not to omit any essential, honorable step for the defense.

The worth of a criminal defense lawyer depends heavily upon his reputation for professional integrity. He is not a mere agent of his client. He is an independent professional representative. He must maintain the proper professional detachment and conduct himself according to accepted professional standards. Most important, the court must rely on his representation of the facts or the law.

The only limitations upon the obligation of defense counsel in the pursuit of his client's interest are the canons and standards of professional conduct. The courts and experienced lawyers have been concerned about the influx of larger numbers of inexperienced lawyers into the criminal process, because many display a disturbing lack of understanding of the rules of professional conduct. The need for professional discipline of practitioners in this field of law has undoubtedly contributed to the unwillingness of competent lawyers to enter the field.

The legal profession has not yet reached the point of requiring certified specialization. Wider participation in the defense of criminal cases is necessary to ensure the availability of qualified counsel to every accused. The word "qualified" must be emphasized. Not every lawyer licensed to practice is actually competent to try a case in court effectively. Although only a small percentage of cases go to trial, the judgment and experience of a trial lawyer are essential in the process of negotiation leading to a disposition without trial. The number of specialists presently in criminal trial practice is clearly insufficient to satisfy the need.

A trial lawyer's experience in civil practice is such as to qualify him for criminal practice with a minimum of additional training and experience. Such training is available through programs of continuing education. Experience can also be gained by working as associate counsel to lawyers who are more experienced in the criminal courts.

By encouraging that large number of lawyers now active only in the civil courts to come into the criminal practice, the bar will take a significant step toward meeting its responsibility to make competent counsel available. The undesirable professional isolation of criminal trial specialists will be reduced or even eliminated.

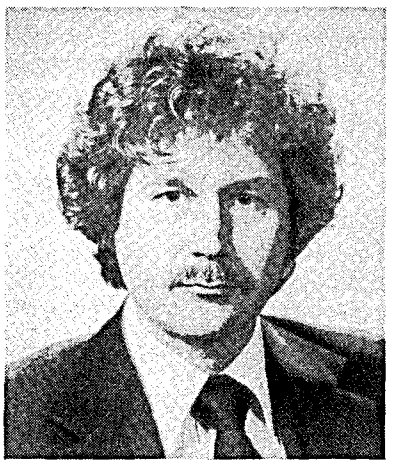
It is not only the right of the lawyer but his duty to participate in the defense of criminal cases. The public has been much mislead into thinking that honorable lawyers must pick and choose criminal cases according to their professional belief in the innocence of the accused. The lawyer has been thought to be unethical if he particpates in the defense of someone who has admitted his guilt to the lawyer or whose situation leads to widespread belief in his guilt. The lawyer should not reject the client for personal considerations or because of the client's unpopularity. The great lawyers in the history of this country have risked public disfavor to defend the hated defendant. In the past lawyers have been all too eager to announce that they do not practice in the criminal courts. The bar should discourage lawyers from privately or publicly claiming that they disdain criminal practice. Rather, the leaders of the trial bar should encourage participation by accepting criminal cases themselves and encouraging others to do so.

There are two key elements in restoring an imperilled balance, and they are education and encouragement. Both the general public and the trial bar need to be educated or re-educated about the role of the criminal defense lawyer. Encouragement to practice in this field of law must begin in law school and must continue through the efforts of the organized bar. □

REAFFIRMING THE VALUE OF LIFE

ARGUMENTS AGAINST THE DEATH PENALTY

KENNETH C. HAAS



Kenneth C. Haas is an Associate Professor in the Division of Criminal Justice and Department of Political Science at the University of Delaware where he has won two Excellence-in-Teaching Awards. He specializes in criminal law and the law of corrections and post-conviction remedies. His articles have appeared in many law reviews and social science journals. He is co-author of *Crime and the Criminal Justice Process* and *The Dilemmas of Punishment*. Professor Haas received the Ph.D. in political science in 1978 from Rutgers University. He has served as a consultant on correctional problems for government and is a member of the Governor's Advisory Council on Corrections.

For over 300 years, Americans have been arguing passionately about the death penalty without reaching a moral, legal, or practical consensus. However, those who support the death penalty clearly have been gaining strong public and legislative support in recent years. Since the late 1960s, every major public opinion poll has shown that the American public favors capital punishment by approximately a two-to-one margin. Politicians have found that it is easy to win votes by coming out in favor of the death penalty and other so-called "get tough on crime" policies. As a result, 38 states and the federal government now provide a death penalty.

The tragic irony of this state of affairs is that the American people and their chosen representatives, apparently motivated by increasing fear for the safety of lives and property, have embraced a criminal sanction that can only succeed in harming the social order, reducing respect for the law, and increasing the loss of innocent lives. Space limitations preclude a discussion of more than a few of the arguments against the death penalty. I shall, therefore, address several issues about which much unclarity exists not only in the public mind, but in all too many American courtrooms and legislative chambers. The implications, I contend, are that capital punishment represents a simplistic and illusory response to crime — a response that cannot withstand the tests of logic or scientific study.

Proponents of the death penalty usually base their arguments on the requirement of retribution on the one hand and the need for deterrence on the other. Let us consider these justifications. The principle of retribution requires a proportionate relationship between the severity of a particular criminal act and the quantum of punishment meted out to the offender, but the principle of retribution is quite vague about how serious a punishment is necessary for a particular crime. There is no mathematical formula that precisely determines the amount of suffering the offender must undergo to satisfy the needs of "justice."

Those who demand the death penalty for murder apparently define retribution in a literal, Biblical manner: an eye for an eye, a life for a life. However, no civilized society has ever insisted upon a system of penal law that rests upon a literal application of the eye for an eye formula. To do so is not only unnecessary; it would fail to achieve the primary goals of retributive justice — to affirm society's abhorrence of the crime, its sense of dignity, and its determination to make an example of the offender. We don't break into the homes of convicted burglars, set fire to the most coveted possessions of convicted arsonists, or condemn those convicted of assault to savage beatings by a professional fighter. Such punishments would fail to teach potential offenders the most important lesson we want them to learn — that certain types of behavior are wrong and cannot be condoned under any circumstance. In the case of murder, life in prison is the most fitting way to make the point that the value of human life is sacred and that no one can extinguish it without suffering a punishment that many on death row regard as worse than death. The use of the death penalty, on the other hand, only succeeds in teaching all of us, including potential murderers, that life is no longer sacred, whenever someone with the means to take it away

decides that there are good reasons to do so.

In the past few years, some apologists for capital punishment have advanced a particularly obnoxious version of the retribution argument. They take the position that although *they* are sophisticated enough to realize that absolute retribution is an outmoded, anachronistic basis for administering justice in a modern society, the mass public nevertheless believes in retribution. Consequently, we must satisfy the people's primitive yearning for vengeance or they will lose respect for the law and resort to vigilantism. Anthony Amsterdam, Professor of Law at New York University, calls this argument one which "asserts that the proper way to deal with a lynch mob is to string its victim up before the lynch mob does."[1] What is offensive about this argument is that it assumes that Americans are a bloodthirsty, mindlessly vengeful people; it ignores the possibility that the American people would have long ago rejected the death penalty if governmental officials had not renounced their responsibility to give full play to the best arguments from *both* sides of the issue.

Unquestionably, an increasing number of Americans are troubled and angered by an apparent rise in violent crime, but they have not yet become a lynch mob. If they are moving in that direction, it is only because public officials have chosen to exploit their legitimate fear of crime by selling them the false hope that the resurrection of "Old Sparky" will reduce crime and make their neighborhoods safer. If Americans were told the truth about crime — that it is a complex problem not amenable to easy, immediate solutions — they would demand real and effective answers to the crime problem instead of the ritualistic infliction of savage punishments.

A closer examination of public opinion surveys reveals that a large majority of those who say they generally favor the death penalty do not consider the death penalty a proper punishment in real-life situations. In one study, several groups of adult death penalty supporters were to read the facts of such crimes as killing a policeman and beating a woman to death — crimes that would usually result in death penalty verdicts in real courtrooms. Nevertheless, less than one-third of these people recommended the death penalty in either case.[2] This great reluctance to impose the death penalty in particular cases is strong evidence that people's willingness to endorse capital punishment in the abstract is not necessarily an accurate measure of their willingness to put it into practice. Other studies have demonstrated that support for the death penalty is best explained as a symbolic attitude — one aspect of an individual's general political-social belief system — rather than as a firm, deeply entrenched preference for the death penalty.[3]

Justice Thurgood Marshall was ridiculed in conservative circles when, in *Furman v. Georgia,* he asserted that the public had not been given accurate information about the effects of capital punishment and how it is used in our society, and that such information "would almost surely convince the average citizen that the death penalty was unwise." However, recent studies have confirmed both of the so-called "Marshall hypotheses." Interview and questionnaire studies have shown that support for the death penalty is indeed founded on misinformation about basic factual propositions related to capital punishment. Most Americans, especially those who support the death penalty, accept as true demonstrably incorrect statements about the legal status of the death penalty in their home states, the racial and social composition of death row populations, the effects of capital punishment on murder rates, the average length of prison term served by convicted murderers, and the relative financial costs of the death penalty and life imprisonment.[4] Equally important, when adult populations are presented with pamphlets that provide factual, unbiased material on the realities of capital punishment, enough people change their minds to turn what had been a minority opposition to capital punishment into a majority.[5] The results of these studies, however, will never be duplicated nationally or even statewide until public officials begin to promote policies founded on scholarly analysis of the effectiveness of various forms and degrees of punishment rather than on emotions, symbols, and rhetoric.

This brings us to what is probably the most frequently cited justification for the death penalty: deterrence. What is most astonishing about the deterrence aspect of the death penalty controversy is that there are still well-educated people who assert the "common sense" proposition that the death penalty as a deterrent to potential murderers will save innocent lives. Perhaps this is an instinctive position some people take because they are certain that they would refrain from any activity that carries with it a clear threat of death. Appealing as it

may be, the belief in the deterrent effectiveness of capital punishment reflects a profound misunderstanding of the complex motives that guide human behavior. The key question, of course, is whether there is any evidence that the death penalty deters murder better than does life imprisonment. (I will assume that few proponents of capital punishment would be willing to accept the responsibility for killing other human beings, with all the attendant risks of loss of innocent life, if they were aware that non-capital punishments would be an equal, if not superior, deterrent to the commission of murder.) After over 50 years of research and hundreds of studies on the deterrent efficacy of capital punishment, the evidence overwhelmingly demonstrates that this question must be answered in the negative.

Criminologists have tested the assertion that capital punishment is the best available deterrent of murder and other serious crimes in nearly every manner imaginable. It is important to note that nearly all studies conducted in the United States used data on homicide rates compiled during the first half of the twentieth century — a time when thousands of Americans were executed and the possibility of receiving the death penalty was a very real possibility for those convicted of willful homicide. Dozens of studies looked at pairs of contiguous states, one with and one without the death penalty, during comparable periods in order to see if murder rates were lower in the death penalty states than in the abolitionist states. Without exception, none of these studies found that the death penalty states had statistically significantly lower homicide rates than the abolitionist states. In fact, most of these studies revealed consistently (but not statistically significant) *lower* homicide rates in the abolition states.

Similarly, many scholars have looked at the way homicide rates have changed when states have abolished or reinstated the death penalty.

Without exception, every such study demonstrated that the presence of the death penalty had no appreciable effect upon the rate of murder. Once again, it is noteworthy that the majority of these studies showed that states tended to have slightly lower homicide rates during their abolitionist periods. This was the case in Delaware, for example. In the three and one half year period from April 1958 to December 1961 that Delaware was without a death penalty law, the murder rate was lower than it was during either the two year period before 1958 or after 1961.

Taken together, the contiguous states studies and the before-and-after studies provided compelling evidence of the bankruptcy of the deterrence argument. But researchers didn't stop there. They examined data on the deterrent effects of the death penalty in a variety of historical periods in England, Canada, Japan, Germany, Sweden, the Netherlands, and other nations. They undertook special comparative and longitudinal studies to see if rates of police killings, prison killings, or any other type of serious criminal activity (rape, aggravated assault, etc.) were affected by the presence or absence of the death penalty. In every study of this type, the conclusion was the same: the presence of the death penalty — in law or practice — does not lessen offense rates.[6]

Since 1977, there have been at least 13 cases of defendants convicted of murder, eight of whom were sentenced to death, who later were determined to be innocent.

In 1975, death penalty advocates thought that their blind, heretofore unsupported faith in the deterrent efficacy of the death penalty had been vindicated. Issac Ehrlich, an economist at the University of Chicago, had just published the first purportedly scientific study ever to find that the use of the death penalty did deter homicides. Using what appeared to be a complex econometric model for assessing data on America's use of capital punishment from 1933 to 1969, Ehrlich claimed that each application of the death penalty had prevented numerous murders.[7] This study was cited heavily in the government's briefs in *Gregg v. Georgia* and in subsequent cases leading to the restoration of capital punishment laws.

Unfortunately for those who so quickly embraced the Ehrlich study, eight years of careful evaluations of Ehrlich's methods and countless attempts to reproduce his findings with improved statistical techniques have demonstrated that Ehrlich's work contained numerous flaws and methodological errors. For example, Ehrlich's evidence was totally dependent on the form of the equation he used. As numerous distinguished econometricians have pointed out, Ehrlich produced his results by using a logarithmic form of regression equation (one which exaggerates positive correlation coefficients when analyzing a small sample) rather than any of several more conventional and accurate linear forms of the equation. Because he used only a single equation, Ehrlich was unable to incorporate into his analysis such crucial variables as the length of prison sentences, the probability of life sentences, and the availability of handguns. Indeed, his single equation, with execution considered only as an independent variable, could not even provide a test of the key question of whether homicide and crime rates affect the use of execution. In short, Ehrlich's research did not address the fundamental issue in the capital punishment debate: Does the use of the death penalty deter homicide better than the use of lengthy imprisonment?[8]

Equally important, Ehrlich somehow failed to take into account the sharp rise in the American crime rate which began in the early 1960s. This may be one reason why studies of Ehrlich's research consistently reveal that his findings were critically dependent on the years 1962 through 1969 — an abberational period when executions dramatically declined. When this period is excluded, the deterrent effect disappears. Indeed, excluding years after 1962 and treating variables in their natural rather than logarithmic forms produces findings which fit Ehrlich's model in such a way as to suggest that higher likelihoods of execution lead to higher homicide rates.[9]

It is remarkable that after 50 years of research on the deterrent efficacy of the death penalty, only three published studies (Ehrlich's and two even

more methodologically discredited studies by Yunker and Wolpin) have purported to find a deterrent effect. On the other hand, a great deal of recent research has been completed by scholars who have used Ehrlich's regression analysis techniques, but have eliminated its deficiencies. Without exception, all of these post-Ehrlich studies have found no evidence of deterrence. Many of these studies are discussed in an excellent article in *Crime and Delinquency* by Richard Lempert.[10] Lempert's article also provides a new test of the deterrence hypothesis — one which combines the best methodological features of econometric modeling and sociological research. Instead of comparing states simply with respect to death penalty laws or a lack of them, Lempert compared states in terms of the actual number of convicted murderers executed from 1920 to 1955. He did this by correlating differences in executions with differences in homicide rates, and he did so in a way that arguably controls for the large variety of factors likely to affect homicide rates. The results were in accord with every other scientifically sound study on this subject: nothing suggested that executions deter homicide better than does life imprisonment.

Of course, there is another type of deterrence argument proffered by advocates of the death penalty. This is the *specific deterrence* rationale — the belief that we must kill convicted murderers to prevent them from killing again. There are some obvious problems with this approach. For example, the large majority of homicides which occur in state and federal prisons are committed by inmates who have been convicted of robbery, burglary, and theft. Killings inside prisons are very rarely committed by convicted murderers. Similarly, as a matter of statistical probability, murderers released from prison are far less likely to commit a new crime than any other category of offender, or for that matter, various statistical categories of non-offenders.[11] Shall we kill all these people in reliance on our questionable ability to predict future dangerousness?

What is perhaps most troublesome about the specific deterrence argument is that it betrays a great distrust in the performance and good judgment of prosecutors, judges, juries,

and parole board officials. If proponents of the death penalty so fear that those who decide will mistakenly allow an unrepentant killer to escape with a short sentence or an early parole, why are they so reluctant to acknowledge that these same people can also make mistakes that lead to the execution of the innocent? Rather than kill a convicted murderer or anyone else who frightens us, we should demand that correctional authorities take the necessary security measures to protect guards, other prisoners, and the general public from the very small number of prisoners who are truly dangerous. It certainly would be hard to believe that the most scientifically and technologically advanced society in the world cannot devise humane ways to keep the habitually violent offender in prison and keep him from harming anyone while he is there.

One of the most intriguing findings to emerge from the studies on the deterrent efficacy of the death penalty is that, as I noted earlier, most of these studies have revealed a statistically insignificant positive relationship between the presence of the death penalty and higher homicide rates. Why would states which retain the death penalty have somewhat higher rates of murder than states which abolish it? I should like to offer an answer to this question — one which takes the deterrence debate a step further and should raise troubling questions for those who support capital punishment. In the past few years, researchers using sophisticated time series methods have discovered that instead of deterring homicides, executions appear to cause a short-term increase in the number of murders committed.

In the most extensive study to date, William Bowers and Glenn Pierce examined homicide statistics in the months following each of the nearly 700 executions carried out in New York State between 1907 and 1963.[12] Making allowance for other factors that affect the homicide rate — seasonality, war, economic depression, etc. — Bowers and Pierce found that, on the average, there were two additional homicides in the month following an execution, with one additional homicide likely in the next month. There was a slight drop in murders in the third month after the execution, suggesting that some murders were probably committed by people who would have killed anyway, but did so *sooner* because of an execution. However, the data clearly showed an addition of at least two to the total incidence of homicides, not simply a change in the timing of homicides. These extra murders do not significantly affect the results of other types of deterrence studies which rely on aggregate data compiled on an annual basis, but they nevertheless represent the loss of innocent human lives.

The finding that executions have a "brutalizing effect" may surprise some people, but the Bowers and Pierce data are consistent with a great deal of research on the psychological characteristics of various types of murderers as well as with numerous studies on the short-term effects of publicized suicides, assassinations, mass murders, and airplane hijackings. As Bowers and Pierce point out: *If the typical murderer is someone who feels that he has been betrayed, dishonored, or disgraced by another person — and we suggest that such feelings are far more characteristic of those who commit murder than a rational evaluation of costs and benefits — then it is not hard to imagine that the example executions provide may inspire a potential murderer to kill the person who has greatly offended him. In effect, the message of the execution may be lethal vengeance, not deterrence.*

There is also the possibility that for some people — the suicidal and the mentally disturbed — the suggestive or imitative impact of an execution may be an incentive to kill others for self-destructive purposes. People on the fringe of sanity, in other words, are often more likely to identify with and assume the role of the executioner than they are to put themselves in the shoes of the executed offender. In many cases, individuals with a deep-seated antipathy toward themselves and others have committed murders motivated both by a guilt-inspired need to be punished for their sense of unworthiness and by a desire to strike back at society. Indeed, for a not insignificant number of deranged or fanatical people, the very existence of the death penalty may provide an irresistible opportunity to win much coveted publicity and to draw attention to the "righteousness' of their cause.

As a society, we should worry not only about the short-term effects of executions on those who are troubled, but about the long-term effects on the rest of us. Although social scientists have not yet devised a reliable way to measure the precise long-term impact of executions on the general population, they have gathered mountains of evidence on social learning and modeling behavior. Research studies overwhelmingly demonstrate that the old adage, "violence begets violence," is often true, and it is foolhardy to ignore the probable brutalizing consequences of electrocutions, gassings, hangings, shootings, and lethal injections. Each execution conveys to us and our children the unmistakable messages that human life is not sacred after all and that violence is a civilized and, indeed, a commendable way to deal with those who create problems for us. By fostering an acceptance of lethal violence in the broader society — as some say wars do — state-sanctioned killings may cause all of us to become more jaded and insensitive to human suffering of any kind. In the long run, a society that accepts any devaluation of human life may very well discover that the vicious circle of vengeance leads only to more pain, more suffering, and higher rates of homicide.

Of course, even if the death penalty had no short-term or long-term brutalizing effects on anyone, its use is still guaranteed to result in the loss of innocent human lives. Although proponents of capital punishment understandably argue that the risk of condemning an innocent person to death is very low, such errors occur with

In the three and one half year period from April 1958 to December 1961 that Delaware was without a death penalty law, the murder rate was lower than it was during either two year period before 1958 or after 1961.

much greater frequency than most people realize. There is now a voluminous literature on miscarriage in the administration of American criminal justice. Legal scholars have carefully documented hundreds of cases in which wrongful convictions in capital cases have been proved beyond a reasonable doubt. Some of these people have established their innocence on appeal; some have received executive pardons when, after many years of imprisonment, luck and circumstance led to the disclosure of new evidence which verified their innocence; and some, horrifyingly, went to their deaths knowing all too well that our system of justice had fatally miscarried.

One of the many studies of wrongful capital convictions was done by Hugo Adam Bedau, a prominent sociologist and legal scholar who has devoted much of his scholarly career to the study of the death penalty. Putting aside controversial cases in which alleged mistaken convictions could not be proved (e.g. The Scottsboro Boys in Alabama, the Rosenbergs in New York, Hauptmann in New Jersey), Bedau nevertheless documented 71 cases occurring in the United States from 1893 through 1962 in which innocent people were convicted of criminal homicide. In 40 of these cases, the defendants were sentenced to a life term or to a lengthy period of imprisonment. In the remaining 31 cases, the defendants were sentenced to death, and eight of these unfortunate people were executed.[13] The claim that the present competency of our courts will prevent such atrocities of justice in the future cannot be taken seriously. In the past decade alone, innocent men have been convicted of homicide in all areas of the United States. Since 1977, there have been at least 13 cases of defendants convicted of murder, eight of whom were sentenced to death, who later were determined to be innocent.[14] We shall never know how many innocent people have been sent to their deaths, for once an execution has taken place, the authorities rarely continue to investigate the case. Unlike other sentencing alternatives, an execution is irreversible.

Champions of the death penalty often assert that an innocent person has less chance of being convicted in an American court than the courts of any other nation on earth, and they may very well be correct. Nevertheless, as a result of inherent human fallibility, the process of determining guilt in our courts will always be plagued in instances of mistaken eyewitness identification, perjured testimony, coerced confessions, laboratory errors, concealed evidence, and inattentive, confused, or prejudiced jurors. If anything, the kinds of legal and factual errors that lead to wrongful capital convictions are less likely to be discovered and corrected today than they were in the past. Last year, in *Barefoot v. Estelle,* the Supreme Court bestowed its approval on "expedited procedures" for hearing death penalty appeals. It will now be more difficult to win stays of execution that will last long enough to uncover significant mistakes at trials or flaws in state death penalty laws. In a further effort to make the administration of death more efficient, Justice Byron White recently called for Congress to enact a statute which would require prisoners to state all their federal claims in their first habeas corpus petition to the federal court. It thus appears that the costly, time-consuming appellate reviews that have so often characterized death penalty cases may become a thing of the past. This may help reduce the current backlog of criminal appeals, but it will also deprive those who have been wrongfully convicted of their most precious resource: time.

In *Capital Punishment: The Inevitability of Caprice and Mistake,* Charles L. Black, Professor of Law at Yale University, contends not only that the system by which we choose people for death is mistake-prone, but that it is so saturated with standardless and arbitrary discretion that it

inevitably results in death-sentencing discrimination against the poor and the black. Supporters of capital punishment cannot deny that we have always executed a highly disproportionate number of racial minorities and the economically disadvantaged. Although blacks account for only 12 percent of the nation's population, they constitute about half of all those executed for murder since 1930. But, according to those who have worked so hard to resurrect the death penalty, the Supreme Court's *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976) decisions provide new procedural safeguards, which ensure fair and nondiscriminatory imposition of the death penalty. When making the decision whether to sentence a convicted defendant to death or to a term of imprisonment, a judge or a jury, we are assured, will be constrained by legal guidelines — specific lists of aggravating and mitigating circumstances — to the exclusion of racial and class prejudice.

Eight years have now passed since the announcement of *Gregg v. Georgia,* and it is clearer than ever that no court decision or legislative enactment can cure the fundamental defects of discrimination and caprice in the imposition of the death penalty. As a result of ineradicable ambiguities in the language of the law and the realities of our system of justice, those condemned to die will not necessarily be those who have committed the most savage and atrocious crimes; they will instead be those from the poor and socially disadvantaged classes who are least capable of defending themselves before middle-class juries. Even if judges and juries could somehow temporarily submerge their conscious or unconscious biases against those with whom they are least familiar, the "have nots" of our society will still suffer from discriminatory decision-making in the preconviction and post-sentencing stages of the criminal justice process. For example, the decisions of the prosecutor as to what the charge and whether to offer a plea-bargain are both unfettered and unreviewable under American law, and the gubernatorial decision for or against clemency is not only standardless, but shielded from any kind of appellate review.

The latest available statistics on the racial and social characteristics of the nearly 1300 inmates on death row offer compelling evidence of the selective and discriminatory manner in which the death penalty is administered. As of January 1, 1983, over 40% of those under sentence of death were blacks; nearly all of those on death row — black, white, hispanic — were too poor to afford private counsel and had to rely on a state-supplied attorney. A good example of the arbitrary and haphazard quality of capital sentencing is that more than two-thirds of death row inmates are held in Southern states. A similar pattern exists in Delaware. Although the large majority of murders are committed in New Castle County, five of the six Delawareans presently under sentence of death were convicted in Kent County courts. Such crazy-quilt sentencing patterns make it clear that regional attitudes, community prejudices, and local idiosyncrasies play a more important role in determining who gets the death penalty than do the kind of crime and the defendant's prior record.

BLOOD LUST IN KENT?

Although the large majority of murders are committed in New Castle County, five of the six Delawareans presently under sentence of death were convicted in Kent County courts.

Several post-*Gregg* studies of capital sentencing patterns show not only that blacks are disproportionately represented on death row, but that the death penalty is primarily reserved for those convicted of killing whites. One recent study of the 1973-1980 death row populations in Georgia, Texas, and Florida — states with death penalty laws upheld by the Supreme Court as meeting constitutional standards of fairness — disclosed that those who kill blacks are grossly underrepresented on death row. For example, in Georgia, blacks who kill whites are more than 33 times more likely to receive the death penalty than are blacks who kill blacks; in Texas, blacks who kill whites are 87 times more likely to receive the death penalty than blacks who kill blacks; and in Florida, blacks who kill whites are five times as likely to get a death sentence as whites who kill whites, and whites who kill whites are more than 40 times as likely to get the death sentence as whites who kill blacks.[15] These findings show that the system of capital punishment under post-*Furman* and post-*Gregg* statutes is no less discriminatory and unfair than it was in the past. The burden is now on the supporters of the death penalty to show that any system of capital punishment can be administered without racial bias, class discrimination, and a considerable amount of caprice.

I submit that the advocates of capital punishment cannot meet the burden of proving that any social benefit will flow from the death penalty. Perhaps because their deterrence arguments have crumbled under the onslaught of scientific evidence, the defenders of the death penalty increasingly advance anger, outrage, and vengeance as the rationales for capital punishment. Thus, in *For Capital Punishment,* Walter Berns decries our loss of a sense of "moral community" and urges us to reassert moral responsibility by striking out against those who are our enemies. By accepting our natural desire to punish the wicked, he contends, we can cleanse the community of evil, reward the upright, and reestablish a true, selfless form of "moral righteousness." Ernest van den Haag (*Punishing Criminals*) goes one step further, condemning our "failure of nerve" in hesitating to assert our need for revenge.

It is difficult to know what one should make of such philosophical justifications for capital punishment. Terms such as "moral community" are simply not susceptible to empirical examination; they are intended, I suppose, to be more inspirational and rhetorical than scientifically useful. In my view, at least, no moral community will tolerate the use of punishment that inevitably results in the loss of innocent human life. Until we repudiate the death penalty, we shall go on killing some by mistake and others we don't like because of their race and their position in our social hierarchy. By undermining the taboo against killing, we cheapen the value of life and increase the future probability of killing. And we do this despite the absence of any reliable evidence that the death penalty accomplishes any useful purpose that cannot be achieved by long-term incarceration.

Fortunately, the death penalty is a dying institution in most of the civilized world. Only three of 15 nations in Western Europe reported any executions in the 1970s: France, Greece, and Turkey. In 1983, a proposal to bring back executions in Great Britain was soundly defeated in the House of Commons, leaving the Soviet Union, South Africa, the United States, France, and Japan (the latter two execute about one person a year) as the only industrialized states that officially put people to death. The trend is clearly toward worldwide abolition of the death penalty, and it is only a matter of time until "the evolving standards of decency that mark the progress of a maturing society"[16] convince Americans to renounce the death penalty as dangerous, useless, and self-defeating. □

FOOTNOTES

1. Anthony G. Amsterdam, "Capital Punishment" in Hugo Adam Bedau, ed., *The Death Penalty in America, 3rd Ed.* (New York: Oxford University Press, 1982), 353.
2. Phoebe Ellsworth, "Attitudes Towards Capital Punishment: From Application to Theory" (Paper presented at SESP Symposium on Psychology and Law, Stanford University, October 1978), See also the discussion of Ellsworth's research in *Psychology Today,* January, 1979, 13.
3. See, for example, Tom R. Tyler and Renee Weber, "Support for the Death Penalty: Instrumental Response to Crime or Symbolic Attitude? *"Law and Society Review,"* Vol. 17, No. 1 (1982), 21-45.
4. Phoebe Ellsworth and Lee Ross, "Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists," *Crime and Delinquency,* Vol. 29, No. 1 (January 1983), 116-119.
5. Austin Sarat and Neil Vidmar, "Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis," *Wisconsin Law Review,* 1976, 171-206.
6. A good summary of these research findings can be found in Richard O. Lempert, "Desert and Deterrence: An Assessment of the Moral Bases for Capital Punishment," *Michigan Law Review,* Vol. 79, No. 6 (May 1981), 1177-1231.
7. Issac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life or Death," *American Economic Review,* Vol. 65, No. 3 (June 1975), 397-417.
8. See Lawrence Klein, Brian Forst, and Victor Filatov, "The Deterrent Effect of Capital Punishment: An Assesment of the Estimates," in Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin, eds., *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington, D.C.: National Academy of Sciences, 1978), 336-360.
9. See Peter Passell and John Taylor, "The Deterrent Effect of Capital Punishment: Another View," *American Economic Review,* Vol. 67, No. 3 (June 1977), 445-451.
10. Richard Lempert, "The Effect of Executions on Homicides: A New Look in an Old Light," *Crime and Delinquency,* Vol. 29, No. 1 (January 1983), 88-115.
11. See the studies reported in Thorsten Sellin, *The Penalty of Death* (Beverly Hills, CA.: Sage Publications, 1980), 103-120.
12. William J. Bowers and Glenn L. Pierce, "Deterrence or Brutalization: What is the Effect of Executions?" *Crime and Delinquency,* Vol. 26, No. 4 (October 1980), 453-484.
13. Hugo Adam Bedau, "Murders, Errors of Justice, and Capital Punishment," in Bedau, ed., *The Death Penalty in America, Rev. Ed.* (New York: Doubleday, 1967), 434-452.
14. See the cases described in Jack Greenberg, "Capital Punishment as a System," *Yale Law Journal,* Vol. 91, No. 5 (April 1982), 919-920; and Raymond L. Chambers, "When Is a Victim Not a Victim," *Academy of Criminal Justice Sciences Today* (September 1983), 14-15, 20.
15. William J. Bowers and Glenn L. Pierce, "Arbitrariness and Discrimination under Post-*Furman* Capital Statutes," *Crime and Delinquency,* Vol. 26, No. 4 (October 1980), 563-635.
16. This well-known phrase was authored by the late Chief Justice Earl Warren in his plurality opinion in *Trop v. Dulles,* 356 U.S. 86 (1958). His point, of course, was that future generations of Americans are not bound by the 18th century notions of what kinds of punishments violate the Eighth Amendment proscription of cruel and unusual punishment.

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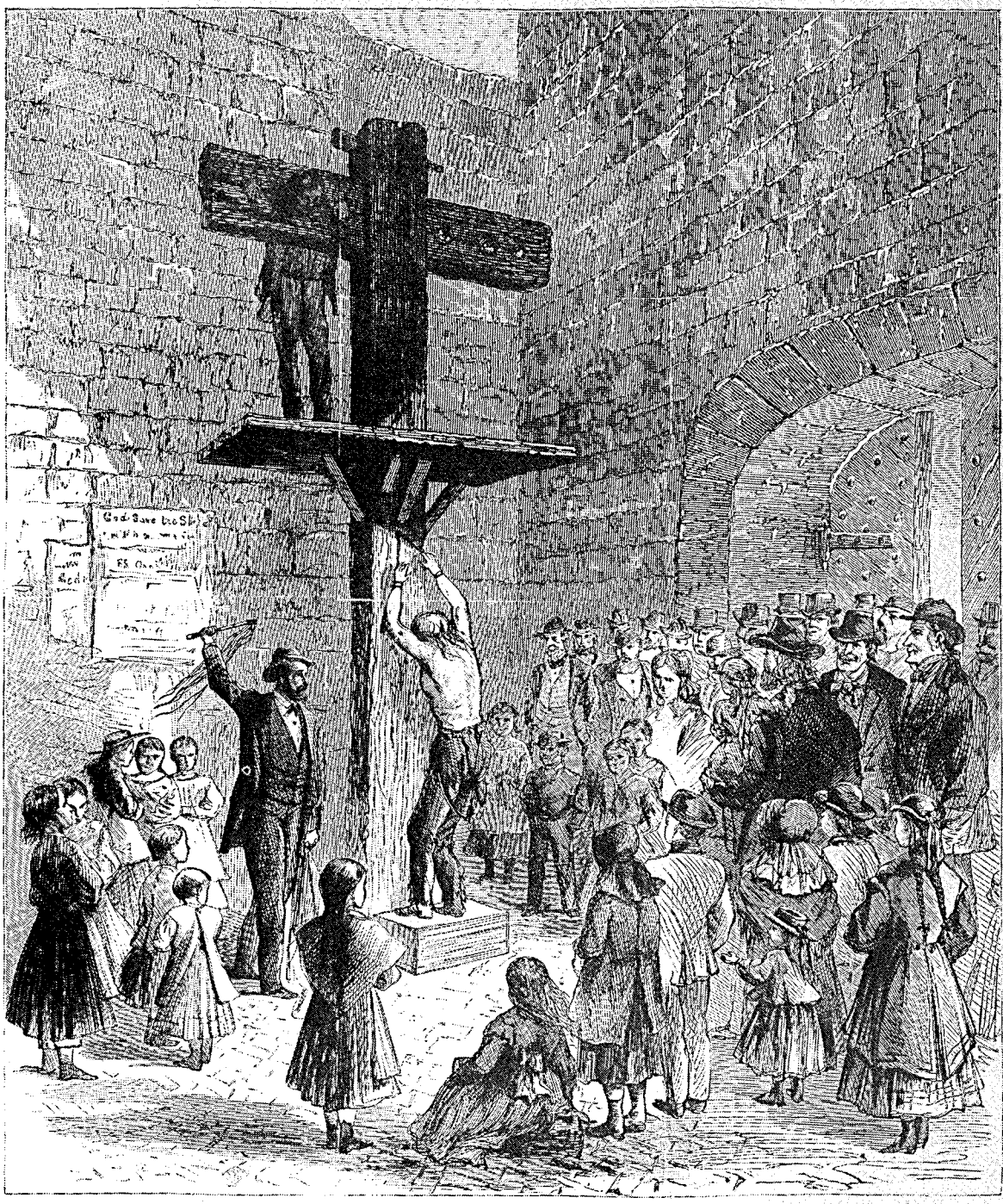


THE WHIPPING-POST AND PILLORY AT NEW CASTLE, DELAWARE.—SKETCHED BY EARL SHINN.—[SEE PAGE 791.]

Jim Bailey's account below of the savagery of Delaware punishments in the good old days is a premier exercise in sadistic nostalgia. It also vividly demonstrates the change in public attitude towards punishment:

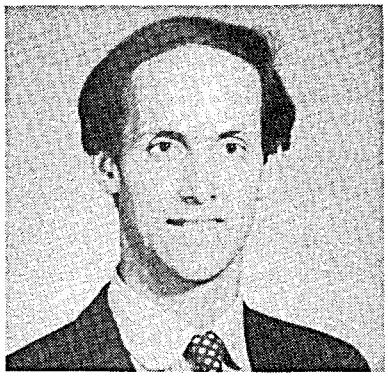
Contrast the brisk execution of stringent sentences in colonial times with the tomfoolery attending such events today. Two centuries ago the whipping, dunking, stockading, and hanging of malefactors came with greased lightning dispatch on the heels of unappealed convictions. In those good old days execution of capital sentences did not follow all-night prayer vigils, led by taper-clutching zanies, and devious last minute constitutional challenges to the electric chair, challenges more distinguished for desperate ingenuity than sincerity of profession. In colonial times a condemned killer presumably "enjoyed a hearty meal". His counterpart today enjoys a hearty press conference, during which, his dying eye cocked shrewdly toward PR values, he embraces religion, graciously forgives the society he has savaged, and generally patronizes God. Histrionics like these always prompt a lot of righteous clucking from the condemned's spiritual advisor and the candle-clutchers outside the penitentiary walls: it seems the majority conceal hearts of darkness behind civilized facades. Reflection upon Mr. Bailey's discoveries below will suggest, however, that we have made substantial gains in humanity and discriminating sensitivity to the rights of those who prey upon us. Read on!

The Editors

Punishment in Delaware - An Historical View

. . . . **PUNISH:** *1: to impose a penalty on for a fault or crime; 2: to inflict a penalty for; 3: to inflict injury on: HURT syn. chastise, castigate, chasten, discipline, correct— Merriam Webster Dictionary (7th ed. 1975).*

JAMES BAILEY



Jim Bailey, a youthful and talented lawyer-historian, has practiced law in Wilmington since 1975. He is a member of the firm, Elzufon and Bailey. This article is Jim's debut in DELAWARE LAWYER, and an auspicious one. We look to him for much more!

Discussion, both in Delaware and throughout the country, now addresses death by injection, death by hanging, and what crimes should be treated as capital offenses punishable by death. Evening news commentators, magazines, newspapers and cocktail party conversationalists agonize over crimes and how best to deal with those who commit serious ones. No matter how the discussions are phrased, the real issue is whether these forms of punishment are "cruel and unusual". Lawyers and non-lawyers alike know that this phrase comes from the Federal Constitution and that it has been a part of our evolving law since 1789.

What many fail to realize is that our Founding Fathers' view of what was "cruel and unusual" bears little resemblance to those of a Delawarean in 1984. We now ask if death by injection is cruel or unusual. In 17th century Delaware, it was considered an act of leniency to grant "benefit of clergy" to a convicted felon before he was hanged and drawn and quartered for any of the elaborate list of offenses for which the penalty was death.

Today, we question whether the long delay between trial and execution, which can run to 10 years or more, is cruel or unusual. Paradoxically, we also wonder if five or ten minutes between injection and death is cruel and unusual.

Today in Delaware, punishment is either fine, imprisonment or death by hanging, although a bill to permit death by injection is now before the General Assembly. In some cases, mandatory community service is a form of punishment (or reimbursement) to society. A hard look at our

Wilmington, overrun by transvestites and fruit thieves, was plainly in the hands of the Prince of Darkness.

Delaware past suggests we've come a long way in tempering public retribution with mercy.

In the 17th and 18th centuries, the "lower three counties", as Delaware was once known, had a vast array of punishments, each more terrifying than anything used today.

For blasphemy a defendant could expect to sit in the pillory for two hours, to be branded on the forehead with a capital B, and to receive 39 lashes on the bare back in full view of the public. Drunkeness and mild profanity were punished by fines and a two to three hour sojourn in the stockade. For an even juicier account, see Dr. J. Thomas Scharf in his marvelous *History of Delaware, 1609-1888,* Vol. 1, p. 137 (1888).

During the career of Delaware's pioneer lawyer Thomas Spry*, the sheer number of acts which were considered crimes and punishable was much greater. No doubt, his view of cruel and unusual was quite different from that of the 100 young lawyers recently admitted to practice in Delaware. His clientele no doubt included rapscallions like George Robinson, a Georgetown butcher, who "for being a person of evell fame as a common swearer and a common drinker, and particularly upon the 23rd day of this inst., for swearing three oaths in the marketplace, and also for uttering two very bad curses the 26th day of this inst.", was indicted by grand jury and sent to the stockade. One, Phillip Gilbeck, upon uttering three curses, was fined for terrifying "the Queen's liege people". John Smith, living in Strawberry Alley, (Wilmington) sentenced "for being maskt or disguised in womens' aparell' walking openly through the streets of this citty from house to house on or about the 26th day of the tenth month [day after Christmas] as being against the law of God, the law of this province and the law of nature, to the staining of lowly profession and incoridging of wickedness in this place." Translation: John was headed home from a costume party. Apparently he had been at a party given by John Simes as a result of which he was charged with "mastking in womens clothes the day after Christmas walking and dancing in the house of John Simes at nine or ten o'clock at night". Another partygoer, Miss Sara Stiner, was charged with "being dressed in man's cloathes, contrary to ye nature of her sects...to ye great disturbance of well minded persons, and incorridging of vice in this place." John Simes, who gave the masquerade party was charged with keeping a disorderly house, a "nursery to depotch ye inhabitance and youth of this city...to ye greef of indisturbance of peaceable minds and propigating ye Throne of wickedness amongst us."

For punishment, the whipping post, pillory, and stocks were customary. Children's thefts of apples from an orchard were referred to as "great abuses", "licentious liberty", "common nuisances", and "grievances". A Wilmington overrun by transvestites and fruit thieves was plainly in the hands of the Prince of Darkness.

There was private as well as public punishment. Consider the following note delivered by Peter Evans to a man he found to be unduly rude: "Sir: you have beastly slandered a gentle woman that I have a profound respect for, and for my part shall give you a fair opportunity to defend yourself to the morrow morning, on the west side of Joseph Carpenter's garden, betwixt seven and eight, where I shall expect to meet you,

* See DELAWARE LAWYER, Vol. 1, No. 2, p. 50.

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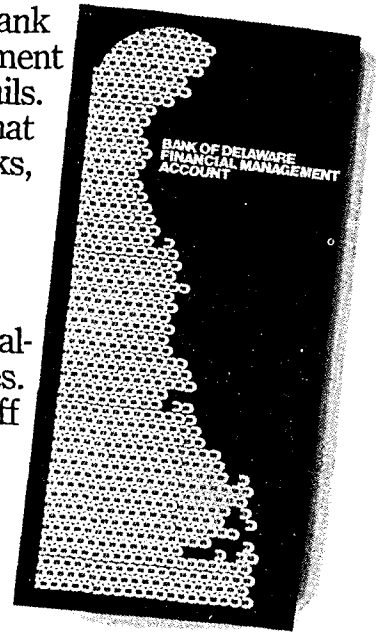

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gladio cinctus, in failure whereof depend upon the usage you deserve from yr. etc." Signed Peter Evans. P.S. "I am at ye Pewter Platter."

The power of the "lower three countries" to punish depended in part on the authority given by William Penn's government and from "an act of the assembly of New Castle, Kent and Sussex County" in 1719, which conferred criminal jurisdiction on the Court of Quarter Sessions. The penalties were remarkably inconsistent, though in strict accord with English common law as it had been since the reign of King James I. For disabling the tongue, putting out an eye, slitting the nose, cutting off the nose, or cutting off or disabling any limb or members of any of the King's subject, the sentence was death "without benefit of clergy". Until 1779 it was against the law for "conjuradion, witchcraft and dealing with wicked and evil spirits." Obviously, the prosecutor would have to present interesting circumstantial evidence to win.

Under the Act of 1719, burglary was punishable by death without benefit of clergy whether the felonious intent of killing or stealing was committed within the dwelling or not. The burning of a dwelling house or even of buildings not inhabited, if they contained property, was also a capital crime. A person who concealed a robber, burglar, felon or thief or who received stolen property was to have a capital T burned on the "braun of the left thumb".

Blacks were marked for special punishment. Witness the law with regard to attempted rape of a white woman by a black, which was punishable by standing the criminal four hours in the pillory with both ears nailed to it. Before being taken down, both his ears were cut off close to his head. Theft by a slave meant the master was compelled to make restitution and the slave was whipped.

The whipping post is a peculiarly local form of punishment. One Diedrich Nickerbocker recalled that on the visit in 1656 of the Governor of New Sweden to the Dutch Port Casimir where New Castle now stands, he was greatly honored by the local commander. A good deal of parading preceded a sumptuous dinner. Before the guests sat down to feast, three prisoners were brought out and soundly flogged to impress on the minds of the Swedes the discipline the commander maintained in his colony. Twenty years later in Sussex County a local tavern keeper was ordered whipped for serving liquor to minors and for having no license. In 1679, Agnita Hendrix "being heretofore presented for horring, and having three bastard children one after another, the court doe, therefore, think just to order and sentence that she, the stated Agnita Hendrix, be publicly whipped 27 lashes and pay all costs." Not having learned her lesson, the following year this woman received 31 lashes and was banished. Today, having children out of wedlock would result not in a penalty but in payments by the state if the woman was eligible for welfare. Clearly, no punishment would follow. For that matter, rarely does one serve time for prostitution.

One long-abandoned policy in Delaware required a criminal after his release or after the whipping post, the pillory, stocks or graffing, to wear a letter T one inch wide and four inches long made of red flannel and sewn to the outer garment. Later this was changed so that the former prisoner wore a convict's jacket, with the object of calling him up to public ridicule. Clearly, there is some historical basis for Hester Prynne's scarlet letter.

There is one fascinating Delaware case of a man, who pleading guilty to an indictment for larceny, was sentenced to five lashes. After being fastened to the post, he succeeded by artful squirming in freeing his left wrist, and thereby managed to evade the blows inflicted by the sheriff. It is doubtful that he received more than two of the five prescribed lashes. When the count reached five, the sheriff was extremely irritated at the fellow's dodgings and so, for good measure, he inflicted one more lash. Nothing was said until the following Term of Court when the defendant, his term of imprisonment completed, demanded damages for the extra lash. The Chief Justice held it a case without precedent. The only way he knew to settle it was to credit the prisoner with one lash on the records of the court, as the Chief Justice was sure the miscreant would be back again!

By 1888, the pillory as well as the whipping post was still used in Delaware, although by then there were complaints that good old-fashioned Delaware whippings "have been pronounced, in their farce, so lightly as the lash lay on". One wag complained that punishment rested with the sheriff, and each succeeding sheriff seemed to vie with his predecessor in lightly applying the lash. As for the pillory; it was standard punishment for burglary, robbery, assault with intent to kill, and many other felonies. Some years before 1888 it was the custom to allow the general public to pelt offenders in the pillory with rotten eggs and other missiles. Eventually that practice was abolished, but the prisoner still had to suffer public humiliation.

Delaware continued to use the whipping post until quite recently. On April 3, 1963, headlines announced "Whipping Upheld by a Court". All this was to the great dismay of a 20-year old youth sentenced to 20 lashes by then Superior Court Judge Stewart Lynch for violating probation. On appeal, then Chief Justice Daniel F. Wolcott, speaking for a unanimous court, held that the 8th and 14th Amendments to the U.S. Constitution did not invalidate whipping as punishment. (The 8th Amendment prohibits cruel and unusual punishment and the 14th amendment affords "due process of law".) The Court stated that legislation was the preferred way to eliminate the 144 year old whipping post law.

The whipping post was, however, only one of a number of punishments available under the Delaware State Constitution of 1776 that would strike us as unusual today. At that time death by hanging, drawing and quartering, or burning; standing in the pillory; cropping the ears; branding; convicts' badges; and sale into servitude were at hand for the flexible imposition of justice.

What ever did the Founding Fathers mean by banning "cruel and unusual punishment" in the State and Federal Constitutions, considering the kind of punishment they dished out? The answer to that question apparently is that there were some forms of punishment so cruel and barbarous that they bordered on outright torture. Breaking on the wheel, public dissection, and the like were some of the punishments felt to be cruel and unusual. By 1826 many of the more barbarous modes of punishment had been eliminated, and one who committed a capital crime was simply hanged. Drawing and quartering without benefit of clergy had been abolished. The 1963 Supreme Court opinion on the whipping post detailed some of the historic changes in punishment. The convict's badge, the cropping of ears, and the whipping of women had been abolished. But it was not until 1905 that the pillory was eliminated as a form of punishment. At the time of the 1963 Supreme Court decision, the whipping post had not been used for eleven years. The Court declared that it was not its function to comment on the fitness of corporal punishment. Several of the lawyers involved in that case are still active in the Delaware Bar. Harold Schmittinger, James Messick, and Nicholas H. Rodriguez from Dover represented the defendant. E. Norman Veasey represented the State. Howard Handelman, on behalf of the American Civil Liberties Union, spoke as a friend of the Court. Judge Lynch, who presided at the trial, was unmoved by the furor, and in an article in, of all places, the *Saturday Evening Post* defended use of the whipping post and said he wouldn't hesitate to use it again.

I wonder what the writers of the Delaware Constitution and the United States Constitution would say if they were alive and could sit in on recent last minute appeals to the Courts as defense counsel argue that the death penalty *per se* is cruel and unusual. It has been said that our United States Constitution is a "living constitution", in that it is constantly redefined and remolded to accommodate changing views of trial and punishment. Perhaps the Founding Fathers would agree. Thomas Jefferson, writing to James Madison in 1789, observed:

"I set out on this ground that which I suppose to be self-evident, 'that the earth belongs in usufruct to the living,' that the dead have neither powers nor rights over it.... On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it...." □

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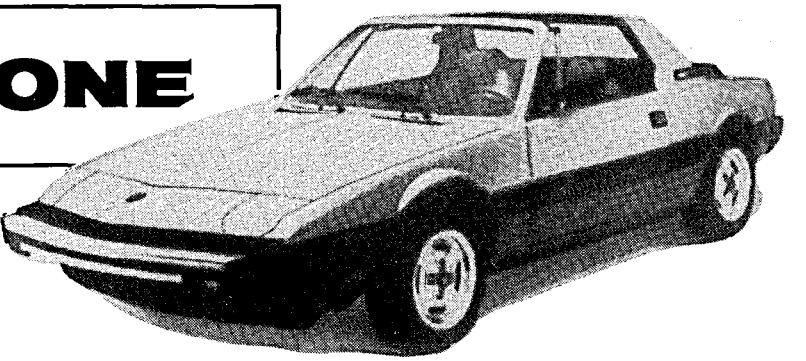

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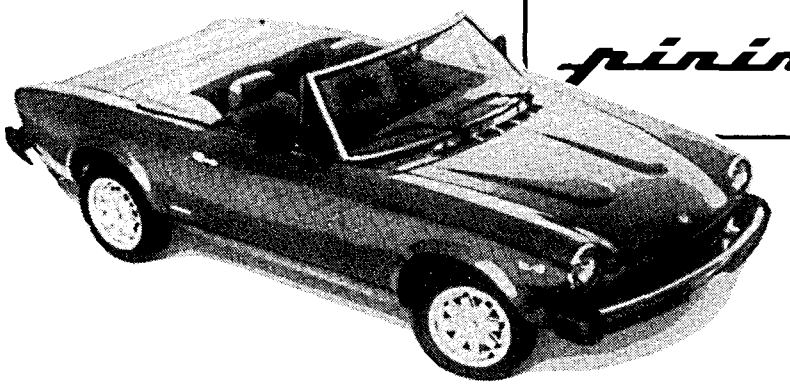

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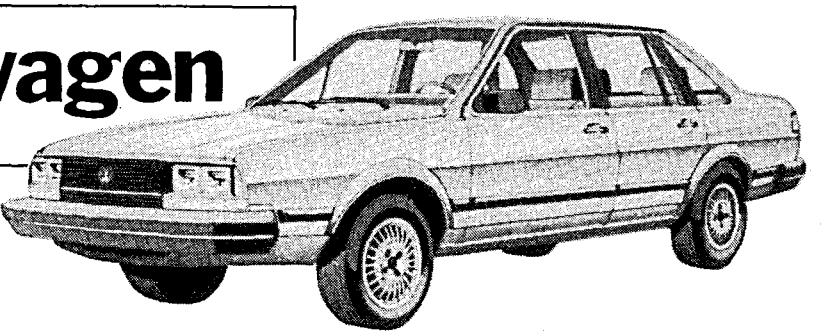

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PUTTING SENSE INTO SENTENCING

Sentence Reform In Delaware

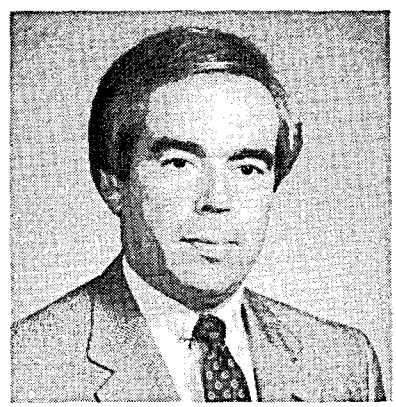
DAVID S. SWAYZE

In Delaware, as in many other States, our method of sentencing makes little sense. Few will defend the budgetary and human carnage wrought by the current system. Witness:

- Delaware spends between $17,000 and $18,000 a year to house, feed, and clothe a prison inmate, which means that 18 Delawareans must pay their taxes just to keep one inmate in prison for one year;
- The cost of new prisons places them among the most expensive real estate in Delaware: Gander Hill Prison, will cost us (and our children and grandchildren) about $70,000 per bed;
- In the last seven years, the budget of the Department of Corrections has increased 300%;
- Seven years ago, our corrections system accounted for 3% of the State operating budget; the projected corrections budget for FY85 is more than 7%;
- The costs of jail dwarf those of other systems operations: we now spend 88% of our entire corrections budget on the 21% of the sentenced population in prison;
- Our jails are overcrowded: at the Delaware Correctional Center near Smyrna, prisoners must be bunked dormitory style in the area that is supposed to serve as a vocational education center, and at Gander Hill Prison, the brand new showcase facility intended for pre-sentence inmates, the Department is already housing some of the overflow of sentenced inmates and projecting double-bunking by September, 1984.

In his State of the State address in January 1980, Governor duPont asked me to join with the Chief Justice, the Attorney General, and other leaders from all segments of the criminal justice community in developing a common sense response to the corrections problem. In February of this year the Commission that evolved from that call, the Delaware Sentencing Reform Commission (the S.R.C.), after three years labors submitted its 1983 Report to the Governor, the President Pro Tem of the Senate and the Speaker of the House of Representatives. The report makes comprehensive recommendations (Accountability Level Sentencing) after analyzing how the Delaware sentencing system has managed to drift so far from its original moorings.

Little more than a decade ago, after minimal debate, we set upon a course that would eventually result in equating punishment almost exclusively with incarceration. The more serious the crime, the greater the likelihood of going to jail, and the longer the stay. As we came more and more to regard jail as the only true punishment and any constraint but jail as leniency, the rate of incarceration and the length of sentences began a swift rise, helped along by the enactment of mandatory sentences, and the prohibition of consecutive sentencing. In 1983 only two states in the union had a higher rate of incarceration than Delaware's 274 prison inmates for every 100,000 people.



Dave Swayze, a partner in the firm of Prickett, Jones, Elliott, Kriston, & Schnee, is a former prosecutor with extensive experience in the executive branch of state government. Dave served for two years as Governor du Pont's Chief Legal Counsel, and thereafter as the Governor's Executive Assistant and Chief of Staff before his return to private practice.

Statistics regarding the duration of sentences are equally striking: seven years ago, there was one inmate serving a sentence of a year or less for each inmate sentenced to 10 years or more. Today, for every inmate sentenced to a year or less, there are four serving sentences of 10 years or more.

If our zeal for imprisonment had lowered the crime rate, it might be worth it, but not one of the many studies on the subject even hints that more incarceration has lead to less crime. Furthermore, the high rate of incarceration has lead to chronic overcrowding, which in turn prompts "safety valve" relief programs such as supervised custody. Worse yet, our present system does not achieve two goals for which the tougher sentences were intended: retribution and incapacitation of those likely to commit more crimes. Finally no one even pretends that our system fosters the fourth, traditional object of sentencing: rehabilitation, which our law proclaims the *exclusive* goal of sentencing. (11 *Del. C.* §6502(a)).

Accountability Level Sentencing System

Restrictions	I 0 - 100	II 101 - 200	III 201 - 300	IV 301 - 400	V 401 - 500	VI 501 - 600	VII 601 - 700	VIII 701 - 800	IX 801 - 900	X 901 - 1,000
Mobility in the Community[1]	100% (unrestricted	100 % (unrestricted)	90% (restr. 0-10 hrs/wk)	80% (restr. 10-30 hrs/wk)	60% (restr. 30-40 hrs/wk)	30% (restr. 50-100 hrs/wk)	20% (restr. 100-140 hr/wk)	10% (90% of time restr.) incarcerated	0% Incarcerated	0% Incarcerated
Amount of Supervision	0:0	Written rpt/ monthly	1-2 face to-face/month 1-2 wkly phone cont.	3-6 face to face/month Wkly phone contact	2-6 face-to-face/wk, dly phone, wrtn rpts/wkly	Daily phone dly face-to face, wkly wrtn rpts	Daily on site supervis. 8-16 hrs/day	Daily on site supervis. 24 hours/day	Daily on site supervis. 24 hours/day	Daily on site supervis. 24 hours/day
Priv. withheld or special conditions[2]	(100%) same as prior offense convic.	(100%) same as prior convict.	1-2 priv. withheld	1-4 priv. withheld	1-7 priv. withheld	1-10 withheld	1-12 withheld	5-15 withheld	15-19 withheld	20 or more withheld
Financial Obligations[3]	Fine/cost may be applied (0-2 day fine)	Fine/costs/ rest./prob. supervis. fee may be applied (1-3 day fine)	Same (increase proba. fee by $5-10/mo) (2-4 dy/fine)	Same (increase proba. fee by $5-10/mo) 3-5 dy/fine)	Same (pay part. cost of food/lodg/ supervis. fee) (4-7 dy/fine)	Same as V (8-10 day fine)	Same as V (11-12 day fine)	Fine, costs restitu. payable upon release to VII or lower (12-15 day fine)	Same as VIII	Same as VIII
Examples (These are examp. only-many other scenarios could be constructed meeting the requir. of each level)	$50 fine/ court cst; 6/mo unsupervised proba.	$50 fine, restitu., court costs; 6/mo superv. probation; $10/ mo fee; wrtn report	Fine/costs/ restitu; 1 yr. probat.; wkend comm. serv.; no drinking	Wkend comm. serv or mandatory treatm. 5 hrs/day; $30/ mo. probat. fee no drinking; no out-of-st trips	Mandatory rehab. skills prog. 8 hrs/ day; restitu.; probat. fee of $40/mo; no drinking; curfew	Work release; pay port. of rm/bd/restit; no kitchen priv. outside meal times; no drinking; no sex; wkends home	Resident treatment prog; pay port. of program costs; limited privileges	Minimum security prison	Medium security prison	Maximum security prison

1. Restrictions on freedom essentially structures an offender's time, controlling his schedule, whereabouts, and activities for the designated amount of time. To the extent monitoring is not standard or consistent or to the extent that no sanctions for accountability accrue for failure on the part of the offender, the time is *not* structured. It could consist of residential, part-time residential, community service, or other specific methods for meeting the designated hours. The judge could order the hours be met daily (e.g. 2 hours/day) or in one period (e.g. weekend in jail).
2. Privileges/Conditions: choice of job; choice of residence; mobility within setting; driving; drinking (possible use of Antabuse); out-of-state trips; phone calls; curfew; mail; urinalysis; associates; areas off limits.
3. As a more equitable guide to appropriate fine, the amount would be measured in units of equivalent daily income, such as 1 day's salary = 1 "day fine".

If you challenge the rate of incarceration in Delaware you must be prepared to argue that some people in our jails need not be there. The S.R.C. has concluded just that, and it recommends better screening of offenders at the point of sentencing and moving eligible inmates to other forms of punishment. (But again, more of the solution anon.) The recognized over-use of jail derives not only from the high rate of incarceration in Delaware, when contrasted with that of other states, but from two other telling statistics: fully 49% of our inmates are in jail for crimes against property, not persons; and almost 40% of those serving time are in jail for misdemeanors, not felonies. In both instances, of course, aggravating circumstances, such as previous convictions for more serious offenses, furnish an excuse for hard time. But for many offenders such excuses are lacking.

The simple truth is this: we put a lot of people in jail in Delaware because we don't have other means for punishing and supervising them. Another statistic makes this point eloquently: of the 8,725 Delawareans within the jurisdiction of the Department of Correction on August 31, 1983, 6,157 were assigned to probation or parole, guaranteeing each an average of approximately two hours of Department contact a month. On the other end of the scale, 1,805 people were in prison. Only 763 sentenced offenders were in programs more structured and punitive than probation, but less restrictive than jail. Why? Available places in such programs (to the extent they exist at all) are simply not there. Simply put, our judges must send numerous offenders who require punishment to prison because there is no other way to punish them.

So much for the somber prologue. The S.R.C.'s suggested solution begins with four sentencing principles, which it originally adopted in its first year report, and which, as we will see, it carried through to the Accountability Level Sentencing proposal finally adopted. They are:

(1) Our system should emphasize the *likelihood* of punishment for any given offense over the *severity* of that punishment;
(2) The system should be flexible enough to permit sentencing that addresses the harm to the victim and *his* needs;
(3) A wide range of sanctions, which do not now exist, should be available to the sentencing judge, and, in each case, an offender should be sentenced to the least restrictive (and hence least costly) punishment consistent with the public safety; and
(4) The offender's potential for rehabilitation should be weighed in selecting punishment.

But before we can apply principles we must establish what we don't have now: a variety of differing, increasingly restrictive or punitive methods of punishment that give a sentencing judge the power to tailor a sentence and to impose an effective punishment short of jail where jail is not mandated and public safety does not require it.* As part of its comprehensive sentencing reform recommendations, the S.R.C. has recommended that $160,000 be appropriated for the fiscal year beginning July 1, 1984 to provide for seed money, matching funds and start-up expenses for various programs that the Commission, with the assistance of the Corrections Advisory Council, has identified as presently available in the private sector.**

By contracting out to the private sector the S.R.C. believes that it will be possible to bring programs on line more quickly and at a lesser cost per offender than would be possible within the mix of the programs historically administered by the Department. To date, more than 30 such programs are under study, the best of which will have been identified before the publication of this issue of DELAWARE LAWYER.

If we arrange alternative punishments, sequentially from least to most restrictive or punitive, and place them in a matrix of crimes defined in the Delaware Criminal Code, also arranged from least to most serious, we have diagramatically expressed the Accountability Level Sentencing system. (See facing page).

* Two on-going studies by sub-committees of the SRC — one involving risk assessment and selective incarceration, and the other enhanced presentence analysis, should result in recommendations that make the latter determination more accurate than it is today.

** Examples of such alternative programs include community-based drug and alcohol treatment, work camps and centers, honor barracks, electronic braceleting, and halfway houses.

There are ten punishment levels, each with five separate categories of punishment. The punishments escalate from a suspended sentence or minimum fine to currently available forms of incarceration (levels 9-10). Delaware has, at present, no level 8. If one were to take the August 31, 1983 configuration of Department of Corrections clientele previously described, levels 1-3 would contain the 6,157 persons not subject to restriction, and levels 9 and 10 would absorb the 1,805 prison inmates. The remaining 763 are disbursed almost entirely at levels 4 and 5 (work referral and community work service), and level 6 (work release).

At the bottom of the matrix is a representative sentence for each accountability level, again shown for illustrative purposes. As is evident, the equation of differing punishments in terms of their punitiveness and restrictiveness, when combined with the availability of these alternative punishments, would give the sentencing judge much greater flexibility than he now enjoys and would provide a significant lessening of pressure for the classic "in/out" decision, which presently attends the sentencing process.

The Commission has also recommended that the sequential sentencing process also be used for periodic reclassification of those within the system. For example, an offender who is doing badly in the punishment originally imposed may be placed in a more restrictive or punitive setting short of commitment or return to prison. So too, a gradation of restrictive settings not requiring constant security will permit gradual reclassification of those who function well in more restrictive levels of punishment, instead of sending an offender directly from jail to an almost unsupervised setting. Of course, both the will of the General Assembly and due process considerations will impose certain restrictions on the mobility of the population within this proposed classification system. But the system will permit better control of the sentenced population without incarceration, except in those instances where the initial punishment commands it, public safety requires it, or the conduct of the offender within the system results in it. And each offender will become accountable to the Department of Corrections, and the Department in turn more accountable to the public for each member of its population.

In 1983 only two states in the union had a higher rate of incarceration than Delaware's 274 prison inmates for every 100,000 people.

Putting Accountability Into Practice

There are several legislative tasks that the S.R.C., in conjunction with other representatives of the General Assembly, the judiciary, and the criminal justice agencies who gathered at a two day conference in Lewes in March of this year, decided were critical to making Accountability work. They are:

(1) Establishing a permanent successor to the S.R.C., the Accountability Sentencing Commission, to consist of eleven representatives of all three branches of government. They will work with all branches of government in adjusting accountability levels to the commands of the Delaware Criminal Code. They must train personnel in the criminal justice system, who in turn must administer the new system. They must monitor the new system for its effectiveness in doing what it promises;*

(2) The same legislation should require court rules for final sentencing guidelines and sequential sanctions adopted in collaboration with the Commission;

(3) Amend 11 *Del.C.* §6502(a), which now defines treatment and rehabilitation as the sole purpose of sentencing, so as fairly to reflect the actual goals of our sentencing system, and state the need for certainty of punishment and resource efficiency;

(4) As before noted, start-up money will be necessary for programs on contract with the private sector and, where it is suitable, offenders must pay for these services.

I hope these modest legislative proposals for 1984 designed to make Accountability Level Sentencing a reality in 1984 will be on the legislative agenda. As part of the legislative debate, the education, the training, and the development of the matrix, lawyers must play an active role as advocates, teachers, and students. Those of us accustomed to a sentencing process that boils down to imposition/avoidance or maximization/minimization of jail time will have to adjust to a much more complex process, with attendant burdens on prosecutors, defense counsel, and officers of the court.

Lawyers have figured prominently in the deliberations of the Commission. The Chief Justice; the Secretary of State, Glenn Kenton; former Attorney General Richard Gebelein; and Jeff Weiner have all chaired standing subcommittees of the Commission. George Evans, Judge O'Hara, and the Public Defender, Larry Sullivan, have chaired important *ad hoc* committees. Many other judges and lawyers have contributed in other capacities.

We have a chance to make a major overhaul of our sentencing structure, and to guarantee accountability of those convicted of crimes and accountability of the system to the public. We can get reform without disregarding the need and resolve of the General Assembly to see that those who threaten public safety are securely behind bars. And that reform promises eventually to halt the upward spiral in the cost of corrections to the detriment of funding for other badly needed programs.

As the principle conservators of Delaware's system of justice, all members of the bench and bar must join in this cause. It's up to us; it's up to *you*. □

* Senator Vaughn and Representative Houghton, together with 25 of their colleagues, introduced this legislation as S.B. 434 on May 3, 1984.

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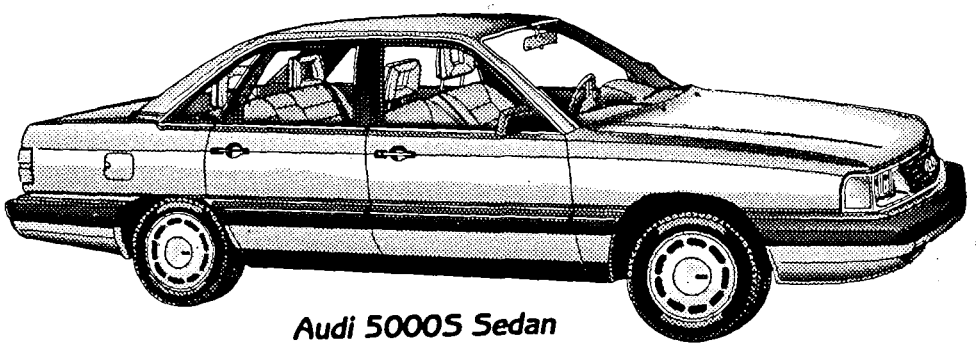

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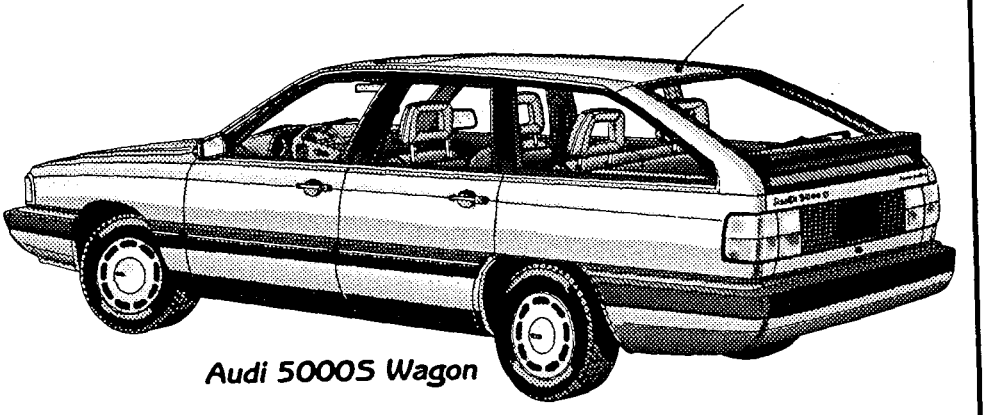

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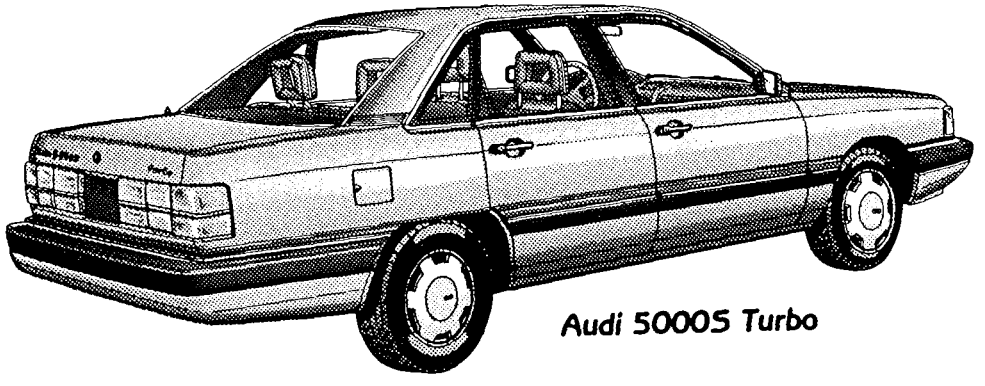

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SENTENCING ALTERNATIVES

How Shall I Sentence Thee? Let Me Count the Ways.

JACK M. KRESS

Elsewhere in this issue David Swayze outlines proposals of the Delaware Sentencing Reform Commission. Perhaps the boldest aspect of those proposals is the attempt to break our dichotomous attitudes about sentencing alternatives. We can best grasp the advance over current practices these proposals represent and the great advantage they give the judiciary in providing alternatives by examining traditional sentencing practice and the anomaly of our own attitudes.

In a narrow sense, when we refer to "sentencing alternatives," we are just talking about a list — the choices a judge has once a defendant has been found guilty. The judge simply goes to the penal code where the choices are clearly set out. Or are they? We are only at the threshhold of analysis. If choices there are, should they be more explicit? More discretionary? Should the list be broadened or narrowed?

Furthermore, the word "alternatives" leaves open a basic question. To *what* is the sentence an alternative? Many reformers have turned the phrase around and refer to "alternative sentencing," by which they usually mean various forms of community service instead of imprisonment. These reforms are usually seen by the public as lenient slaps on the wrist, akin to virtually unconditional probation. Should alternatives to *probation* be considered as important as alternatives to jail?

Finally, what do we mean by "sentencing" anyway? Are we really concerned with the single act of a local judge or with the entire range of post-adjudicatory punishments society metes out? If the latter, then many actors are involved and many philosophical issues must be explored. We are now talking about alternatives to judicial sentencing authority. Clearly the issue becomes broader and more complicated the more closely we consider it.

Variety

If we include the federal system, we have 51 penal jurisdictions with a remarkable variety of substantive and procedural sentencing structures. Although we are concerned here primarily with Delaware, it is worth attending to the systems of our sister states. I have found that most of us, including those who should know better, do not adequately comprehend these differences. When I began speaking across America on sentence variation I was nonplussed by the expressions of disbelief provoked by the purely descriptive portions of my lectures. Whenever I speak at the National Judicial College in Reno to audiences of judges from all over America, the first day of each week-long session is devoted to the audience's shocked discovery of differences. Judges at such seminars typically spend the first day asking how the other judges do things. Typical first day judicial utterances: "You're kidding!" "I don't believe it!" "Really!" It is only after a day or so of this that the judges can start discussing worthwhile similarities.

Professor Jack Kress, formerly of the Delaware Law School faculty, is a distinguished authority on the problems of sentencing those convicted of crime. He has served as a project director on two major programs inquiring into the adequacy of sentencing guidelines and sentencing practices in state courts. Professor Kress is a graduate of Columbia University, of both the college and the school of law. After completing law school, he did graduate study at the Institute of Criminology at Cambridge University, England. DELAWARE LAWYER looks forward to further contributions by the exceptionally accomplished scholar.

Let me give some examples from our national sentencing hodge-podge. Ten years ago, a major survey of sentencing procedures throughout the 51 jurisdictions reported:

(1) Determinate vs. indeterminate sentencing:
   (a) only ten states had determinate sentencing (since that time, four to twelve — depending upon definition — have followed suit);
   (b) of the 41 jurisdictions with indeterminate sentencing schemes only 13 allowed the sentencing judge to set a minimum. The others fixed it legislatively.

(2) For time served while awaiting trial:
   (a) 39 jurisdictions granted credit, either by statute or case law;
   (b) 12 left the issue to the exclusive discretion of the judge.

(3) Conviction of two or more offenses at the same time:
   (a) some states required consecutive terms;

(b) some states required concurrent terms;
(c) most states gave the judge a choice.

(4) Habitual offender legislation:
(a) most statutes applied after a second felony conviction, others only after a third or fourth;
(b) some jurisdictions simply doubled or trebled the potential sentence, while others applied intricate mathematical formulae.

In the past decade, mandatory prison terms have been legislated for a host of offenses, most commonly violent crime, habitual crime, narcotics violations and crimes involving the use or possession of a firearm. A survey conducted last year revealed that only three jurisdictions did *not* have a mandatory prison term statute for at least one of these categories. (Delaware is one of 13 jurisdictions imposing mandatory prison terms for *every* one of these categories.)

Choices

This variety suggests some broad differences of policy, and leads us to an examination of what most people mean by "sentencing alternatives."

In most jurisdictions, after conviction for a felony, there is usually a pre-sentence investigation report; most states allow waiver of the report, even for serious felonies, whereas others require reports even for misdemeanors. Particular cases may call for mandatory sentences, but judges usually have an extremely broad choice, even for the gravest offenses. The major options — not available, of course, for every crime in every state — and expressed in varied terminology are:

Unconditional discharge: accorded when the mere fact of conviction is considered punishment enough. Although this appears so lenient as to suggest no burden on a defendant, it reflects recognition that pre-trial incarceration for lack of bail is a real paid-in-advance penalty. The time the defendant spends in jail awaiting disposition is deemed equal to or greater than the punishment warranted by the offense.

Conditional discharge: imposed when the full range of probationary conditions are not considered necessary, but one or more of them may be in order. Restitution to crime victims — a surprisingly recent reform — is today a commonly applied non-standard condition. In highly mobile America, one also finds the modern form of transportation or banishment, popularized in western fiction as "Get out of town by sundown!" and affectionately known to local probation officers as "Greyhound parole."

Fine: typically employed only for relatively minor offenses, traffic violations, and occasionally for significant white collar crimes. We fine far less than our common law cousins in Canada or England, perhaps because of a gut feeling that fines smack of economic discrimination in more serious cases. In Scandinavia the "day fine," one day's income or 1/365th of the offender's annual income, is frequently imposed.

Probation: far and away the most common American sentencing alternative. Roughly four out of five convicted of serious offenses get probation. Unfortunately, for the student of comparative jurisprudence, the term probation has a tremendously varying import across the United States. It does imply some set of probationary conditions, but the range is wide. A number of conditions are just about standard, such as not habituating places frequented by criminals, periodic reporting to a probation officer, and seeking gainful employment. When we depart that familiar terrain anything goes and we encounter some highly individualized, objectively strange conditions, such as compulsory sterilization, mandatory "volunteer" work in hospitals, and the avoidance of one's family. Beyond this, one major difference among jurisdictions—which bedeviled my own sentencing research at one point—was the major "condition" of probation known as time in jail. In my early research, I had rashly assumed that the term "probation" in other states meant what it did in my home state, New York. I thought of probation as the major alternative to incarceration, not merely one example of it. I soon learned that in many western states jail time is a frequent condition of probation. I am not talking of a day or two of so-called "shock" probation, but terms of six months to two years. These "conditions" of probation would, in most civilized nations, be considered extremely lengthy penalties per se.

Jail: The local county jail has two main functions. Typically, it holds those deemed innocent until proven guilty, but who can't raise bail, while simultaneously housing those convicted of misdemeanors and serving determinate sentences under two years in length. In most jurisdictions these jail populations mix indiscriminately. In Delaware, the mix is even richer: we've placed our statewide jail inside our main prison at Smyrna.

Split sentence: combines probation and incarceration. Jail time, often only a few days and usually no longer than six months, is followed by probationary supervision. In theory, it is a sentence to give young offenders a "short, sharp shock" but in practice it is uncertain whether this is "softened" incarceration or "hardened" probation. "Shock probation" is a popular euphemism for the split sentence.

Intermittent sentence: less frequently exercised than the split sentence, its purpose is to accommodate offender behavioral patterns to employment. For example, instead of interrupting an offender's employment, the judge may sentence him or her to weekends or nights in jail. This humane alternative serves the rehabilitative needs of the offender, but jail officials complain that it does not serve the habilitative needs of their personnel. At night and on weekends jail staffs are at their numerical low, and a reverse flow of inmates disrupts correctional work patterns.

Youthful offenders: Most states accord special treatment to young adult offenders, and although the age limits vary, all accord exceptional treatment to juveniles. Intensive supervision, anonymity of court records, and potential expungement are typical of youthful offender programs.

Corporal Punishment: Living in the last state to bar the whipping post, we should not ignore a plea for restorating corporal punishment recently made by criminologist Graeme Newman. He makes a case for it as more *humane* than the horrors of prison.

Prison: Often called "correctional centers," prisons are 24-hour lockups

where we isolate the worst among us for years and even decades. This is the nub of the sentencing problem in Delaware as it is in the rest of the nation. Who goes in to prison and who stays out of lies at the heart of the moral question that sentencing poses.

Death: With only a handful of executions in the United States in the last decade, this has not been a common sentencing alternative, but it looks as if it will be a growing one. The United States Supreme Court has given its final approval to a number of death penalty statutes and we appear headed for a major resumption of executions. Despite its puny statistical impact, the moral and political significances are great. While the evidence for capital punishment as a deterrent to murder is at best equivocal, most Americans favor the death penalty as the just and fitting punishment for one who has taken a life. As of this writing, Delaware has six prisoners on death row.

These are the major sentencing options available to judges, but their manner of imposition has three major variations:

(1) *Execution:* On the date of sentencing, the alternative is announced and imposed immediately;

(2) *Suspended:* On the date of sentencing, the specific sentence is announced, but execution is suspended and the defendant gets an unconditional, unsupervised release. This reduces the harshness of many sentences but it does not give freedom or complete release. A fixed punishment awaits the defendant who fails to perform satisfactorily.

(3) *Deferred:* This combines the other two variations into an *unfixed* retribution. The erring defendant is brought back before the sentencing judge to be sentenced as it were anew, with the full range of options available to the judge at the time of execution.

In or Out?

The options set out above seem to provide a great deal of choice, but do not many of them create distinctions without differences?

Many years ago, as a young assistant district attorney in Manhattan, I was educated in the realities of sentencing alternatives by a streetwise defendant who interrupted a plea discussion I was having with his public defender. We had been talking about what would appear on the defendant's rap sheet, whether there would be credit for time served, what portion of the sentence might be suspended, etc. The defendant poetically got to the heart of the matter, declaring "In or Out, that's what it's all about." The charge was grand larceny, but the defendant made it clear that he would have pleaded guilty to murder if he could have been assured an immediate sentence of probation. On the other hand, a simple postponement, while continuing the $500 bail he could not make, was effectively a jail sentence. In or Out.

Recent research confirms that judges, too, view sentencing in the same bifurcated way. That is, first the judge decides whether a defendant should go in or stay out. The defendant is "too dangerous to put on the streets" or "a safe probation risk." Yes or no. In or out. If the decision is to incarcerate, the judge must decide how much time he wants the defendant to serve. It is only after making this decision (perhaps unconsciously) that the judge "fits" the decision into available statutory alternatives. The judge may suspend part of a sentence, or make one sentence run consecutively with another. In setting the length of jail sentences, a judge also attempts to take into account prevailing "good-time" and parole practices. Unfortunately, the judge's information about those matters is often pure guesswork.

Purpose and Practice

Certainly, the statutes and the literature are replete with alternatives beyond In or Out. We already have fines, intermittent imprisonment, restitution, community service, etc. In fact, we use them in only a tiny proportion of cases. Why is there this reluctance to go beyond the self-imposed limits of In or Out? Partly, because the system is demonstrably insincere. It creates options without providing the funds to put them into practice. (Alcohol and drug detoxification programs are notorious examples.). Mostly, it is because of a philosophical gap we have not bridged.

The Delaware penal code is out of step with reality. It declares the only legitimate sentencing goal is rehabilitation, but no one seriously contends

that Delaware prisons rehabilitate. Some blame the insufficient resources we give corrections officials. Others argue that the state of the art of psychology and therapy is simply not yet far enough advanced for us to rehabilitate offenders. Most recent writers on this subject would declare that, even if rehabilitation could work, it would be an improper and even immoral rationale for imprisonment, absent other justification. Instead, our modest but realistic goal should be to ensure that when offenders go to prison — for some other legitimate reason — they should not emerge worse criminals than when they went in.

There is a related prison problem we cannot ignore: prisons are overcrowded. In some states, federal courts have found the degree of overcrowding to violate the "cruel and unusual punishment" prohibition of the Eighth Amendment. In a recent conversation with Mike Rabasca, head of the Statistical Analysis Center, I learned that we have about 230 life sentence prisoners in the Delaware Correctional Center. Their average age is 24; their average life expectancy is 73 years. They are not leaving and others are joining them at an accelerating rate. Unless there is a major change of policy, Mike projects that in less than ten years, Smyrna will be filled by lifers only!

Prisons punish. Prisons may extract society's legitimate just deserts from a defendant. Prisons may deter potential future offenders. Prisons may incapacitate dangerous offenders and thereby protect society. But prisons do not rehabilitate. The fact that virtually everyone knows this—no matter what we and our codes say—helps to explain our pragmatic reluctance to go beyond *In* or *Out*.

In is hard. *Out* is soft. *In* is prison. *Out* is probation. *In* is the tough sentence. *Out* is the lenient one. *In* serves the purposes our code leaves unstated. *Out* is what's left over for rehabilitation, the purported rationale for jail! And that is how defendants, judges, and virtually all the rest of us think.

Sequential Sanctioning

The Delaware Sentencing Reform Commission proposals attempt to change this distortion of purpose and principle. They set up an accountability scheme of sentencing that provides various degrees or levels of punishment adjusted to our conflicting needs and resources.

By *progressively* limiting the freedom of convicted defendants, the accountability scheme attempts to create a middle range between our two extremes. The punishments are too strict to be viewed as a slap on the wrist, yet far less costly in monetary and human terms than prison. These gradations of correctional severity will respond to a need that was expressed at a recent conference by Judge Vincent Bifferato. He described the difficulty he faced in sentencing an offender for a minor probation violation. "Resentencing to probation was clearly not enough punishment, so I had to send him to the Delaware Correctional Center, even though I knew that was a more severe punishment than he needed." The *effective* range of choice presently available to Delaware's judiciary is too narrow.

Judicial sentencing authority has been challenged in many jurisdictions. For example, mandatory sentencing laws reflect legislative distrust of judicial discretion. Judicial sentencing guidelines for an accountability scheme may achieve the benefits that we have sought in vain from an enlightened judicial discretion.

Sequential sentencing is an exciting prospect, but we shall have to be careful in how we structure it. Sentencing guidelines must be instituted at the judicial level so as to attain evenhandedness in application, while providing the judiciary with sufficient flexibility to account for aggravating and mitigating circumstances. We must thoughtfully develop and tightly supervise a classification system employing objective criteria designed so that the appropriate offenders are assigned to each level of accountability. We must properly fund, carefully staff, and closely monitor correctional performance in the middle range. Finally, an appellate sentencing review procedure should be established to ensure that propriety as well as equity prevails in Delaware's revised sentencing scheme. □

Sentencing the Sex Offender In Delaware

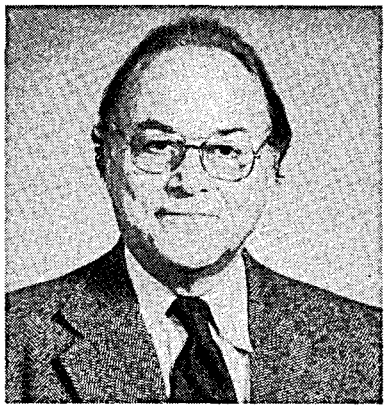
In which a distinguished jurist observes: "The judge who sentences the sex offender reaches out for justice with hands no less shackled than those of the offender he jails..."

ROBERT C. O'HARA

Most Delaware judges would agree that one of their hardest tasks is imposing fit sentences on convicted sex offenders. This arises in part from misconceptions about the offender, but even more, it is due to the absence of guidelines for determining the manner of man the offender is, as well as the absence of real options in dealing with him.

One of the more popular myths is the notion that, in cases involving a female victim, the defendant is probably just a good old lusty male who has been unable to resist a provocative or vindictive woman. Another view is that of sexually frustrated man reacting in a socially unacceptable way under pressure of pent-up needs. Some see the actor as a demented fiend, beset by insatiable and perverted desires. In any event, the street wisdom is that you deal with the worst of these offenders by throwing the book at them, or worse. Mike Royko, the nationally syndicated columnist, ruminating on the etiquette that prevails in the taverns of New Bedford, Massachusetts, pungently expressed this point of view: ". . . I'm of the opinion that rapists should be hanged—and not necessarily by the neck.*

Every responsible study rejects such views, but we are left with a staggering problem. The kinds of behavior that give rise to most public concern, notably violent sexual assaults or predatory sexual molestation of children outside of the home, are nearly always committed by males. While the aggressive sexually assaultive act is invariably of complex origin, more hostile than passionate, the impact on society is severe. In the United States, in 1981, arrests for forcible rape accounted for about one-third of all arrests of males for sex offenses, other than prostitution. In 1980, there were 37.2 rapes per 100,000 population in the United States, probably the highest rate in the world. Those numbers do not represent the full extent of the problem, for it is conceded that only a third of the encounters of this kind are reported.



The Honorable Robert C. O'Hara has been a judge of the Superior Court for more than eighteen years. He is the ideal author for the accompanying article: last year he served as Delaware representative to the Victims' Rights Conference, held by the National Judiciary College. His sensitivity to the disturbed offender and the injured victim is well expressed here. Judge O'Hara has taught regularly in programs for advanced legal education.

Although recidivism (repeated crimes by a given offender) is always difficult to measure, it is unquestionably as high among sex offenders as others. When sex offenders are more narrowly defined, it becomes clear that the violent ones, acting compulsively, may have recidivism rates as high as 70 percent.

Does all of this have any special meaning for Delawareans? It does: we are confronted by the activity of sex offenders no less than are citizens of other states. We have no program for dealing with sex offenders, or for that matter, any program for classifying them before or after sentencing.

Let's take a closer look. On July 31, 1983, of the 1901 prisoners in the Delaware Correctional system, 172 were serving a sentence for offenses directly related to sexual activity, ranging from Rape First Degree to Attempted Incest.

* *Mr. Royko, a wise and funny man and an absolutely marvelous writer, has apparently learned how to release his hostility through a fountain pen. But what do we do about the unsyndicated pervert? The Editors.*

In addition, there were 97 prisoners serving sentences for Assaults and Offensive Touching, a fair number of whom were jailed for offenses that might otherwise have been labeled sexual. It is safe to say that on that date in 1983 somewhere between 12 and 15 percent of all prisoners in the correctional system were there for sex offenses. Figures are not available about those on probation after conviction of sex offenses, and of course there is no way of determining the vast number of sex offenders, on that particular day in the State of Delaware, who had not been accused, charged, or convicted. When you consider how many of those convicted of sex offenses now released from imprisonment, and the high recidivism rate that the worst of them display, you realize that it is a gross understatement to say we have a problem in Delaware.

On top of this Delaware has no semblance of a program for dealing with sex offenders, other than probation or imprisonment. Is there any wonder a judge comes to the sentencing of a sex offender with grave misgivings? This is all the more appalling if one realizes that the vast majority of states *do* have special sentencing procedures for the sexually disturbed offender. Although these programs vary, they all serve the general purpose of protecting the public from, and of providing special treatment for, the criminal offender who is neither psychologically "normal" nor legally "insane."

In states such as Delaware where the choice of the sentencing judge is either probation, with the attendant risk of public wrath, or imprisonment, protection of the public is left entirely to a criminal justice system that has virtually no tools to deal with the problem. Furthermore, our approach is costly. Aside from damaging side effects, such as the harm to innocent victims and family members, we incur the exorbitant costs of financing police, courts, and prisons.

For a moment it may be well to look briefly at what is being attempted in some of our sister states where innovative programs have been undertaken in an effort to understand and bring some order to a chaotic situation.

The state of Washington is a good example of what is being done. Washington has a Sexual Psychopath law, under which anyone convicted of a listed sexual offense is hospitalized at the Western State Hospital for observation and assessment for as long as 90 days. If it is determined that the offender is treatable, he is then committed by the court to the State Hospital. His treatment is conducted in a hospital ward setting with gradually increased liberty under supervision. When he is released, there is aftercare, supplemented by regular reports to the hospital. The treatment is heavily weighted on the psychiatric side, with intensive group therapy. There are work assignments aimed at education and skill development. Social and recreational life is not neglected, because it is believed that in many, if not most, instances *these offenders are social misfits or outcasts.* The thrust of the treatment program is to afford the subject an understanding of why he has been involved in the kinds of deviant sexual acts for which he has been convicted, how this has come about, and the effect of his behavior on victims, families, friends, and himself. There is an all-out effort to commit the offender to responsible self-change.

Although recidivism rates are always subject to some question, one of the more reliable studies of those who have come through the Western State Hospital program suggests that of young males in the 20 and 30 year age bracket, who were engaged in aggressive sexual acts against young females or children, over a twelve year period the rate was about 22 percent. These are the same type of offenders who most informed authorities believe will ordinarily show a 70 percent recidivism rate.

Closer to home is the New Jersey program. The New Jersey sex offender law requires that all convicted sex offenders be examined psychiatrically. Mandatory treatment is prescribed for those found within the purview of the statute. The program is intended for those who have demonstrated repetitive and compulsive behavior, accompanied by violence or age disparity between offender and victim. If the offender is amenable to treatment, the court has no sentencing discretion. The offender receives an indeterminate sentence not to exceed the statutory limits for the crime charged. He is then committed for

treatment to an in-patient program or an out-patient program with probation.

In 1966, a new facility, which is a part of the Department of Corrections for the State of New Jersey, was established as an independent institution known as the Adult Diagnostic and Treatment Center. The Avenel, New Jersey institution was built at a cost of $7.2 million dollars and funded by a public bond issue. It was one of the first institutions built in the United States specifically for the treatment of convicted sex offenders. A psychiatrist administers the program with a staff of 147 professionals.

The Avenel program includes an out-patient diagnostic service for an average of 600 cases per year, mostly convicted sex offenders referred by the courts. Those referred have been convicted of offenses of aggravated sexual assault, sexual assault, aggravated criminal sexual contact or attempts to commit such crimes. If the examination by the Diagnostic Center, which must be completed within 30 days, reveals that the offender's conduct was characterized by a pattern of repetitive, compulsive behavior and, if the Diagnostic Center so recommends, the court may sentence the offender to the Center for a program of specialized treatment, or, if the Center also recommends, the court may, in lieu of incarceration, place him on probation, provided he receive out-patient psychological treatment. On the other hand, if the diagnosis suggests that his conduct was not characterized by a pattern of repetitive compulsive behavior, then the court may impose a sentence of treatment but must impose that sentence the law would otherwise prescribe.

Delaware has no semblance of a program for dealing with sex offenders, other than probation or imprisonment. Is there any wonder a judge comes to the sentencing of a sex offender with grave misgivings?

An important feature of the New Jersey program is that anyone committed to Avenel can be released on parole only by the State Parole Board, after the treatment center has provided the Board with full information about the physical and psychological condition of the patient and has recommended consideration for release.

The treatment provided at Avenel is extensive. It includes consultation with a sizeable staff of psychiatrists, psychologists, social workers, staff counsellors, para-professionals, and others, and large amounts of specialized group therapy, individual therapy, marriage therapy, family therapy, sex education therapy, and patient-directed responsibility therapy. It emphasizes social and employment skills and provides a strong aftercare program, including ongoing therapy with residents still at the facility.

Avenel has for eight years been treating the most difficult and violent sex offenders throughout the state, and the New Jersey authorities are beginning to feel confident in the recidivism records. They claim as a conservative estimate a recidivism rate among these worst of sex offenders that has fallen to something under 15 percent.

Obviously the cost of such a program is considerably higher than the Delaware prison program for which we spend $18,000 plus a year per inmate. But figures can lie: the tremendous drop in recidivism surely means far less expense than we incur warehousing such offenders in Delaware.

Another considerably different approach to the problem is being conducted at the Biosexual Psychohormonal Clinic at the Johns Hopkins University Hospital in Baltimore, Maryland. The Clinic treats a great variety of sexual problems, including homosexual and heterosexual pedophilia, sexual sadism, voyeurism, exhibitionism, hypersexuality, transvestism, and compulsive rape. Most of those under treatment have been convicted of sexual offenses but, if they have been imprisoned, are now on probation or parole. Some few are imprisoned during treatment.

For a patient to be treated at the Clinic he must undergo a complete psychiatric and physical examination. His evaluators then decide if he can be helped by the principal Clinic treatment, the drug Depo Provera.

If the patient is accepted for treatment he is thereafter followed by the Clinic's out-patient department and receives injections of Depo Provera, plus psychiatric counselling and continuing weekly or bi-weekly reassessments according to his needs.

Studies begun at John Hopkins in 1966 show that many sex offenders treated with the anti-androgenic hormone, Depo Provera, reinforced by counselling, have made remarkable progress in self-regulation of their sexual behavior. The medication can be thought of as an appetite suppressant for the sex drive.

Part of the early treatment of a patient at John Hopkins is determining the right dosage of Depo Provera for him. Once that level is determined, most patients do not require a progressively increasing dosage. Before Depo Provera came along the main method of reducing the level of testosterone in men was surgical castration. Castration has been used throughout history, but it is not favored in American society. Castration is irreversible, whereas after disuse of Depo Provera, the patient regains his sexual drive. In some cases it

is possible for patients to discontinue Depo Provera without detriment. This is a step-by-step weaning away of the hormone dosage and some patients discover that they are completely relieved of the tendency to engage in sex offending behavior. Some patients, however, prefer to continue on a low maintenance dosage of the medication so as to ensure a maximal guaranty against relapse. Some patients choose not to reduce their dosage for fear that they would be tempted to repeat sex offenses.

While the Clinic at John Hopkins is relatively new, some of the patients have been followed for as long as 15 years. The only patients who have not been able to self-regulate their sexual behavior while receiving medication are a few who have stopped medication against medical advice and subsequently relapsed. The experience at the Clinic suggests that the combination of the drug and counselling can greatly reduce recidivism. Among those sufficiently motivated to stay with the treatment, recidivism falls to practically zero.

Assuming the effectiveness of programs in other jurisdictions, what should we offer in Delaware? Severe penalties for the most atrocious sex offenses without regard to the widely varying circumstances of such crimes, is counterproductive. It discourages guilty pleas, encourages juries to think twice, and promotes plea bargaining to totally unrepresentative lesser offenses. For the compulsive, assaultive, young, male anti-social offender, not sexually deviant, and unlikely to repeat his sexual offenses, the usual deterrents (prison and perhaps training in sociosexual sensitivities and skills) should be sufficient. But it seems that the dangerous, repetitive aggressors do best in a hospital setting or when imprisoned with immediate therapy. I believe firmly that an enlightened and effective approach requires close cooperation between therapists and custodians, careful timing of release, and post-release supervision.

Delaware always rises to the occasion and finds solutions to great and pressing problems. There is no reason to think that this is not possible with respect to sex offenders. The current system, if it can be called a system, is just plain useless. An early gathering of leaders from the criminal justice system, and representatives of the other pertinent disciplines, should be promptly called to define the problem, to examine the possible solutions, and to make recommendations for the early institution of a realistic, effective, and humane program. *The victims of the sex offender are entitled to nothing less.*

By sentencing, society expresses the extent and depth of its disapproval of criminal behavior, and attempts to maintain order and dignity among its members. The judge, who performs the sentencing role must bear in mind not only the injury to the victim but the damage such a crime inflicts on the very structure of society. At his best, the sentencing judge must balance the competing claims of fairness, community mores, the depth of the defendant's culpability and motivation, and the affront to the victim. The sentencer, in condemning the wrong, speaks for the past and proclaims the future by what he does to the defendant. Without the assistance of the best that society can offer, the judge who sentences the sex offender reaches out for justice with hands no less shackled than those of the offender he jails. □

In June, Judge O'Hara sentenced a sex offender to a minimum term of jail time. (The Deputy Attorney General had argued forcefully for a longer term.) The News Journal papers reported the sentencing in a clear, accurate, and well-written account.

Two weeks later the paper published an angry letter to the editors in which the correspondent waxed wroth and mounted a blistering attack on Judge O'Hara and the Deputy for their softness on crime. She also erroneously charged the judge with awarding a completely suspended sentence. It seems clear the correspondent did not read the original account carefully. It also seems that the newspapers failed to defend the judge, the deputy, and their own reporter against an unwarranted attack.

Too bad! Mark Twain once said that a lie could get around the world twice while the truth was lacing up its boots. Here we go again!

The Editors

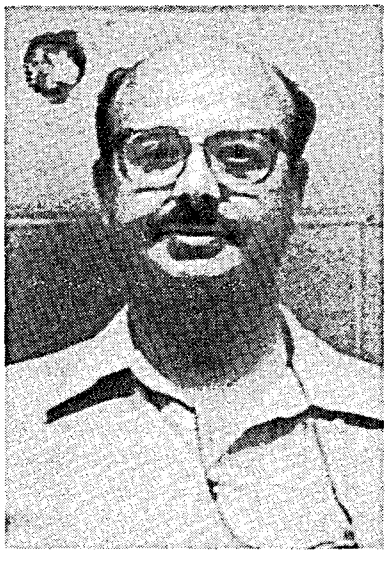
Samuel Butler's "Erewhon" is a world of reversals in which we confront ourselves in satirically cracked mirrors. In Erewhon crime is viewed sympathetically; sickness is punished. Our society frequently attempts to explain anti-social behavior as a species of disease, but in Butler's "Erewhon" disease is the real crime. In Erewhon the charitable formula for describing one guilty of poor health is to say, "He's stolen a sock," just as we say of some criminals, "Only a mad man could do such a thing."

The gist of the innovative and exciting approach to violent crime that John Nichols describes below is a therapeutic and Erewhonean recognition that the guilty and the innocent are both victims (although of very different sorts) and we had best repair the violent criminal before he makes more victims.

EXORCISING THE VIOLENCE OF THE PAST

JOHN T. NICHOLS

Once Bar and Bench are finished with the violent offender, he is committed to the Department of Corrections. Psychiatrists frequently diagnose the behavior of such people as "personality disorders" and declare them untreatable. Although incarceration does little to alter violent behavior, the people of Delaware expect the Department to do "something" to correct the dangerous offender before returning him to the community. I should like to tell the readers of DELAWARE LAWYER about a new approach the Department has taken to fulfill this obligation.



John Nichols holds an M.S. degree in counselling from the State University of New York. He conducts a private practice in family counselling in Kent County and serves on the treatment staff of the Delaware Correctional Center. Mr. Nichols wishes to thank Dr. James Wiggins of the University of Delaware for his assistance and advice in the preparation of this article.

The Seeds of an Experiment

In August 1981 Ms. Sue Murdaugh, R.N. of the staff of Parents Anonymous of Delaware made a presentation on child abuse at a conference held at the Delaware Correctional Center for the prison staff and the inmates. The staff liked what they saw and consulted with Parents Anonymous to see how the program might be adapted to incarcerated men. In November 1981 I was asked to design a program for the prison population, and spent six months in specialized training conducted by Parents Anonymous.

By the following June, John L. Sullivan, the Commissioner of Corrections for the State of Delaware, was convinced that the program we had developed had sufficient merit to warrant a one year pilot program. In July Ms. Murdaugh and I organized a group of interested prisoners, and the program got under way.

Our approach to violence was a novel one, drawn from the experience of Parents Anonymous in confronting this seemingly intractable problem. The techniques of Parents Anonymous ("P.A.") applied in very different social settings, furnished the method we would use. A few words about P.A. are accordingly in order.

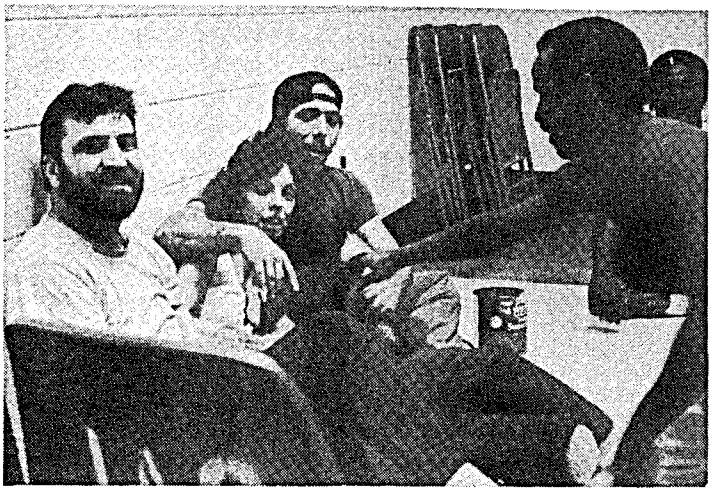
The P.A. Philosophy

P.A. is an organization of small self-help groups that supplement individual psychotherapy for child abusers. The P.A. philosophy embodies three assumptions: (1) parents who abuse or neglect their children acquired these traits in childhood, when *they* were abused or neglected; (2) parents who abuse their children have very low self esteem because of their behavior; (3) even abusive parents love their children and are searching for ways to be better parents.

A P.A. group, led by volunteer professional counselors, seeks to give its members the self respect they need to break the cycle of child abuse. The counselors are trained to understand child abuse without condoning it. Members share their successes in parenting and help one another through the many emotional crises experienced by parents.

Volunteer professional counselors lead all Parents Anonymous groups. During their professional careers most of them have worked with abusive parents. However, before they head up parents groups, they undergo a course of training to be a leader.* A facilitator or sponsor, as

** A Leader is regularly designated by the faintly repellent title "facilitator". The Editors.*



Above: A group session. Right: The concluding "group hug."

he will be called in these pages, begins his training at an interview with the local P.A. organization. The sponsor must have enough training and experience to avoid judgmental reactions to the behavior he will encounter in the group. He must be comfortable with the notion that antisocial behavior is but one part of a whole human being. The sponsor must recognize that abusive parents are capable of loving their children and that, by participation in P.A., they are desperately searching for ways to be better parents.

A prospective sponsor is interviewed in some depth. If he shows a commitment to the P.A. philosophy, he is asked to spend several weeks attending group meetings to learn the variations of member problems and the diversity of leadership styles among other sponsors. The third phase of training is service with an experienced sponsor in an established group. A newly trained sponsor may become a permanent co-sponsor of a group, or he may be asked to lead another group or to create a whole new group, such as the prison group in Delaware.

Acting Out Conflicts

Parents Anonymous has developed specialized equipment for group use. Since much of the destructive behavior of group members was learned in childhood, the equipment consists of "toys" used to dramatize earlier emotions, relived in a play setting. If it sounds grotesque, be patient. It works. Let me describe some of the very serious toys we use.

Playdoh is used as a tension releaser. Each group member has a ball of Playdoh to manipulate during the meeting. The kneading of the soft dough seems to lessen the physical tension developed by the emotionally charged discussions that often occur.

Stuffed animals can take on imaginary personalities. They may be talked to, caressed, or abused. A teddy bear may serve as a surrogate spouse, child, in-law or parent.

The B.S. Flag (P.A. groups revel in plain speaking) is a triangular piece of bright red felt glued to a stick. Group members use it to confront the statements of other members. Confrontation is an important skill to be learned because many abusing parents don't know how to stand up for their rights by confronting their peers.

Confrontation is given a deeper meaning when a hand held mirror is used for *self*-confrontation, but it must be used by the sponsor with the greatest discretion. The emotional power of having to look into one's own eyes and be truthful can be awesome. Misused, the mirror device can unleash uncontrollable emotional crises.

The magic button—a "gag" toy, used on members expecting instant solution to all their problems, deals with inevitable frustration. Abusive behavior is learned over a long period of time; it takes time to unlearn it.

Threatening Marshmallows and Lethal Tennis

Some of the very serious toys used by P.A. groups in dredging up old emotion, confronting it, and achieving a degree of resolution and insight, were considered unfit for the prison setting. For example, marshmallows to be thrown at other group members as a kind of safety valve in dealing with frustration were rejected because of a prison infestation of cockroaches. A tennis racquet used in "coached aggressive behavior" was eschewed in the prison setting as a possible deadly weapon.

On the other hand we added wrestling mats for our prison group to permit group members to relax on what would otherwise be an uninviting concrete floor.

A P.A. group, both inside and outside prison, works with more than the artifacts of psychodrama and play. P.A. has accumulated an impressive body of written matter to supplement the play-learning process. Literature from the national P.A. organization and other sources in parenting is made available to a group member who wants to learn theory. P.A. also has developed a series of "children's stories" that make strong points about self worth, responsibility, and sharing emotions. These may be read

and discussed in group meetings to aid in developing insight.

Coming to Terms with Oneself In a Prison Setting

Our prison group, applying the techniques described above, was of course different from a typical P.A. group, but it addressed problems that are very close to the heart of the P.A. experience.

The prison group was first taken through a series of relaxation exercises at the start of each meeting to teach one way of coping with stress and tension, which run high in prison. The exercises also teach body awareness and how emotion affects the body.

We encourage group members to deal with each other's behavior in socially acceptable ways. As in an ordinary P.A. group, the hand mirror was occasionally used for self-confrontation. We allow periodic breaks in the exploration of a member's problem in order to get feedback from other members. This encourages all group members to share in each other's problems. We believe this approach helps liberate a member from the isolation of self-contempt through the recognition of common frailty.

We encourage members to regress into their problems of childhood and try to recapture how they felt during emotionally significant events of childhood. We encourage role playing to further the experiences from the past and the emotions connected with them. Since P.A. believes that abusive behavior is rooted in childhood experience, the process of reliving these experiences is encouraged to furnish insight into adult behavior.

The sponsors engage in a good deal of praise of group members, because aggressive behavior has been closely linked to poor self-esteem. Each meeting ended with a "group hug". Nonthreatening physical contact seems to go a long way to improving an individual's feeling of worth.

The Prison Group

Our group had fifteen members, of whom about eight turned up at any one meeting. All members were men convicted of violent offenses, such as murder, manslaughter, aggravated assault, rape, incest, and armed robbery. The members were serving sentences that ranged from a few years for incest through life imprisonment for murder and rape. The sponsor team (Ms. Murdaugh and I) acted as a father/mother role model for the group. This is standard for many P.A. groups, but the female sponsor is especially important as a source of feedback for an all male group, such as ours was. Group membership was racially mixed, open-ended, and totally voluntary. Membership is anonymous, and those who took part received no administrative recognition.

"Though educational and vocational outlets are needed to help the unlearned and the unskilled here, I feel that groups such as our Parents Anonymous are the most needed and the most helpful; as most of the men here need to gain an understanding of themselves, and learn how to better control their emotions and actions during time of rejection and stress."

..... a prisoner member of the group.

Group Goals

At the outset, we set some goals for what we expected of the group as a part of a learning process:

1. Separate the person from the behavior. Let the member see that he is multifaceted and not totally the evil person society has labelled him by convicting him of a crime.

2. Separate the behavior from the emotion. By realizing that one may show a range of emotions from love to hate without condemnation, the men learn that feeling does not dictate behavior.

3. Learn the effect of the emotion on the body. By learning to read body signals and symptoms, one learns to detect a repressed emotion. This serves as an early warning system to check emotions before they may reach an intensity sufficient to destroy control over behavior.

4. Creat an open yet anonymous forum. Much of what the men have done is so repulsive that they dare not share their experiences for fear of rejection. By sharing experience and feelings in the anonymity of a group, they learn to cope with the burden of memory.

5. Teach suitable behavior. The group sponsors acted as role models, reinforced by group responses that allowed a member to experiment with various behavioral responses to emotion in a safe, nonthreatening environment.

6. Teach the cause and effect of one's behavior on others. The men learn to broaden the scope of their thoughts from self to family, and ultimately, to society. In so doing they learn how their behavior affects the emotions of those around them.

7. Separate past from future behavior. P.A brands as a myth the notion that past behavior is a reliable predictor of future behavior. If one learns to reject this view, he takes on a greater responsibility for controlling his present and future behavior.

8. Use past experiences for learning instead of excusing. The popularized Freudianism that childhood experiences control present behavior often enables criminals to excuse themselves of responsibility for their adult conduct. By learning the effect that previous experience has on emotion and the effect emotion has on behavior, they should be able to take control of behavior prompted by emotion.

9. Create feelings of interdependency. As has been previously suggested, the criminal personality is often extremely egocentric. The men we work with need to learn how to deal with other people. Aggressive behavior is bred and grows in a closed mind, that of the fearful and emotionally isolated man. Learning how to deal with others decreases that isolation peculiar to the aggressive offender.

Observed Achievement

All interviews with members of the group begin with an open-ended question: "Tell me what, if anything, you have gotten from the group?" The principle response has been that the group provides a nonthreatenting environment to talk about problems. Members come to realize that other

people have problems, and this sharing furnishes insight into the causes of their own problems. The men speak of gaining a better grasp of their emotions, and of learning of the considerable differences among human beings. I think one of the most important things they claim to have learned is that emotions, which are merely felt and are neither good nor bad, are not occasions for shame or self-depreciation.

I am convinced the group has helped the men open up, share thoughts and feelings, and deal more effectively with others. They have been surprised to learn that others understand their feelings. They feel good about having a place to share feelings. They have learned the importance of discussing emotions and bringing them out into the open. I am convinced they have come to regard the group as a place where men with common concerns can be brought together for support. Several members became so intensely involved that they asked for more frequent meetings.

Assessing the Health of the Program

When I wrote this article more than a year ago I naturally wondered how our hopes and plans would turn out. The answer: surprisingly well, but still evolving. We do not yet have follow-up studies of those who have left the program, but there are reports that those who have stuck with the program are more open about their problems, more truly social beings. Group members with continued contact with the Courts (e.g. child visitation proceedings) seem to be displaying more mature and rewarding behavior in a litigation setting.

One member of a group has been inspired to write an article for *Frontiers,* the Parents Anonymous national magazine. It is still too early to assess the ultimate effectiveness of the program, but the gains are encouraging. Of course I am biased: I just believe there is a better way to stop crime and violence than by locking people in cage areas for long periods of time. Of couse, incarceration is necessary, if only for maintaining an offender's attention long enough to help him improve himself. I intend to keep working with the program, and I hope that in a later issue of DELAWARE LAWYER I shall have good news to report. □

CRIME STOPPERS

JACK M. KRESS

(Former Delaware Law School Professor and member of the board of directors of Delaware Crime Stoppers, Inc.)

Eight years ago in Albuquerque, New Mexico a group of concerned citizens started a program aimed at crime. Its purpose was to assist the police, but to be *apart* from the police, to reach segments of the community the police could not reach, to use means ordinarily unavailable to the police, and to tackle only those cases in which the police truly needed and wanted help. For more than a year we have had a like program in this state, Delaware Crime Stoppers, Inc.

It is a fairly simple program. There is a statewide toll-free telephone number, 1-800-TIP-3333, which citizens are urged to call to report information about any unsolved crime, especially the "Crime of the Week"—a crime prominently described in the print and broadcast media. This crime is selected for feature coverage by a citizen board of directors, who take into account the diverse interests of all Delawareans. Crime Stoppers is a private, non-profit corporation that solicits tax-deductible contributions from the general public.

There are two potentially troublesome aspects of the program. Rewards up to $1,000 are offered for useful tips, and callers are promised anonymity. In practice, however, none of the deleterious consequences once foreseen have arisen. This is because the Board, chaired locally by Norman G. Powell, and the largely volunteer staff, headed by Sam McKeeman, have carefully screened all incoming calls and have assiduously preserved confidentiality to all informants.

Although the Albuquerque program has been copied all over the country and abroad, some concerns were initially expressed about the Delaware effort. First, we were told that the program had taken a fairly long time to achieve success elsewhere. Second, when Crime Stoppers began operations in April 1983, it was the very first of such programs to cover an entire state. Despite the small size of the state, some people argued that this was unwise, given the necessity of close police cooperation and the typically fractious competition between local police agencies. Neither fear has proven well-founded. Our police agencies have been remarkably cooperative, showing far greater interest in solving crimes than in establishing "turf" priorities. Moreover, the success of our modestly funded local effort has been nothing short of phenomenal. The statistics for the first eleven months are eloquent:

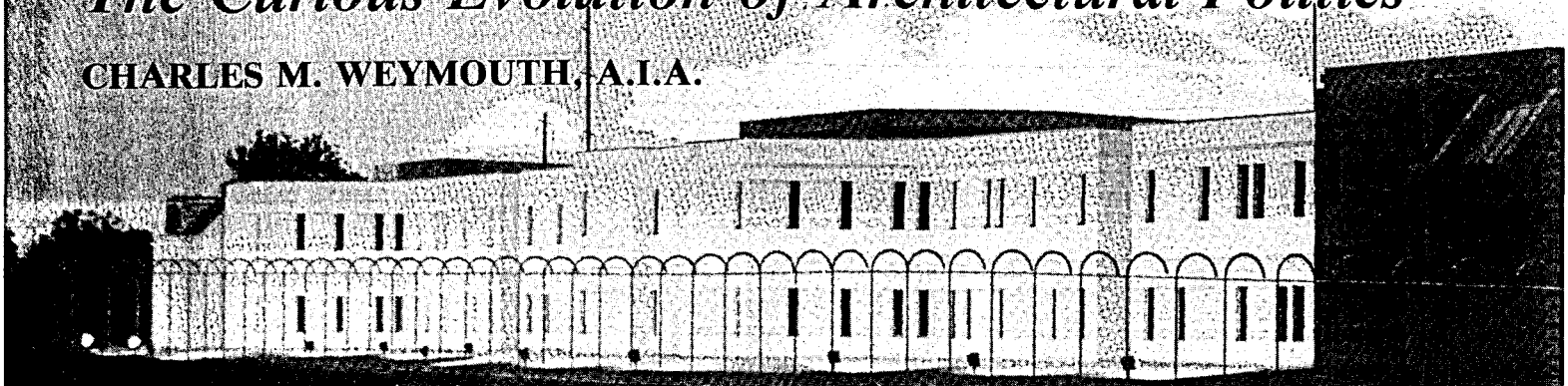
Dollar value of recovered property and narcotics	$102,600
Amount of rewards paid	$ 4,400
Number of rewards paid	21
Callers not desiring reward	10
Substantive calls received	789
Crimes of the Week solved	5
Arrests made	54
Total cases solved	110

The Crime Stoppers are here to stay! □

OVERDESIGN OR UNDERDESIGN

The Curious Evolution of Architectural Politics

CHARLES M. WEYMOUTH, A.I.A.



Four Summers of an Architect To Be

One: It is a hot summer day in 1949. Teams of inmate "trusties" from the New Castle County Workhouse Farm are setting fence posts along the long entrance lane of a Hockessin farmhouse. The work force, in long-sleeved blue cotton shirts with a highly visible "P" on the back and in blue denim pants with a yellow stripe down each leg, are clearly identifiable. Despite the intense heat, the shirts never come off. There is only an occasional pause for a tin cup of water. Only one guard, armed with a shotgun, wanders casually among these prisoners, some of them lifers. There is no violence between trusties and not even a hint of it towards the guard. Fear of losing the privilege to work outside Greenbank, then the County's maximum security prison at Cedars, is greater than fear of the shotgun. Other trusties are working at private households or in the highly-regarded Workhouse furniture repair facility. Every other summer or so, an inmate breaks from the Main House (Greenbank) and a number of local farmers join the man hunt, load their shotguns, mount their barn roofs, and gaze across the fields and woods. Usually the inmates will be found far beyond, perhaps in Avondale, exhausted and nauseated from eating raw, field-picked food.

Two: During a Navy midshipman cruise aboard an aircraft carrier in the Pacific in the summer of 1959, a marine corporal is eyeball to eyeball with a shaved-headed Navy enlistee, the latter white with exhaustion. The enlistee has been standing for 24 hours without eating. His T-shirt and dungarees conceal blue welts and three cracked ribs inflicted by a billy stick. The marine major in command will eventually be court-martialed for repeated incidents of this kind.

Three: Another hot summer, now 1961 in the Mediterranean Sixth Fleet. A new sailor has misbehaved, fortunately for him, aboard ship. Ashore, under recent agreements with foreign governments, he would have been tried locally to waste away in a foreign jail. "Rocks and shoals" is gone. The Uniform Code of Military Justice now prevails. The sailor gets counsel and is tried in a rigidly-defined judicial system designed to safeguard the sailor's rights. The sailor pleads, among other things, "poor upbringing," and his conviction by his superior officers is later dismissed because of improper procedure and a prejudiced court. Scuttlebutt is that the new code's intricacies enable a sharp defense attorney to beat any rap.

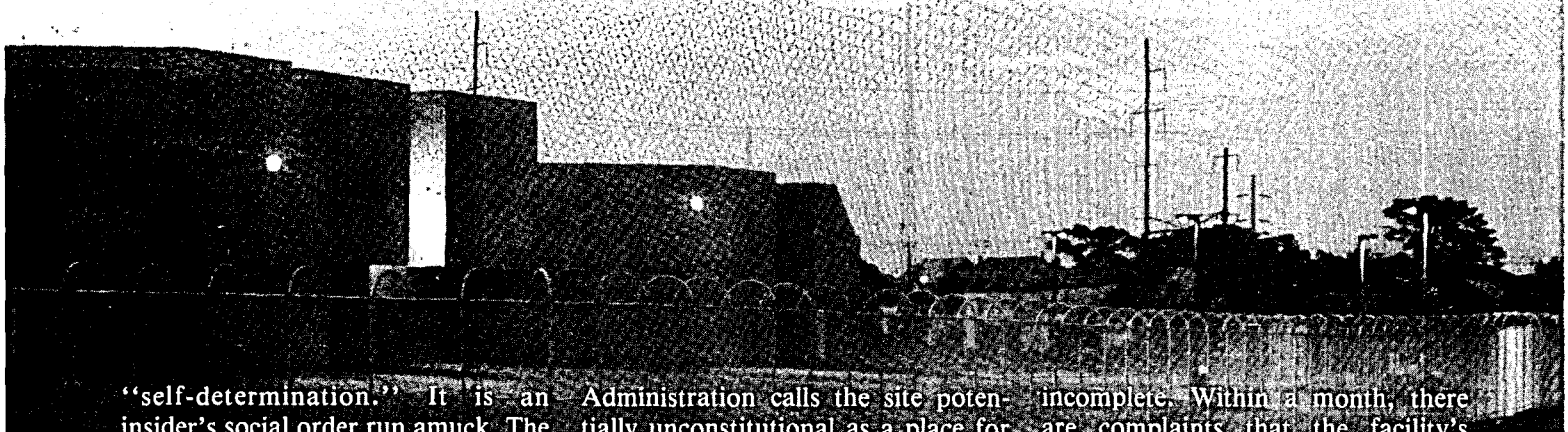
Four: Another summer: 1971. A young architect visits the new, campus-like correctional center at Smyrna, Delaware. Inmates play basketball outdoors, other games indoors, or recline against pinesol-fresh corridor walls. Guards carrying sidearms chat amicably with inmates through the open bars that separate them. Gone are the striped pants and the "P" identification and the free-labor work programs. Now, inmates have nothing to do but ponder ways to escape.

The Architect and "Super Max"

It is now early fall, 1976. With elections coming up, politicians from both parties are in a panic. U.S. Federal District Judge Murray M. Schwartz has told the State government: reduce the state's bursting prison population or face personal fines in excess of $5,000 a week. But the public will tolerate no major release of prisoners. Even with the economy down and the State facing a record deficit, new prisons must be built.

The facts clearly justify Judge Schwartz's order. "Holding tanks" are packed with ten men who have to climb over their cellmates to use the toilet. Cells are vandalized. Paint peels from the walls. The corridors smell of urine. Rumor has it that drugs are for sale. Inmates, some in Ras Tafarian dreadlocks, taunt and rage at visitors. Some even playfully grab for a guard's sidearm. A curious rapport has developed between guard and inmate, symbolic of ten years of societal permissiveness and inmate

Charlie Weymouth is a Delaware architect/planner who has practiced in Wilmington for 16 years. He is a graduate of Yale University and received his Masters degree in architecture from the University of Pennsylvania. Mr. Weymouth's training also includes law: he graduated from the U.S. Navy's Judge Advocate General school in Newport, Rhode Island and acted as counsel in Navy judicial proceedings while serving as a line officer aboard an Atlantic fleet destroyer. Mr. Weymouth designed the state's "super-maximum" security prison in Smyrna and, more recently, served as coordinating architect for the Gander Hill multi-purpose criminal justice facility in Wilmington. Both structures were reviewed nationally. Gander Hill was the subject of an exhibit by the American Institute of Architects. The following are a few observations from Mr. Weymouth's experience as an architect on our state's penal system and its political processes, and a few conclusions on possible improvements. *(Photo: Gander Hill)*



"self-determination." It is an insider's social order run amuck. The State is ready to build state-of-the-art, supermaximum security prison facilities. It is ready to build a cathedral to degradation.

In early January 1977, the State's Department of Corrections presents its dictates for the "super max" standards for housing the most dangerous inmates. The Department wants 88 cells, expandable to 120. Advising architects identify a need for only 15 of the cells. Faint cries from the Citizens Advisory Committee on Corrections can still be heard — cries for a stronger, tighter inmate classification system and an overlap of the Corrections system with the State's mental health facilities. The State's Department of Health and Social Services does not covet this increased responsibility nor does it lust after the Department of Corrections as a potential collaborator. On top of all this, Corrections is seeking that max facility — the need for which is questionable — without any disclosed master plan, without any operational plan, and without a site!

Liabilities to all parties grow day by day. The architect suspects that the tentative site of the prison, because of its isolation, is a potential Bastille, accountable to no one but itself. In a review requested by the new governor, Pierre S. duPont IV, the U.S. Law Enforcement Assistance Administration calls the site potentially unconstitutional as a place for housing prisoners. Unimpressed, Corrections decides to build where it wants to build. It is Delaware money, not Federal money, and the Department is bound only by State legislation and by Judge Schwartz's order. DuPont is hesitant. To salvage the state's credit rating he has laid down a blanket moratorium on new construction, including the super max. But he wants a new 360-bed detention center, and he'll compromise to get it. He cuts a deal that allows the max to go forward.

Even while duPont hesitates, the Department and the Senate Committee on Corrections move full-steam ahead. By November 1977, plans are ready: beds compromised at 64, expandable to 82, with backup guard monitors, a separate security access sub-floor, 6,000 lbs./square inch test strength pre-cast concrete walls, and an internal geometry for direct visual access to each cell. They won't walk outa here. Hell, with individual cans and bedrooms, they'll want to stay. Few program spaces are provided. The price of this dubious facility will more than double — from $2.25 million to more than $5 million, costing the citizens of Delaware $76,000 a cell.

In the early spring of 1982, well over a year later, the facility is delivered. The outer security system is incomplete. Within a month, there are complaints that the facility's warden, a former marine, is too tough on new prison residents. Further gripe: non-max inmates are being max-housed. The warden quietly departs. Within days, an inmate in a day-glo orange jump suit climbs over the unguarded recreation yard wall and escapes through the unfinished double security fence. So much for all the post-planning operational standards laid down by the Governor's special assistant, Colonel Gerard Frey.

The Architect and Gander Hill

The Gander Hill multi-purpose detention center in Wilmington, designed during the same period, is to be, professedly, a major site for holding the unconvicted. It will have state-of-the-art accommodations for classification and medical and psychological screening — in a word, a full-service system with a significant innovation, an on-site court for bail hearings. The goal is to get the accused off the street fast, process him and, when possible, release him, with the advantage of superefficient computer technology. Millions can be saved.

The team assigned to this project — owner, architect, and construction manager — are all under orders to "fast track" site selection, design, close-cost budgeting, the "separate

bid" package, and to deliver a multi-million dollar facility within two years! At the same time, Gander Hill is to be the product of cool, rational, objective analysis.

Fine, but where to put the center? It will become difficult for governmental appointees to remain objective in choosing a site for this new kind of institution. As site selection goes forward, interdepartmental protectivism and turf resentments emerge. Those in the court system slated to serve in the prison's on-site court resist the loss of autonomy in such an arrangement. Result: the site specification is changed to one with quick access to *existing* courts. Although there are plenty of public lands, there is also plenty of protectivism on the part of the departments that manage those lands. An emerging prime site, "belonging" to another state department, is dismissed after a separate "feasibility" study.

At last a site is selected: 12th and Bower Streets in Wilmington. It is initially dubbed "Gator Hill" until someone on the Governor's staff reports that in the old days there weren't alligators out there but furry "geeses." After $2 million is spent to dislodge a few residents and drive piles through a garbage heap, Gander Hill begins to rise.

What society wants the center to be and how it is to be run once it is built are clear. But those involved in planning the details and spending the money are not clear about financial controls, the necessary priorities for such a prototype facility, and the actual cost of construction. Can the State be heading for an "overdesigned and underdesigned" facility, rich in superfluous security devices and poor in ordinary amenities? In fact, will this imposing structure actually be more prison than simple detention center?

The orthodoxy of controllable prisoners and direct visual surveillance into cells, although suitable for a supermax penitentiary, is applied to Gander Hill, a temporary holding place. Yes, the prison must be capable of "cool down" if rioting occurs, and it must offer maximum protection to individual inmates. By all means, in a preliminary detention place for those intended for return to the street, let us protect the harmless from the less than harmless. But the economies of a grouped dormitory environment are not even seriously considered.

The bids come in well over budget. Materials are to be compromised. Soon the brick exterior will go, then heavier duty detention equipment, the institutional ceiling system, and certain types of security glazing. Even jettisoning these "amenities" will leave costs way off the mark. Finally, someone consults the local construction market and we know what we are in for: a walloping $23.9 million and an ungainly compromise that will come in a year late. Those once confident spokesmen for a facility to be erected within budget and pursuant to strict financial controls have vanished. They are out hunting more business to help the State pay the large bills they did not foresee.

Four years from initial dream, the reality of Gander Hill is there. The guards are unarmed, the inmates clad in a variety of costumes. We, the taxpayers are holding an overdesigned and underdesigned monument to compromise, bureaucratic rivalry, and unravelling common sense.

How do we prevent a repetition of such a triumph? I humbly suggest the following:

1. The criminal courts should accept the efficiencies inherent in functioning close to detention facilities. The judiciary is not as independent as it thinks. It needs public and legislative support. Without both, it loses effectiveness in fulfilling its role in criminal law, which now appears to be the case.

2. We must recognize that our penal system is not so much neglected as misguided. Discipline over those in prison must be tightly maintained from top to bottom. An inmate must be put to purposeful work, just as in the old Greenbank days; otherwise inmates will not find purpose in life and legitimate self-exoneration from guilt. Work programs have again been initiated at Smyrna.

I am delighted to find myself in distinguished company on this point. U.S. Chief Justice Warren Berger recently called for reinstituting the work ethic in U.S. prisons, making them truly penitential and societally useful. Hearing this from one with the authority of the nation's Chief Justice should inspire optimism in those who care about a penal system that works for those on both sides of the bars.

3. Professionalism within the Department of Corrections must be restored. The Department should be managed by properly paid men and women. Those at the top should have graduate level education and extensive training and experience in penology.

4. We need controls over site selection and public construction, especially in the case of prisons, which are expensive, complex, and difficult to do well. Reasonable design criteria and standards are hard to develop when those making final decisions are unresponsive to professional overview. Super Max and Gander Hill have cost Delaware citizens unnecessary millions of dollars because of well-meaning folly. Key government officials — the clients — should listen more closely to the opinions of design professionals, who know something about what is being done.

5. In Delaware, big building contractors are politically powerful. In-state firms enjoy obvious preference. Competitive bidding for the largest public projects has nearly vanished. For such large projects, we do not demand time and cost overrun guarantees from our builders. And standards for qualification as a general contractor do not exist.

Delaware is a small state. The slightest change in the way government does business is felt up and down the state in a remarkably short time. This makes those who do business with the government cautious — even nervous — about proposed change, even change that would be an improvement. I should be asking myself what injury to my pocketbook I will suffer if my prescriptions are adopted. Many in my shoes, builders, bureaucrats, and even governors, may be understandably hesitant to sacrifice immediate personal advantages inherent in present inefficiencies. But we all stand to benefit in the long run from public construction that is better-planned and better-managed and that aims for the highest standards of both economy and serviceability. □

RECENT CRIMINAL LAW RULINGS FROM THE SUPREME COURT

The Conservative Bloc Begins To Exercise Control

RICHARD J. McMAHON

The United States Supreme Court as currently constituted has yet to establish a clear identity. In criminal law there has been no clear-cut direction, such as that taken by the "Warren Court" of the 1960s. However, recent decisions of the Court evidence a conservative trend with the potential to create a Court identity as significant in fact, if not in reputation, as any in recent history.

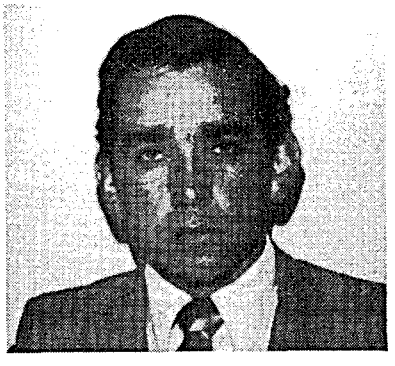
There were many decisions during the 1982-83 term dealing with the various branches of criminal law. The most significant addressed the Fourth Amendment.

Searchless Search and Seizure

The exclusionary rule, under wide attack during recent years, seemed ripe to many for a Supreme Court "Good Faith Exception". Instead of adopting a "Good Faith Exception", the Court took some less dramatic steps. For example, the Court held that certain actions thought by some to be "searches" have nothing to do with the Fourth Amendment. Several cases emphasized the "reasonableness" requirement of the Fourth Amendment over the search warrant requirement. In another significant action the Court modified the test for probable cause founded on hearsay in search warrant affidavits.

On June 20, 1983 the Court decided *United States v. Place,* 103 S.Ct. 2637 (1983). *Place* holds that police may seize personal belongings such as luggage on reasonable suspicion short of probable cause. However, the manner and length of the detention in *Place* was held by the Court to exceed Fourth Amendment limits. The police had held Place's luggage for 90 minutes. The Court held that 90 minutes was too long a time to hold luggage (or a person for that matter) under a *Terry*-type stop. Justice O'Connor declined to adopt an outside time-limit such as the 20-minute maximum suggested by the American Law Institute. (This holding suggests that Delaware's "2-Hour Detention Law" (11 Del. C. §1902) allots time much too generously.) But *Place* contains a statement by Justice O'Connor that exposing the luggage to a "canine sniff" is *not a search.* This announces just one part of an emerging freedom for law enforcement investigators from the constraints of the exclusionary rule.

The Court also found no search for Fourth Amendment purposes in *Illinois v. Andreas,* 103 S.Ct. 3319 (1983). *Andreas* arose from what the prosecution claimed was a "controlled delivery", in that the item searched had already been lawfully opened and found to contain contraband before it was resealed and delivered to the defendant. The lower courts had found that there was a search requiring a search warrant when the container (a table) was seized from the defendant and reopened. Since the authorities had not maintained "dominion and control" over the container from the original lawful examination they could not be "absolutely sure" that the contraband was still in the container. Chief Justice Burger wrote for the majority that there is no legitimate expectation of privacy, and hence no search, in a container previously opened under lawful authority, unless there is a "[S]ubstantial likelihood that the contents have been changed." *Id* at 3325.



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In *United States v. Knotts,* 103 S.Ct. 1081 (1983), the Court held that the monitoring by "beeper" of a vehicle's movements on a public road to its arrival at a private residence is *not a search.* Justice Rehnquist stated that "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id* at 1085. The use of the beeper to accomplish what visual observation could accomplish creates no expectation of privacy. *Knotts* is *not* a *carte blanche* for law enforcement officials to install and monitor beepers without search warrants. The three separate concurring opinions in *Knotts* emphasize the fact that it leaves more questions unanswered than answered about beepers. It is nonetheless another instance of the "not a search" rationale.

On January 16, 1984 the Court accepted certiorari in a case likely to define more clearly than *Knotts* the

Fourth Amendment limitations on beepers. *United States v. Karo,* 710 F.2d 1433 (10th Cir. 1983). In *Karo* the beeper was installed in a drum before the defendant took possession, just as in *Knotts.* But in *Karo* the beeper was used to locate the drum in several private residences after the Government agents had lost track of it. If *Karo* is decided in the Government's favor, it will represent a substantial change in Fourth Amendment law and will undoubtedly result in a large increase in the use of beepers.

Sweet Reason in the Ascendant

The shift to "reasonableness" of search, from the search warrant requirement of the Fourth Amendment can be seen in cases such as *United States v. Villamonte-Marquez,* 103 S.Ct. 2573 (1983). The Court, through Justice Rehnquist, held that Customs officers may stop and board any vessel without a warrant and without probable cause or reasonable suspicion of wrongdoing. The Court relied upon history. Congress, ever since the adoption of the Fourth Amendment, has viewed such boardings as permissible. But the Court went further: governmental interests and the difficulties inherent in such searches make random stopping and boarding of vessels "reasonable" and, therefore, constitutionally permissible. The "reasonableness" approach and the language of *Villamonte-Marquez* suggest that the Court would be likely to find such procedures as Driving Under the Influence Roadblocks constitutional.

Once again, stressing "reasonableness", the Court held in *Illinois v. Lafayette,* 103 S.Ct. 2605 (1983) that the police may conduct routine inventory searches of property carried by an arrestee pursuant to established procedures incident to incarcerating him. Chief Justice Burger explicitly rejected "the least intrusive means" rationale in holding that "[I]t is not our function to write a manual on administering routine, neutral procedures of the station house. Our role is to assure against violations of the Constitution." *Id* at 2610.

In *Michigan v. Long,* 103 S.Ct. 3469 (1983), the Court applied "reasonableness" in deciding whether a *Terry* search for weapons may extend to the passenger compartment of a vehicle. The Court found such action reasonable. Justice O'Connor observed in the majority opinion, as did the Chief Justice in *Illinois v. Lafayette,* that the existence of less intrusive procedures does not render "reasonable" measures unconstitutional. The opinion also lays down new guidelines to be used in deciding whether the Court has jurisdiction in such cases: the Court will have jurisdiction unless the state court "clearly and expressly" grounds its opinion on state law instead of the Federal Constitution. *Id* at 3476. *Michigan v. Long* may enlarge the Court's use of the "reasonableness" test on state court cases in which evidence has been suppressed.

The trend towards resolving Fourth Amendment questions by examining the "reasonableness" of police conduct may prove very important. The changed approach of these decisions was noted with some disfavor by Justice Blackmun in his concurring opinion in *United States v. Place,* discussed above. Also noteworthy is the dissent of Justice Rehnquist in *Florida v. Royer,* 103 S.Ct. 1319 (1983), a Fourth Amendment case decided by a plurality vote. Rehnquist joined by the Chief Justice and Justice O'Connor, stated "Analyzed simply in terms of its 'reasonableness' as that term is used in the Fourth Amendment, the conduct of the investigating officers toward Royer would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of this Court's Fourth Amendment jurisprudence." *Id* at 1336.

The Future of "Good Faith"

Many expected the Court to announce a "Good Faith Exception" to the exclusionary rule during the 1982-83 term. The likely vehicle was *Illinois v. Gates,* 103 S.Ct. 2317 (1983). The Court had asked the parties in *Gates* to address the question of whether the exclusionary rule should be changed, such as by eliminating "[T]he exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." But the Court then apologetically declined to deal with a "Good Faith Exception" because the argument had not been advanced by the state below. The Court did reverse the lower court's suppression of evidence seized under a search warrant largely prompted on information from an *anonymous* informant. In so doing, the Court did away with the rigid two-pronged test of *Aguilar-Spinelli,* for evaluating probable cause built upon hearsay in an affidavit. The Court substituted "totality of the circumstances" for the "two-pronged test." The opinion also discusses probable cause and mentions with approval an 1813 statement of Chief Justice Marshall that probable cause "[I]mports a seizure made under circumstances which warrant suspicion." In *Texas v. Brown,* 103 S.Ct. 1535 (1983), Justice Rehnquist had stated that probable cause *does not even require a showing* that "[S]uch a belief be correct or *more likely true than false*". *Id* at 1543 (emphasis added). In *Brown,* the Court applied the "plain view exception" in unanimously reversing a Texas court's suppression of evidence seized without a warrant. The Court emphasized that the "plain view" of the item need only provide probable cause that it represents evidence of criminal activity. The officer who saw a tied-off balloon in the passenger compartment of a car reasonably believed that it contained contraband, and the plain view exception applied.

The above Fourth Amendment cases provide an interesting framework for considering the course the Court is likely to follow in dealing with the exclusionary rule. What has been expected and what the Court itself seemed to be anticipating in *Gates* is a rule that will allow the use of evidence seized illegally but seized in "good faith." It seems that Justice Rehnquist has had an additional change in mind. Rather than simply letting in "illegally" seized evidence because of good faith, he seems to be laying the groundwork for rulings that searches and seizures have been legal, because they were "reasonable" or because there was "no search" for Fourth Amendment purposes. Many criminal law experts expect that the initial "Good Faith Exception" will be something such as: "Police acting under a lawfully issued search warrant are acting in 'good faith' *per se;* therefore, there will be no suppression

of evidence so seized even if the warrant is later found to be defective." A careful reading of *Illinois v. Gates* suggests that it will be difficult to find many search warrants defective under that standard. Certainly there will be defective warrants but will anyone be able to say that they were obtained in "good faith" if they actually fail to meet the *Gates* standard? "Good Faith" seems to be a very subjective test, especially when coupled with a finding that the conduct was illegal. The conservative section of the Court, led by Justice Rehnquist, seems to be attempting to make the entire Fourth Amendment synonymous with the "Good Faith" of police officers, not just the exclusionary rule. Thus, if a police officer possessing normal intelligence and exhibiting basic respect for the Fourth Amendment conducts a search or seizure in reasonable good faith, the evidence will be admissible not as an exception to the exclusionary rule, but because the search and seizure were *legal.* It is also necessary to consider the possible effect of Congressional action on the exclusionary rule. In February, 1984, the Senate voted 63-24 in favor of S. 1764, which would establish a "Good Faith Exception" to the exclusionary rule. That measure provides:

"Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a court of the United States if the search or seizure was undertaken in a reasonable good faith belief that it was in conformity with the Fourth Amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation."

If S. 1764 is passed by the House and signed into law, it will undoubtedly affect the course of change already started by this Court. Any "Good Faith Exception," judicial or legislative, will be directed at the exclusionary rule rather than the Fourth Amendment itself. Justice Rehnquist's approach is that a good faith attempt to comply with the rules is all that the Fourth Amendment requires.

It is in the Fourth Amendment cases that Rehnquist, O'Connor, and Burger epitomize the conservative approach. In all nine of the important opinions discussed above, those justices were in complete agreement. On the other side Justices Marshall and Brennan were also in complete agreement. The conservative threesome combined to write eight of the nine lead opinions. Justice Rehnquist alone was responsible for four. The only other lead opinion was written by Justice White in *Florida v. Royer.* The prosecution won seven out of nine times in those cases and each victory reversed a lower court's suppression of evidence. Although four judgments were unanimous and four were decided six to three, the numerous concurring opinions made it clear that only Rehnquist, O'Connor and Burger fully support the reasoning of these decisions. It is apparent that the results of the next Presidential election will greatly affect the course of Fourth Amendment law because of the likely retirement of at least Justices Marshall and Brennan during the next Presidential term.

Capital Punishment

There were no dramatic changes in the capital punishment cases during the 1982-83 term, but there was a noticeable shift in tone, reflecting an apparent impatience with multiple and prolonged appeals. The Court affirmed every sentence of death to which it gave plenary review and it announced approval of procedures designed to expedite appeals.

In *Zant v. Stephens,* 103 S.Ct. 2733 (1983), the Court affirmed a death sentence despite the fact that one of the aggravating circumstances presented to the jury was ruled unconstitutional by the Georgia Supreme Court. In so doing the Court, through Justice Stevens, held that a state need only narrow the class of persons subject to the death penalty so as to obviate "(T)he arbitrary and capricious infliction of the death sentence." *Id* at 2743, quoting *Godfrey v. Georgia,* 446 U.S. 420, at 428, 429 (1980). Once the class is narrowed, no particular formula is required for the jury to decide who in that class will get the death penalty.

Similar to the *Zant* case is *Barclay v. Florida,* 103 S.Ct. 3418 (1983). Justice Rehnquist delivered a plurality opinion by affirming a death sentence, although one of the aggravating circumstances the trial judge relied on was not a statutory one. Unlike the Georgia statute, the Florida statute called for a weighing of statutory aggravating and mitigating factors in deciding whether to impose the death penalty. Because there were no mitigating factors the Florida Supreme Court had found the inclusion by the judge of a non-statutory aggravating circumstance harmless error. There was also serious question whether the four statutory aggravating circumstances found by the judge were actually proven. The Rehnquist opinion can be summarized as advancing the proposition that failure to follow state statutory procedures will not of itself invalidate a death sentence. As long as the defendant's sentence was imposed as a result of the presence of factors sufficient to warrant a death sentence under the Federal Constitution, and that sentence is reviewed for proportionality on appeal, procedural errors not rising to the level of constitutional violation will not invalidate the sentence. Justices Brennan, Marshall, and Blackmun filed dissenting opinions to the effect that state procedures must be more closely followed than they were in this case for a death penalty to be constitutionally imposed. It can be seen in capital punishment, as in search and seizure cases, that the future will be determined to a large degree by whether the conservative side of the Court receives additional Justices.

In *Barefoot v. Estelle,* 103 S.Ct. 3383 (1983), the Court approved and encouraged the use by federal courts of expedited procedures in federal *habeas corpus* review of death penalty cases. Justice White stated that "[F]ederal *habeas* [is not] a means by which a defendant is entitled to delay an execution indefinitely." *Id* at 3391. The Court announced five guidelines to be followed by the lower federal courts in handling *habeas corpus* petitions in death penalty cases. They can be summarized: a stay of execution should not be granted unless a certificate of probable cause has been issued and even if that certificate has been issued, a court of appeals may use expedited procedures. *Successive*

habeas petitions will require an even greater showing for a stay of execution. Finally, a stay of execution will not be granted automatically by the Supreme Court pending its consideration of a petition for a writ of *certiorari* to a court of appeals. *Ibid.* at 3393-3395.

A very important capital punishment topic *not* dealt with directly by the Court in the 1982-83 term is what is commonly called the *Witherspoon* issue. It relates to what measures states may take to exclude opponents of capital punishment from juries in capital cases. Many believe that *Witherspoon v. Illinois,* 391 U.S. 510 (1968), which allowed exclusion under some circumstances, actually left the question open, pending further evidence that exclusion results in guilt-prone juries. Most recently, *Grigsby v. Mabry,* 569 F.Supp. 127 (E.D. Ark., 1983), held that in so far as *Witherspoon* allowed exclusion from the guilt phase of the trial of those who could not vote for the death penalty, it was no longer valid. *Grigsby* required bifurcated trials to allow such persons to participate in the guilt phase. There is very little support for *Grigsby* in prior rulings of the United States Supreme Court. *Witherspoon* does not support *Grigsby,* and more recently in *Adams v. Texas,* 448 U.S. 38 (1980), the Court reaffirmed *Witherspoon:* "We repeat that the State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths." *Id* at 50. Moreover, the Court's other recent rulings on capital punishment suggest no majority support for *Grigsby*. The Court has vacated many stays of execution in death penalty cases during the past year and it seems to be increasingly impatient with drawn-out appeals. On January 13, 1984, the Court vacated a stay of execution in the case of *Woodard v. Hutchens,* 104 S.Ct. 752 (1984). This action was taken despite the presence of a *Grigsby*-type issue. *See* the dissenting opinion of Justice Brennan, 104 S.Ct. at 754. Will *any amount* of statistical evidence convince the Court that persons unwilling to follow the law must be allowed to sit on juries? Second, will statistical evidence actually show that *Witherspoon* juries are guilt-prone? The Court's disinclination to modify *Witherspoon* suggests the most likely answer to the first question is "*no*" and the answer to the second question is accordingly moot. The Court's finding in *Pulley v. Harris,* discussed below, that no proportionality review is necessary in death penalty cases, is further evidence that this Court is not about to embrace statistical analysis.

In capital punishment cases, Justices Burger, O'Connor, Rehnquist and White appear to be the most likely to affirm a death sentence. Justices Powell and Stevens are in the middle but they appear to be somewhat closer to the conservative than to the liberal position. Justice Blackmun is not against the death penalty *per se* but he seems closer to Justices Brennan and Marshall (who oppose any death penalty).

Habeas Corpus

The third branch of the criminal law that is being changed significantly by the Court is Federal *habeas corpus.* One of the most important decisions in recent years is *Sumner v. Mata,* 449 U.S. 539 (1981). That case held that federal courts in *habeas corpus* cases must state explicitly their rationales when they overrule a factual finding made previously by a state court. The true impact of *Sumner* remained dependent upon how the federal courts would decide what constitutes a factual question, and whether any recital of a rationale by the federal court would be accepted on review by the Supreme Court.

The answers to those questions are beginning to be heard. The term "factual" is receiving a broad construction, and the Court is requiring strong and detailed rationales from the lower federal courts.

Marshall v. Longberger, 103 S.Ct. 843 (1983), reversed the Sixth Circuit's grant of *habeas* relief to a defendant convicted of murder. The Circuit Court had held that the use at trial of the defendant's prior guilty plea to attempted murder violated due process because the plea in the earlier case was not voluntary. (The Circuit Court found that the defendant had not understood to what he was pleading guilty.) But the state court had held that the record demonstrated the defendant had indeed understood the charges to which he pleaded guilty. In reversing the state court, the Sixth Circuit accepted the defendant's testimony at a hearing in state court that he had *not* understood that to which he was pleading. The Supreme Court was critical of the Court of Appeals. The law "[G]ives Federal *habeas* courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Id* at 851. The Sixth Circuit had given reasons for overruling the state court, but the Supreme Court found them inadequate. The Sixth Circuit was undoubtedly attempting to apply *Sumner* because the case was before it a second time after the Supreme Court vacated its earlier judgment for reconsideration in light of *Sumner.* It seems clear from *Marshall* that *Sumner v. Mata* makes a substantive difference in how federal courts decide *habeas* cases, not merely a formal difference in how they explain their decisions.

If *Longberger* highlighted just how detailed the rationale must be, *Maggio v. Fulford,* 103 S.Ct. 2261 (1983), certainly added breadth to what the Supreme Court considers to be a "factual finding" for purposes of *habeas corpus* review. In *Maggio,* the Supreme Court summarily reversed the Fifth Circuit's grant of *habeas* relief to a murder defendant who had, on the morning of his trial, moved the state court for the appointment of physicians to look into his competency. The trial judge denied the defendant's motion because he found that there was not a sufficient likelihood that the defendant was incompetent to stand trial. The Fifth Circuit found that it could not conclude that the defendant had been competent to stand trial "[W]ith the certitude befitting a federal court." A majority of the Supreme Court found that the state trial court's findings on competency were factual and thus entitled to a presumption of correctness. Finding that the circuit court had not accorded the proper deference to the state court, the Supreme Court reversed. Justices White, Brennan, Stevens, and Marshall did not agree that the competency finding was purely factual. By seizing on a presumption of correctness the Court shows an apparent intent to cut back on the scope of Federal *habeas corpus* review of state convictions.

The Court also disagreed with a circuit court on the interpretation of *Stone v. Powell,* 428 U.S. 465 (1976) with respect to the admissibility of a confession allegedly obtained as the result of an arrest that violated the Fourth Amendment. In *Stone,* the Court held that Federal *habeas* courts could not review a state prisoner's claim that evidence used against him at trial should have been excluded because of a Fourth Amendment violation, as long as the prisoner had the opportunity to litigate that issue fully and fairly in the state courts. Since *Stone* dealt with physical evidence illegally seized, rather than a confession, the Court's *per curiam* reversal of the Ninth Circuit, in *Cardwell v. Taylor,* 103 S.Ct. 2015 (1983), appears to be more than a simple reaffirmation of *Stone.* Once again the Court was called upon to give either a limiting or a broadening interpretation to a case which was designed to cut back on Federal *habeas corpus* review of state convictions, and once again the Court chose to put teeth into that policy.

In *Anderson v. Harless,* 103 S.Ct. 276 (1982), the Court demonstrated that it will also apply the *exhaustion of remedies* doctrine very strictly against Federal *habeas corpus* petitioners. That doctrine requires that petitioners must first provide the state courts with a "fair opportunity" to decide all of the issues they bring into the federal court. The defendant in *Anderson* had argued to the Michigan courts that the instruction which the trial court gave to the jury concerning malice was improper. In the federal court the defendant relied upon *Sandstrom v. Montana,* 442 U.S. 510 (1979), which held that mandatory presumptions improperly shift the burden of proof to the defendant. However, in the state courts the defendant had relied only upon Michigan case law and, although he claimed the instruction was improper, he did not raise the precise point dealt with in *Sandstrom.* The Supreme Court reversed the Sixth Circuit by holding that the defendant had not exhausted his remedies in state court because he had not argued the federal case law or the federal constitutional doctrine, which the *habeas* court relied upon in granting relief.

Miscellaneous

During the 1982-83 term the Court made a large number of other significant decisions in various subdivisions of the criminal law. Unlike Fourth Amendment, Death Penalty and *Habeas Corpus* cases, these do not signal major shifts, but they are worthy of mention.

In *Solem v. Helm,* 103 S.Ct. 3001 (1983), the Court held that not only death sentences are subject to a proportionality review and the 5-4 majority, therefore, reversed the life without possibility of parole sentence of the recidivist defendant who had been convicted of his seventh nonviolent felony, which was the uttering of a fraudulent $100 check.

The Court decided two drunk driving cases. In *South Dakota v. Neville,* 103 S.Ct. 916 (1983), the Court held that evidence of a defendant's refusal to take a chemical test may be admitted without violating the federal constitution. Rationale: the states allow a defendant to refuse to take such a test only as a matter of grace because there is no constitutional right to refuse. In *Illinois v. Batchelder,* 103 S.Ct. 3513 (1983), the Court summarily reversed the Appellate Court of Illinois' holding that police officers must submit an affidavit demonstrating probable cause before a driver's license can be suspended for failure to take a chemical test. In so doing, the Court noted that "[T]he interest of the states in depriving the drunk driver of permission to continue operating an automobile is particularly strong." *Id* at 3516.

The Court also decided two cases relating to the due process rights of prisoners. Each went against the prisoner. In *Hewitt v. Helms,* 103 S.Ct. 864 (1983), the Court held that procedural rules created by statute for the purpose of day-to-day prison administration do not create a due process liberty interest. The mandatory language of the rules in *Hewitt* convinced the Court that a *liberty interest* had been created in this instance concerning administrative segregation of prisoners, but, the Court also held that there is no *due process* right to the procedures mandated by the rules. Rather, even when such a liberty interest is created, the procedures actually followed will be deemed to be sufficient or insufficient by comparing them with what the due process clause requires. In the case of a prisoner transferred administratively, the due process clause requires only an informal non-adversary hearing with some notice to the inmate of the charges and an opportunity to present his views to the deciding official. In *Olim v. Wakinekona,* 103 S.Ct. 1741 (1983), the Court held that the transfer of a prisoner from Hawaii to California does not implicate the due process clause. Moreover, the fact that Hawaii had mandated transfer procedures did not create a due process liberty interest in remaining within that state.

In *Brisco v. LaHue,* 103, S.Ct. 1108 (1983), the Court held that police officers are immune from Section 1983 lawsuits for alleged perjury. In so doing, the Court rejected the suggestion that police officers should be treated differently from all other witnesses (who are immune). The Court emphasized the negative effect to law enforcement which constant exposure to such suits would probably produce.

The Court also decided three cases on abortion. *See City of Akron v. Akron Center for Reproductive Health, Inc.,* 103 S.Ct. 2481 (1983); *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft,* 103 S.Ct. 251 (1983); and *Simopoulos v. Virginia,* 103 S.Ct. 2532 (1983). These cases reaffirm *Roe v. Wade,* 410 U.S. 113 (1973), including the well-known trimester approach. However, the cases also point to a growing split on the Court on abortion and some disapproval of the trimester approach. Justice O'Connor dissented in *City of Akron* and called for abandonment of that approach. As Justices Brennan and Marshall support *Roe* and its trimester approach, it appears that future decisions of the Supreme Court on abortion as on other subjects may well depend on who gets to fill the vacancies likely to follow the next Presidential election.

1984 UPDATE

There are several important criminal law cases now pending before the Court this term. Because this article was completed in early 1984, some of those cases had been decided before publication and some will be decided after this article is complete.

Search and Seizure. The Court heard argument early this year in two cases presenting quite similar opportunities for announcing a "Good Faith Exception" to the exclusionary rule. In each case there was evidence seized

pursuant to a search warrant. In *Massachusetts v. Sheppard,* 441 N.E. 2d. 725, the evidence was suppressed because the magistrate failed to specify in the warrant the items to be seized. In *United States v. Leon,* (9th Circuit, January 9, 1983), the search warrant was held defective after the police seized evidence in apparent good faith reliance upon the warrant. It seems likely the Court will decide in favor of the prosecution. Although this particular "Good Faith Exception" is likely to be a limited one, it presents some interesting questions. Will magistrates and other judges issuing search warrants become more careful and more skeptical under such a rule? In the current situation an issuing magistrate can feel fairly confident that the police believe strongly that probable cause exists when they ask for a search warrant. The magistrate knows that the police are aware that the warrant will be looked at again at a suppression hearing and that all the evidence will be suppressed if the warrant was not properly issued. If the "Good Faith Exception" were to provide that evidence seized under a search warrant is *per se* admissible, then the battle would be over as soon as the magistrate signed the warrant. For this reason among others, there are likely to be limitations on the exception even as to search warrants. Moreover, as mentioned earlier in this article, it is quite possible that legislation will substantially affect any such "Good Faith Exception."

THE CRYSTAL BALL CONFIRMED: LATE DEVELOPMENTS

On July 5 the Court accepted a "Good Faith Exception" to the exclusionary rule. In *Massachusetts v. Sheppard* and accompanying cases, the Court decided that evidence seized in good faith by police pursuant to a technically defective search warrant should not be excluded. This does *not* mean that the signing of a search warrant ends all litigation about admissibility. If the issuing judge acts recklessly or the police unreasonably the evidence may still be excluded.

In another Fourth Amendment decision early in July the Court validated the warrantless *Karo* beeper. (A warrant *is* necessary to monitor by beeper the location of the drum in a private residence.) Despite extensive monitoring in *Karo,* the Court refused to suppress evidence of seized cocaine because the illegal monitoring did not result in or taint the actual seizure.

The Court once again sided with law enforcement in the famous "Christian Burial Speech" case, *Nix v. Williams,* announced on June 11. Chief Justice Burger doubtless relished writing a majority opinion to accept the "Inevitable Discovery Doctrine". Police good faith is now irrelevant if the evidence would have been discovered even without police error.

The Court has also announced two exceptions to the *Miranda* rule. Both *New York v. Quarles* (June 12) and *Berkeman v. McCarty* (July 12) involved defendants questioned by police while "deprived of . . . freedom of action in [a] significant way" 384 U.S. at 444. *Quarles* subordinated *Miranda* to public safety. *Berkeman* upheld roadside questioning of a detained motorist as less "police dominated" than the situation for which the *Miranda* rule was made. While *Berkeman* held *Miranda* applicable to station house questioning of persons arrested for misdemeanors, the twonew exceptions point to a much more limited application of *Miranda.*

Justice Stevens moved closer to the "liberal" justices in 1984, and Justices White, Powell, and Blackman closer to the conservative trio. Stevens continues to protest decisions about what he regards as unnecessary issues. His concurring opinion in *Berkeman* decries resolution of the issue of roadside questioning and lists eight other recent cases in which he has made the same complaint.

Mr. McMahon delivered his article to us in June. We congratulate him on his powers of prophecy. The Editors.

Capital Punishment. The Court decided *Pulley v. Harris,* (9th Circuit, 1982) on January 23, 1984. The issue in *Pulley* was what procedures must the states follow to ensure that death sentences are "proportional." Although it appeared likely that the Court would announce the need for some type of "proportionality review" by state appellate courts, the rule announced was that no such review is constitutionally required.

"Christian Burial Speech". The case of *Brewer v. Williams,* 430 U.S. 387 (1977), is back in the court again *sub nomine Nix. v. Williams* (Eighth Circuit opinion found at 700 F.2d 1164 (1983) *sub nom Williams v. Nix*). This time the Court will review the Eighth Circuit's grant of *habeas* relief premised on a finding that the police acted in bad faith and that the "Inevitable Discovery Doctrine" cannot be applied when bad faith is present. Justice Burger angrily announced the Court's reversal of the defendant's murder conviction in 1977. It appears that Justice Burger will be in the majority

on this occasion. The decision is very likely to be against the defendant. It could be decided simply by the Court's finding that the police did not act in bad faith. On the other hand, the Court may use this case to further limit the availability of Federal *habeas* relief by extending the doctrine of *Stone v. Powell* to the Sixth Amendment. Although this is not a "Good Faith Exception" case, it does highlight the price that society pays for the exclusionary rule. The defendant led the police to the young victim's body after the police had succeeded in gaining an admission from him through the use of the "Christian Burial Speech." The admissibility of evidence about the finding of her body is once again before the Court.

Miranda. Despite the increasingly apparent conservative trend of the Court, most people would be surprised if Justice Rehnquist and his criminal law allies were to effect any radical changes in the *Miranda* rule. The case of *New York v. Quarles* argued before the Court in January, presents an interesting and potentially important issue. Must a police officer first give an arrestee *Miranda* warnings before asking him "Where's the gun?" In *Quarles,* the arrestee was in a store in handcuffs when asked that question. That he was in handcuffs has significance because it diminishes greatly the argument that *Miranda* warnings were unnecessary because of the danger to the officers. One of the questions asked by Justice Rehnquist at oral argument was "Was there really a holding in *Miranda?* Wasn't it all just *dicta*? The defendant in that case did not raise any of the issues the Court decided." Regardless of the outcome of *Quarles,* it may lay the ground for holdings that will diminish the impact *Miranda* currently has on interrogation procedures. A more conservative Court in the near future may establish, for example, a totality of the circumstances test for the admissibility of statements and may require strict adherence to *Miranda* only in limited circumstances such as extended interrogation behind closed doors.

Two Local Cases and a National Trend

In February the Court decided two cases appealed from the Third Circuit. *Flanagan v. U.S.* (Third Circuit opinion at 679 F.2d 1072, 1982) considered the power of federal courts to disqualify a lawyer from representing codefendants who have knowingly waived any resulting prejudice. The Third Circuit had held that under some circumstances attorneys may be disqualified by the Court even though the defendants knowingly waive. Instead of addressing the substantive issue, the Court held that such a ruling is not appealable before trial and reversed for lack of jurisdiction in the circuit court to hear the appeal. By ruling that a disqualification order is not appealable before trial, the Court has probably thwarted defendants' insistence on joint representation for the purpose of delaying trials. In *United States v. Doe* (Third Circuit opinion at 680 F.2d 327, (1982) *sub nomine In Re Grand Jury Empanelled March 19, (1980),* the Court held that a sole proprietor has no Fifth Amendment privilege in his own business records. The Court did affirm that part of the Third Circuit's decision which had upheld the quashing of the Government's subpoena for those business records. The Court agreed that the subpoena should be quashed because the sole proprietor was afforded no valid protection by the Government from the compelled incrimination that could result from his action in turning over and thereby verifying the records. Although the Supreme Court agreed that the subpoena must be quashed, the decision was announced as a partial reversal and partial affirmance. Justice Stevens characteristically disagreed with this procedure. Justice Stevens is very much concerned about the caseload of the Court and he often takes a position in cases quite different from that of the other Justices. He often objects to what he considers *dicta* couched in the form of a holding and frequently disagrees with other Justices that a case merits their attention. On the other hand, the more conservative Justices seem determined to effect as much change as possible in federal criminal case law and procedures. These justices tend to take advantage of opportunities, such as in *Doe,* to let the lower courts know exactly how they want issues, even those considered collateral by some, decided.

On January 11, 1984, the Court decided *Michigan v. Clifford,* 104 S.Ct. 641 (1984), a Fourth Amendment case involving a warrantless entry of a dwelling by arson investigators some six hours after the fire was extinguished. The Court held the warrantless entry to be illegal and affirmed the Michigan Court of Appeals' order suppressing the evidence. This very recent case affirms the conclusions reached above about the Court's current division and its future course. Justices Powell, Brennan, Marshall and White voted for suppression in the majority opinion and Justice Stevens wrote an opinion concurring in the judgment. The Chief Justice and Justices Blackmun and O'Connor joined in the dissenting opinion of Justice Rehnquist. Once again, Justice Rehnquist emphasized the "reasonableness" of the search and stated that as the search was reasonable it was legal. If one or two Justices who subscribe to the "reasonableness" analysis join the Court in the near future, cases such as *Clifford* will probably be decided the other way.

There is a conservative trend present in this Supreme Court. The Government was successful in 23 of the 29 major criminal cases decided by the Court during the 1982-83 term. However, it is even more important to realize how closely divided the Court is now between "liberals" and "conservatives." If the solidly conservative bloc of Rehnquist, Burger, and O'Connor gains an additional Justice or two, the consequences will most probably have as great an impact on the criminal law as did the famous "Warren Court" in the 1960s. The reader may note that I have consistently placed the name of Justice Rehnquist before that of the Chief Justice in referring to the conservative Justices. This is because Justice Rehnquist is the *de facto* leader of the conservative trend. If President Reagan is reelected and succeeds in adding to this conservative group, how will scholars and commentators refer to the Court? Whether they call it the "Burger Court", the "Rehnquist Court" or the "Reagan Court", its leader will be Justice Rehnquist and its impact will be felt throughout the criminal justice system. □

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9/84

BOOK REVIEW

A History of Delaware Through Its Governors, 1776-1984

by Roger A. Martin
McClafferty Printing,
Wilmington, Del.
Price: $20.00 plus $3.00 for handling.
(Send to the author at 13 Pinedale Road, Newark, DE 19711.)

Roger Martin, teacher, historian, and state senator has given us a splendid history of our state in the form of a biographical series on every Delaware Governor since we achieved independence more than 200 years ago. It is said that Martin devoted more than 20 years to research, and this is easy to believe. The detail, the scholarly backup, and the range of sources is impressive, but Roger Martin wears his learning lightly: his book is a vastly entertaining "good read", one of those rare instances of a work invaluable to the scholar and just as rewarding to the intelligent general reader. (DELAWARE LAWYER will gratefully publish an excerpt in a succeeding issue, and Channel 12 might do well to consider a dramatic series founded on Martin's lively narrative.)

Every page yields a surprise or a delight. Did you know, for example, the Wilmington Country Club, now Wilcastle Center, served as an emergency hospital during the flu epidemic of World War I; that a loyal *cat* (not dog, mind you, but *cat*) regularly visited the grave of her duPont master; or that in the depths of the depression the corporation franchise tax kept Delaware afloat, contributing more than half of the state's revenues? Or that a grandson of our first lawyer Governor (Thomas McKean) became the Prime Minister of Spain? Or that in 1778 the state was harrassed by a rebellious malcontent Tory with the odd and sinister name of Cheney Clow? One could go on indefinitely.

There are materials of exceptional interest and value on black history in Delaware, the evolution of our school system, and the changing face of crime and punishment. Moonshiners, chicken thieves, airplane crashes, political feuds, and natural disasters enliven a never less than compelling account. This is a long book, but it reads fast. I think it succeeds so well because of Martin's uncanny ability to give a real sense of time and place (the depression years come marvelously alive). His technique is grounded in the telling detail the the strong voice of apt quotation. While this book is technically a history of our Governors, it opens up into social history, economic history, educational history - a very full picture of what life in Delaware has been for two centuries.

"A History of Delaware Through Its Governors" reveals what an extraordinarily interesting state we live in. This prodigiously researched and endlessly entertaining book is certain to become a classic of Delawareana. Estimable. ☐

HAMADRYAD

BY KARL PARRISH

We have enfolded our reptilian limbic with a cortex.
Genesis instructs; the reptile is the soul's mortal vortex.
Freud suggests these basic ganglia urge an evil discordia.
How may the law regulate this serpent in all of us?
Can we produce it in court by writ of habeas corpus?
Oblivious of the Magna Carta, they hiss like a cobra.
Law trys the Alpha and Omega. Sans the snakes Mea Culpa?

The Lawyers Professional Liability Insurance program – sponsored by the Delaware State Bar Association and underwritten by Lloyd's of London – has entered its fifth year.

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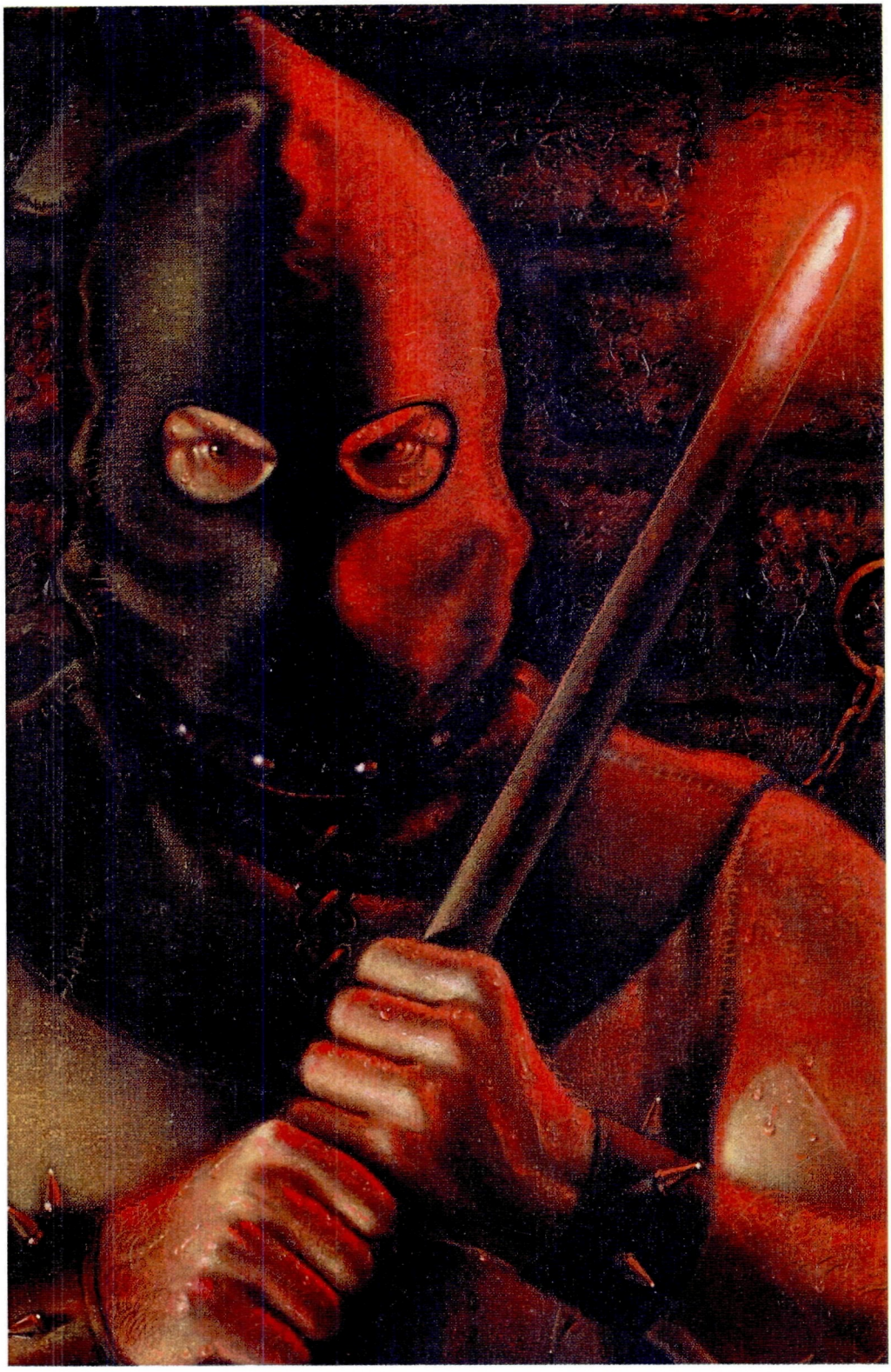

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