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A Tribute to Bridget Pelaez

On November 15, 2000, Mary Bridget Coyne Pelaez, known to her family, friends and many admirers as Bridget, passed away after struggling with a serious heart condition for most of her adult life. Yet "she wouldn't let anything prevent her from doing what she wanted to," said her husband, Professor Alfred Pelaez, "she was truly an exceptional woman, known to a lot of exceptional people."

"We were together just one week shy of 38 years," Professor Pelaez told JURIS. "She has been as much a part of the school since 1966 as I was." Many Duquesne University School of Law students and alumni know Mrs. Pelaez from her involvement with Duquesne's distinguished China University Summer Legal Study Program or from her many other activities at the Law School. Dean Nicholas P. Cafardi told JURIS:

What I remember about Bridget Pelaez is what a brave individual she was. She never allowed her very serious heart condition to prevent her from living life to the fullest. She accompanied Professor Pelaez to China every summer for our summer school program and was a great help to him and to our students. She held receptions at her home for our Chinese visitors every year. The continuing strength of our Chinese program is due in no small part to Bridget's efforts —for which, by the way, she was a volunteer. She never asked for any payment for any of the many things that she did for the law school. We will miss her very much.

JURIS also spoke with Professor Frank Y. Liu, Professor of Law and Director of the Center for Legal Education. Professor Liu teaches in the faculty exchange program between Duquesne University School of Law and the China University of Political Science and Law with Professor Pelaez and serves as its Associate Director.

Mrs. Pelaez made enormous contributions to the China programs at Duquesne Law School. Professor Pelaez was the first Duquesne Law School faculty member who visited the China University of Political Science and Law (CUPL) in Beijing as a visiting scholar. Mrs. Pelaez accompanied him during that first trip. Since the establishment of our Summer Study of Law program in 1995, Professor Pelaez has served as its Director, and Mrs. Pelaez accompanied him to Beijing every summer, paying her own way until the summer of 2000, when she was too ill to travel.

Mrs. Pelaez attended classes almost every day and traveled with students to almost all field trips. Her wise counsel helped tremendously in improving the quality of our program. Mrs. Pelaez loved students. She listened to them and helped them personally whenever necessary. In short, Mrs. Pelaez was an integral part of the Duquesne-CUPL leadership for the Beijing summer program.

Mrs. Pelaez was also extremely kind and hospitable toward our annual visiting CUPL scholars. Every year since 1992, she invited the visiting scholars to her home and cooked a wonderful meal for them; tirelessly, she took them shopping or visiting local attractions. On occasion, Professor and Mrs. Pelaez took the visitors to their seaside apartment in Ocean City, Maryland, for a relaxing weekend.

The communities of Duquesne Law School and CUPL were all deeply grateful to her for her invaluable services to our joint China programs. My wife, Heidi, and I were especially grateful for her friendship, advice and support. We shall never forget the indelible contributions she made to
our China programs, and to promoting friendship and understanding between the American and Chinese peoples. We miss her very much.

But Bridget Pelaez’s significant contributions to the community were not limited to her involvement with the Law School. A graduate of Mt. Mercy College and a former social worker, Mrs. Pelaez was active in Catholic charities and was an extremely effective victim advocate. She was recognized as a “Community Champion” for her work with The Center for Victims of Violent Crime by receiving a Jefferson Award from the United Way. Nancy Wells, Executive Director of The Center for Victims of Violent Crime told JURIS:

For many years Bridget Pelaez served as a key volunteer at The Center for Victims of Violent Crime. Bridget always and consistently demonstrated passion and sensitivity to the needs and concerns of crime victims. She was the quintessential victim advocate. We loved her and we miss her.

Professor and Mrs. Pelaez raised three children, who continued to be the focal point of her life until the day she died, said Professor Pelaez. Linda, their middle child, was the only child ever born to a woman with two artificial heart valves. Her birth made the front page of the Pittsburgh Press on March 10, 1968.

Mrs. Pelaez was also a gourmet cook with a strong sense of fashion, and a trained interior designer who, said Professor Pelaez, “never saw a wall she didn’t think would look better somewhere else.”

“She was both inwardly and outwardly a beautiful person,” Professor Pelaez said, “she was an extraordinary lady — the most emotionally strong and caring person I ever met.”
Learning the Secret Handshake

What most surprised me about law school was that it often seemed like less of a learning experience than a hazing. This is not a unique observation, but it troubles me enough that I can't refrain from addressing it here. Some days the best way to describe how I feel is recalling Robert DeNiro's portrayal, in the film Raging Bull, of a bloody, sweating, Jake LaMotta, staggering around the ring after he had already lost the match and shouting to his opponent, Sugar Ray Robinson: “I never went down, Ray. I never went down.”

There's a sense in which becoming a lawyer is as much about learning the secret handshake as it is about anything else. It's akin to the old joke: “what do you call a doctor who graduated at bottom of his class? An M.D.” In the end, it's all about getting through. It's a metaphor, of course, the secret handshake. I'm not sure there really is one, and if there is, I never learned it, but as long as we all keep acting like there's one, there might as well be.

The playwright David Mamet wrote a little book called Henrietta a few years back, that tells the tale of a pig who wants to go to law school. Henrietta is a children's book, or couched as such, but as is the case with most children's books the irony of the main character's situation is clear only to adult readers. Henrietta has aspired to The Law from an early age, but the law school of her choice would neither admit nor acknowledge her, as she had “no credentials save an honest and inquiring mind.”

She attempts to sit in on classes, and she studies in the library on her own, but she is eventually ejected and barred from campus as a nuisance. It is only after Henrietta encounters the rumpled president of the Great University, who has lost his glasses in the park, that Henrietta gets her big chance. She escorts the old man, whom she's mistaken as a vagabond, back to his home, and along the way they exchange literary quips. When the President asks Henrietta where she got her education, she responds with a quote from Fielding's jonathan Wild: “Education is most often useless, save in those cases it is near superfluous.”

So that's the thing, I guess. I have a lingering hunch that the education itself matters less than the effect of the education—the result—it's the secret handshake effect. You probably won't be surprised to learn that Henrietta goes on to law school at the Great University, (it is implied, though never made explicit, that this is Harvard) and eventually ends up on the Supreme Court. Henrietta, of course, couldn't learn the secret handshake because she is a pig. But she persevered nonetheless.

Dorthy Day, one of the founders of the Catholic Worker Movement, once said: "It is hard to say no to the existing social and political order—and to mean it, to mean it with an everyday commitment of energy." Perhaps that's what's really gnawing at me—the tension between achieving acceptance from the existing social and political order and eschewing it at the same time. That, and the fact that after working for attorneys for the last twenty years crossing over to the other side feels very odd indeed.

My former boss, Scott L. Holden, discouraged me from going to law school. He died in the crash of USAir flight 427 and I think of him often. “Do something productive like teach,” he always told me. I do teach, and I like to think he'd approve. But I also like to think he'd approve of my decision to become a lawyer after all.

"We try to be, in our better moments, an example to ourselves," is something else Dorthy Day said.

I wish that for all of you.

N.S. Kouber

ENDNOTES


2 Id. at 1494.
Hate-Crimes:
The Aftermath of Taylor and Baumhammers

BY SANAZ RAJ

AS THE DAUGHTER OF FIRST GENERATION IMMIGRANT parents who made great efforts to give my brother, sister and I an all-American childhood, I knew that my ethnic background was Iranian, but to me Iran was a far-away land that had no tangible hold on my life. The only way I identify myself as being Iranian is speaking the language, enjoying the cuisine, and celebrating all of the holidays with my family. When my family relocated from Morgantown, West Virginia, to Pittsburgh, however, my first encounters with discrimination forever changed my outlook on being Iranian-American. Someone in our neighborhood welcomed my family with a spray-painted message on our new driveway: “Go Back Where You Came From” and “F**K Iran.”

Although the Iranian Hostage Crisis was in full force when we moved to the Pittsburgh area, we did not think that our new neighbors would feel threatened by our ethnicity. My parents never found out who wrote those disturbing messages, but the effects transformed how we were raised and how we viewed our ethnic background.

From then forward, my parents insisted that my brother, sister, and I never address our Iranian heritage, and instructed us that if anyone should happen to ask why we had such unique names, we were to tell them that we are Turkish. Concealing my cultural identity always made me ashamed; it was only when I started college, and later graduate school, that I could finally feel comfortable in addressing my true ethnic roots.

In the aftermath of last spring’s racially motivated killing sprees, which took place just a little over a month apart, questions are being raised by some about hate crimes in the greater Pittsburgh area. On March 3, 2000, Ronald Taylor, a black man, allegedly shot five white men in the Wilkinsburg. Three of the individuals died and the other two were maimed. A second incident happened just over a month later.

On April 28, 2000, a white man named Richard Baumhammers alleged killed a Jewish woman, and four men — one black, one Vietnamese, one Indian, and one Chinese — in a shooting spree that encompassed both Allegheny and Beaver counties. Although both Taylor and Baumhammers have a history of mental illness, perhaps hate crimes such as these should not completely be dismissed as the actions of madmen.

An FBI report released on February 13, 2001, indicates that 7,876 hate crimes were reported in the United States in 1999. The latest figures released by the FBI regarding deaths from hate crimes show that seventeen people were murdered in incidents classified as hate crimes, compared to thirteen people killed in similar incidents in 1998. Further, of the 7,876 incidents reported, a significant percentage, 54.5%, were racial bias crimes, followed by religious bias at 17.9%, sexual bias at 16.7%, and ethnic bias at 10.5%. The 12,122 law enforcement agencies in 48 states that participated in the survey indicated an increase over the 7,755 hate crimes reported in 1998.

While hate crimes have occurred throughout American history, federal legislation to combat these unique crimes has only recently been enacted. The Hate Crimes Statistics Act of 1990 was the first piece of legislation enacted that specifically addresses the problem of hate crime violence in the United States. The legislation requires the Justice Department to publish statistics on crimes motivated by prejudice based on race, ethnicity, religion, or sexual orientation.

In order to help combat the arsons that destroyed over 60 African-American churches during the mid 1990s, former President Bill Clinton signed The Church Arson Prevention Act of 1996 into law. This act extends The Hate Crimes Statistics Act to the year 2002 and allows federal authorities “to prosecute and bring to justice people who burn, desecrate, or otherwise damage religious property.” It will take a de-
cade to see whether these new pieces of legislation will help remedy the increasing effects of hate crimes in the United States.

George A. Simmons, regional director of the Pennsylvania Human Relations Commission, said that although violent rages triggered by skin color or religious differences are a mystery, he believes that those prone to racism or racist beliefs "need a sense of purpose...they need to believe in something and have something positive to follow."

Both Ronald Taylor and Richard Baumhammers appear to embody Mr. Simmons's statement in compelling ways. Allegheny County police found racial epithets against whites and Jews inside Taylor's apartment and John DeWitt, one of the men fixing Taylor's apartment door, said that Taylor taunted him with racial slurs. Taylor told others that the reason he was carrying a gun before the shootings occurred was because he didn't like white people.

Richard Baumhammers, an immigration lawyer and the son of well-to-do immigrant parents from Latvia, is accused of killing three Asians, a Jewish woman, a black man, and of paralyzing an Indian man during the shooting rampage that occurred on April 28, 2000. Baumhammers enjoyed traveling to Latvia, Austria, and Germany, all countries known for neo-Nazi activities. Further, Baumhammers was self-appointed "chairman" of The Free Market Party, an organization he formed to advocate the rights of European Americans and denounced third-world immigration because European Americans were being overtaken by other races. Baumhammers registered his party's name as an Internet site with a local Pittsburgh Internet company under other far-right groups on the World Wide Web.

Interestingly, the Internet has helped far-right and racist groups to spread their message to millions of people. Joel Ratner, regional director of the Anti-Defamation League, states that the Internet has created a new and discrete way for racist organizations to recruit new members. In addition, Ratner states that despite a huge drop in membership, the Klu Klux Klan has its strongest base in Western Pennsylvania, Ohio and Indiana.

The effects of the Taylor and Baumhammer shootings on the Pittsburgh community have varied among victims. Those involved in the Baumhammers incident have been tight lipped, and the response to my attempts to contact those groups has been cautious. This is understandable, considering that it is documented that hate crimes cause emotional and physiological problems, high blood pressure, sleep disorders, post-traumatic stress, hypertension, and psychosis. In addition, bias incidents perpetuate feelings of inferiority and helplessness among those groups targeted. Moreover, victims of hate crimes may subconsciously modify their behavior in order to avoid further exposure to ridicule, violence, and intimidation. However, Dr. Krishna Aggarwal, a Sunday school teacher at the Hindu Jain Temple, a place where Sandip Patel, one of the victims in the Baumhammers shootings regularly worshipped, commented that "By and large, our experience [in Pittsburgh] is very good..." and "These things are bound to happen whenever you have human beings."

Others involved share a different point of view. Rabbi David Greenspoon of Adat Shalom Synagogue in Indiana Township commented, "This is not a time to hide. This is a time to stand up and re-devote ourselves to Judaism. We must not let hate and terror overrun our lives...The veneer of civilization can be thin. We have to stand up for order when there is disorder and chaos." Commenting on the effect of the Baumhammers shootings on Pittsburgh's immigrant communities, Sister Rita Yeasted, an English professor at LaRoche College said "Our culture is unwelcoming to immigrants in many ways."

Those involved in the Taylor rampage, however, felt that the Pittsburgh branch of the NAACP did not adequately address the heinousness of the incident and failed to comment on the double standard that occurs when hate crimes are perpetuated by blacks against whites. Tony Norman, a Pittsburgh Post-Gazette columnist and an African-American, commented that "Among paranoid black people, the mantra is: "I don't condone what the brother did, but I understand why he did it."

Pittsburghers came together to heal after the Taylor and Baumhammers incidents in several ways, such as joining interfaith groups or participating in the YWCA of Greater Pittsburgh "Day of Dialogue" program, designed to get the "average person" to sit down and discuss the issue of racism. Yet there still is a need for more programs to combat racism in the Pittsburgh area. Pittsburgh Mayor Tom Murphy has pressed for plans to transform Allegheny County into the next Silicon Valley. Many of those involved in the U.S. computer industry are immigrants from Eastern Europe, the Middle East, and Asia. If Pittsburgh wants to attract international talent, hate crimes cannot be tolerated by any means. Only time will tell how the Taylor and Baumhammers shootings have affected the victims and the ethnic/religious communities involved.

I believe that it is only through mediation and discourse that we can truly understand the roots of racial and ethnic hatred. An open mind and patience to listen to others will mend these dreadful acts and help all to realize the uniqueness and special qualities that all ethnic groups and religions possess.

Sanaz Raji is a first-year day student. She received her B.A. from Duquesne University and later attended the University of Pittsburgh School of Public and International Affairs. Ms. Raji will be a summer intern with Federal District Court Judge Gary Lancaster.
Insanity, Guilty but Mentally Ill
The Role of the Forensic Psychiatrist

Can Ronald Taylor and Richard Baumhammers Escape Criminal Culpability?

By Diane Blackburn

The lights the couch on fire and picks up his gun, a .22-caliber revolver. John Kroll, a 55 year old maintenance man, is shot in the neck, and bleeds to death in the arms of a co-worker. John DeWitt, who works with Kroll, luckily escapes unharmed. Minutes later, inside the Burger King on Penn Avenue, John Healy, 71, is dead. Next door in the parking lot of McDonald’s, Richard Clinger is sitting in his van when a bullet pierces the window. Clinger is struck. The killer now enters the McDonald’s and shoots Steven Bostard, the manager. Bostard’s employees run to his aid applying pressure to the head wound as they await medical assistance. Before the rampage is over, the killer moves outside to the drive-thru line and shoots Emil Sanielewicz. 1

Within minutes police surround the accused, Ronald Taylor of Wilkinsburg in a building housing a child day-care center. Frantic parents and bystanders watch. Several hours pass until police negotiators convince their suspect to surrender. 2 When it is all over, Taylor is charged with killing three people and wounding two. 3 A community asks, why?

Prior to March 1, 2000, Ronald Taylor was viewed as a quiet man by his neighbors but there was one thing he made certain they knew—he didn’t like white people. All of the victims were white. Was this carnage racially motivated or was Ronald Taylor legally insane when he allegedly committed these crimes? He had a history of mental problems and received treatment in the past, but a family member says Taylor’s problems were never severe. 4 Fifty-eight days pass. It’s April 28, 2000, and Richard Baumhammers gets into his car with a .357-caliber handgun and a bag of shells. In 72 minutes, five people will be dead and one critically injured. Baumhammers is awaiting trial for a tirade that took him over portions of Allegheny and Beaver Counties and also appeared to be racially motivated. He is accused of defacing two Jewish synagogues, shooting one Jewish woman, two men of Indian decent, two Asian-American males, and one black man. He is calm. He exhibits no signs of panic or anguish. Witnesses claim Baumhammers asked for two of the victims, Theo Pham and Ji-ye Sun, by name. The community is frozen and in shock. School districts delay the release of students until authorities advise it is safe. 5

Is Baumhammers a racist or is he legally insane? People who knew him described his personality as being "slightly different" and one person said Baumhammers had been making claims people were watching him, leading this individual to conclude Baumhammers was schizophrenic. In fact, Richard Baumhammers does have a history of mental instability. He had been receiving medical treatment for seven years and had once voluntarily committed himself. 6 But was he legally insane during the time these crimes were committed?

Pennsylvania defines legal insanity as "laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong." 7 Ronald Taylor told DeWitt shortly before the shooting, "You’re dead... I’ll get you." 8 Did Taylor know the nature and quality of his subsequent act when he allegedly pulled the trigger? Richard Baumhammers was described as having ideas that were out-of-touch with reality. 9 Did he understand what he is accused of doing was wrong?

The Pennsylvania statute on insanity 10 evolved from the 1846 case of Commonwealth v. Mosler 11 which adopted the M’Naghten rule. 12 In 1843, Daniel M’Naghten was tried for murder in England. M’Naghten was suffering from the morbid delusion that people were persecuting him, including the Prime Minister. Seeking to assassinate the Prime Minister, M’Naghten fired shots into a carriage believing it was transporting the Prime Minister. Mistakenly, it was the Prime Minister’s secretary who was
killed. During the trial, the Lord Chief Justice, in his charge to the jury, stated "the question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act."13

The jury found M'Naghten not guilty by reason of insanity. Following the acquittal, Queen Victoria requested the House of Lords review the verdict with the judges of the common-law courts. The judges repudiated the acquittal and set down the M'Naghten rule.14 Lord Chief Justice Tindall's restatement of the rule has been codified into Pennsylvania's insanity statute.15

The M'Naghten rule has been followed by many jurisdictions in the United States and has been expanded in some. At one time a defendant could escape culpability for criminal conduct committed as the result of an irresistible impulse.16 The irresistible impulse test centers on a defendant's ability to control one's self. Today this test has been rejected in many states. Another standard once used was the product test. If the defendant's act was the product of a mental disease or defect, the defendant would not be held criminally responsible. This standard has also been widely rejected.17

The Model Penal Code18 attempts to merge the M'Naghten rule with the irresistible impulse test. Under the Model Penal Code, a defendant is not criminally culpable if, as the result of a mental disease or defect, the defendant is unable to conform his conduct under the law, or is unable to appreciate that his conduct is wrong.19 Although Pennsylvania chose not to adopt this standard for legal insanity, it has been incorporated into the Commonwealth's guilty but mentally ill statute.20

Who will decide if Taylor and Baumhammers are legally insane and with whom does the burden of proof lie? In the 1800's, Lord Chief Justice Tindall stressed the defendant should be presumed sane until the contrary has been proven to the jury.21 The evidence will be weighed by the jury and sanity will be determined as a matter of fact.22 Such evidence can come from an expert witness, but the jury is not bound to lend more credibility to experts.23 The use of lay witnesses can be equally credible in establishing the defendant's mental state at the time of criminal activity.24 Mental illness is a factual determination made from of all the evidence25 and the jury determines the weight and credibility of that evidence.26

Who is an expert in the insanity case? One such person is Dr. Michael Weiner, a forensic psychiatrist and Chairman of "The Forensic Panel" and Professor of Psychiatry at the New York University School of Medicine. Weiner has been utilized by both the defense and prosecution in a number of cases and has been retained by the Commonwealth of Pennsylvania to evaluate Ronald Taylor and Richard Baumhammers.27

In his evaluation, the forensic psychiatrist focuses on the time periods immediately before the incident, during the incident, and immediately after. The reason is two-fold: First, the state of a psychiatric illness in a person will both improve and degenerate over time, so the psychiatrist must take note of the severity of the illness right before the commission of the crime. A person with a severe psychiatric illness may be suffering a chronic episode of his illness or may be relatively stable at the time of the criminal activity. Therefore, focusing on the time of the crime rather than the defendant's mental state well before or well after the crime lends precision to this science. Second, because the forensic psychiatrist is retained in an adversarial situation rather than as a treating physician, he must look for corroborating information and evidence to render a conclusion that is "untainted and as objective as possible."28

Weiner says he acts as both psychiatrist and investigator in his evaluations. The psychiatrist is always present because "everything gets fil-tered through diagnostic terms about symptoms, understanding how syndromes work, and understanding the science of what people do when they are inflicted with 'X' condition." He calls upon his role as investigator reviewing the information supplied to him by the prosecution or defense to determine what additional information he needs. "I'm acting as an investigator ... to think 'how can I confirm this?'"

Weiner assesses whether he needs to speak with witnesses and who those witnesses might be. Also, he needs to focus on how to get those witnesses to talk with him. He determines if he can find a paper trail and if it will be valid and legitimate. Just as important is tracing telephone calls, determining how they were made and to whom, which help identify the person's state of mind near the time of the criminal conduct.

All of this is important, Weiner emphasizes "because ultimately when it comes to an insanity defense, it's not just whether a person has a [mental illness] diagnosis, but in Pennsylvania [it is also] whether a person was able to appreciate the wrong of his or her actions." Answering this question requires obtaining as much information as possible to understand the choices the defendant was making at the time of the criminal conduct.29

Weiner speaks with the defendant and often videotapes the interview for corroboration. This helps keep the science precise and preserves the record because often stories change. In fact, faking or malingered is often indigenous to criminal psychiatric cases. That is not necessarily because the defendant is guilty but rather "the setting encourages people to be dishonest with psychiatrists." Weiner stresses he is not playing a game of "gotcha" with the defendant. Instead he is striving to find the truth. He recognizes that often the defendant is scared. Says Weiner, "They don't know what the right thing is to say. They may be scared whether, in fact, their defense
claim is valid or not.” But determining that the witness is dishonest does not answer the question of whether an insanity defense is valid.30

The psychiatric diagnoses most typically associated with a valid insanity defense include schizophrenia and bipolar disorder. Be cautioned, however, that it is not the disease that renders one legally insane at the time of the criminal act; it is the symptoms associated with the disease. For example, in an actor with schizophrenia, if there are no acute symptoms of the disease at the time of the criminal act, the schizophrenia is likely incidental to the act and not the cause. Alternatively, if the schizophrenic is suffering from a delusion or hallucination brought on by his disease at the time of the criminal act, he may be unable to appreciate right from wrong or unable to understand the nature and consequences of what he is doing. Welner says “Without those symptoms, the schizophrenia is meaningless and it’s just a diagnosis.”31

In bipolar disorder Welner may see an individual experiencing a grandiose delusion, a fixed, false idea. He once worked on a case where the defendant, in a manic episode, believed he had a special relationship with God. The defendant picked up his baby, walked onto the balcony of his apartment building, and tossed the baby off the balcony believing an angel would come by and pick up the baby whisking it to safety. Such a grandiose delusion is common to the consideration of an insanity defense.32

Depression is seldom associated with an insanity defense unless it is in its “most, most, most severe form, with severe psychosis, which means a real loss of reality” says Welner. He explains that people with psychotic depression may, in rare and exceptional instances, hallucinate. It would be more common for their psychotic symptoms, at their worst, to include delusions which may take on a destructive theme.33

These are not the only psychiatric illnesses which can lead to a viable insanity defense. In fact, a break from reality, possibly brought on by stress, might, on rare occasions in a fragile personality, cause someone to unravel enough that their actions might be driven by their mental illness. Then it is possible that the person, under some specific scenario, might not be able to appreciate the wrong of their actions. Welner explains that someone with a severe, brief, psychotic reaction, who has borderline personality disorder, might even hallucinate.34

Regardless of the underlying psychiatric disorder, Welner stresses that just because a person hallucinates and hears voices does not mean that is a viable insanity defense. It depends on what the voices are telling the person. As a forensic psychiatrist, Welner asks “How congruent are the actions to the content of the voices, as well as the person’s ability not to listen to those voices?” There are cases where the hallucinations may be malingered or may be irrelevant to the criminal activity.35

There is a distinction to be made between people who believe their activity is morally right and those who believe their activity is morally right yet recognize that society does not agree. For example, in a case Welner handled in Honolulu, a man who believed he was going to be fired and killed seven of his co-workers. This man believed that his actions were morally right and that the law was wrong. However, he recognized that society does not support his belief and that his conduct was legally prohibited.36

There is also the instance where a person does not see anything morally wrong with his behavior, nor does he believe his behavior is legally prohibited. Still, his actions constitute a criminal wrong. In this instance, insanity may turn on whether the person is aware of the nature and quality of his actions. One case Welner encountered where the issue of nature and quality was addressed was that of a profoundly retarded man who threw his five-year-old brother out the window. The problem with this case was asking if the defendant, whose IQ was about 20, was able to understand gravity. Did he understand the child would be killed? Did he understand death? Welner says this is why “the issue of appreciation of wrong is almost always, in these contentious insanity cases, where the battle is fought.”37

There is a difference between medical insanity and legal insanity. Medical insanity is simply the presence of a major mental illness but the threshold for legal insanity is much higher. It is the presence of the major mental illness PLUS a lack of appreciation of wrong. The legal threshold is much more difficult to overcome. Welner says people do not realize “that those who have major mental illnesses . . . think . . . make decisions . . . may be able to adapt quite well to what would for other people be overwhelming and emotionally disruptive symptoms.” So, many people who suffer from psychiatric illnesses do at the same time have the ability to appreciate right from wrong.38

If, in the Taylor and Baumhammers cases, the jury does not believe either defendant has reached the legal threshold of insanity, does it mean evidence of their mental illness has had no impact? Not necessarily. The jury may determine either defendant is guilty but mentally ill. Guilty but mentally ill came to the forefront in many states following the widely publicized trial of John W. Hinckley, Jr.,39 for the attempted assassination of former President Reagan. Hinckley, claiming he was suffering from mental disease or defect,40 was acquitted when the jury found him not guilty by reason of insanity. He was subsequently confined to a mental institution.41

Following Hinckley, many states made insanity an affirmative defense placing the burden of proving insanity on the defendant. Additionally, a number of states adopted the guilty but mentally ill verdict option.42 Pennsylvania is one such state. The Pennsylvania legislature was con-
cerned that the insanity defense was being over-utilized and that the number of insanity acquittals had reached alarming proportions.\textsuperscript{33} On December 15, 1982, then-Governor Dick Thornburg signed into law the guilty but mentally ill statute codified at 18 Pa. C.S.A. §314.\textsuperscript{44} The statute defines an actor as mentally ill: “as a result of a mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.”\textsuperscript{45} This is the standard set forth in the Model Penal Code.\textsuperscript{46}

This primary difference between finding a defendant guilty but mentally ill and finding a defendant insane is a difference between being bad and sick and just simply being sick. When a jury determines that the defendant was legally insane, the jury is saying the defendant was incapable of forming the necessary mens rea to commit the crime. Therefore, the defendant is “sick” but not “bad.” However, when the jury determines the defendant is guilty but mentally ill, the jury is saying the defendant should be punished for what he has done yet treated for the mental illness. The defendant is both “sick” and “bad.”\textsuperscript{47} Pennsylvania has been adamant that only being found mentally ill will not negate the mens rea requirement for criminal activity. Negating mens rea can only be accomplished when the defendant proves he has met the M’Naghten test.\textsuperscript{48}

If found guilty but mentally ill, it is unlikely that either Taylor or Baumhammers would win on an appeal that the statute is unconstitutional. In prior challenges to the guilty but mentally ill statute, the Pennsylvania court rejected the argument of constitutionality. This is because before that verdict option can even be considered by a jury, the Commonwealth must first prove every element of the crime beyond a reasonable doubt. If proven, the jury then considers whether the defendant has proven his insanity by a preponderance of the evidence.

It is only if the defendant has not met his burden on the insanity issue that the jury addresses whether the defendant was mentally ill.\textsuperscript{50} Holding that the Pennsylvania Legislature’s definition of mental illness is “a logical corollary to the M’Naghten rule”\textsuperscript{51} use of the guilty but mentally ill option in Pennsylvania does not violate one’s due process or equal protection rights.\textsuperscript{52} In the end, these insanity defenses will be in the hands of the judges who have the discretion of determining if Ronald Taylor or Richard Baumhammers escape criminal culpability.

Diane Blackburn is a second-year evening student. She is Assistant Production Editor of JURIS, a member of Law Review, and Chairperson of the International Law Society. Ms. Blackburn is a law clerk for the firm of Zimmer Kunz, PLLC.

ENDNOTES

2 Id.
6 Dennis B. Roddy and Bill Heltzel, Man on a Rampage, Pittsburgh Post-Gazette, April 30, 2000, at A-1.
7 18 Pa.C.S.A. § 315(b).
9 Dennis B. Roddy and Bill Heltzel, Man on a Rampage, Pittsburgh Post-Gazette, April 30, 2000, at A-1.
10 18 Pa.C.S.A. §315.
12 M’Naghten, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).
The Second Amendment and the Individual Rights Debate:
A Look at the Cases and Controversies

BY GREG NEUGEBAUER

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed. What could be more clear? The Second Amendment is short and to the point. As if to avoid confusion among future generations, the founding fathers were wise enough to highlight the key words:

Militia, State, and Arms. The phrase "the people" is noticeably of secondary rank. This constitutional provision clearly protects the state militia from federal infringement, or does it?

Today, there are two "schools of thought" in the debate concerning the rights embodied in the Second Amendment. Those adhering to the "collective rights" theory view the Amendment's introductory, subordinate clause as limiting the substantive contours of the Amendment to protecting state militia against federal disarmament. To the collective rights advocates, the Second Amendment serves to allay state concerns that the Article I Militia Clauses ceded too much control of the militias to the federal government. At the other end of the spectrum, the "individual rights" advocates view the Amendment's phrase "right of the people," as protecting an individual right to keep and bear arms. For them, "the people," has exactly the same meaning as in the First, Fourth, Ninth, and Tenth Amendments. Of particular note to the individualists is the Tenth Amendment's clear distinction between the state and its people. Fortunately, for the advocates of both schools of thought, the brief text of the Second Amendment contains sufficient ambiguity to support a colorable claim for either position.

The controversy concerning the meaning of the Second Amendment lacks easy resolution because there is so little authority to which to turn. The obvious first source is the Supreme Court. After all, "it is emphatically the province and duty of the judicial department to say what the law is." Such has been the cornerstone of constitutional interpretation since the earliest days of the Republic. However, one looking to the Court for guidance runs into serious trouble. The Supreme Court has carefully examined the right to keep and bear arms and the Second Amendment just once, and its analysis spanned a mere four paragraphs. The brevity of the opinion suggests the Court intended to merely dispose of the case at hand and call it quits.

Although the Supreme Court did not hear a Second Amendment case until after the Civil War, state courts have been considering the right to keep and bear arms since 1822. Most state constitutions have provisions touching upon the right to keep and bear arms, and those states have judicial decisions interpreting that right. Prior to the Supreme Court's consideration of this issue, several antebellum state courts carefully examined the arms provisions in their own constitutions. The right to keep and bear arms may be the focus of a great national debate today, but it was settled law in many states almost two centuries ago.

Early Interpretations of the Right to Keep and Bear Arms

The lack of federal firearm statutes accounts for the absence of early federal court interpretations of the Second Amendment. Most of the antebellum state cases arose from challenges to the constitutionality of state statutes proscribing carrying concealed weapons. Whether relying on the state or federal constitution, all but one court upheld these laws as a reasonable restraint on the manner of bearing arms. Antebellum courts generally upheld concealed carry laws as long as the statute did not restrain openly carrying arms, which, at the time, was viewed as the only manner suitable to bear arms for self defense. In reaching this result, courts of the era assiduously recognized the right to keep and bear arms as being a component of the individual right of self defense.
Advocates of the individual rights doctrine suffer from no shortage of antebellum state cases that clearly support their view. The only court to invalidate a concealed carry law, Bliss v. Commonwealth, considered the right to keep and bear arms absolute. The court called the right "entire and complete, as it existed at the adoption of the constitution; and if any portion of that right be impaired, immaterial how small that part may be, ... it is equally forbidden by the constitution." Echoing this view in Cochrum v. State, the Texas Supreme Court declared that the Second Amendment "is based on the idea that the people cannot be effectually oppressed and enslaved who are not first disarmed. ... The right of the citizens to bear arms in lawful defense of himself or the state is absolute," Some courts took a more balanced approach to the issue, while still affirming that the right to keep and bear arms is an individual one. The reasoning in the 1846 case of Nunn v. Georgia is typical. The court recognized the legislature’s valid purpose in prohibiting secretly carrying weapons, which it upheld, “inasmuch as it does not deprive the citizen of this natural right of self-defense, or his constitutional right to keep and bear arms." Even in decisions wherein the court never expressly adopted the individual rights theory, it did so implicitly through recognition of the right of self-defense.

While the individual rights doctrine may have been the majority approach among the early state decisions, alternative interpretations of the right to keep and bear arms existed. In 1840, the Tennessee Supreme Court handed down a decision that would figure prominently in a United States Supreme Court decision a century later. In Aymette v. State, the court considered whether a concealed weapons law conflicted with the state’s constitutional provision guaranteeing the “right to keep and bear arms for their common defense.” The court held that it did not. The Aymette court thus recognized several important aspects regarding the right to keep and bear arms. The court recognized that this right exists for the benefit of the common defense in the form of a militia. As such, the scope of the constitutional provision reached only militia weapons. Consequently, according to the Aymette court, the legislature suffers no restriction in its power to regulate weapons of the type used “for purposes of private assassination.” As for militia weapons, the legislature may regulate the “manner” of the use of militia weapons to “preserve the public peace, and protect our citizens from terror.” While the Aymette court described the right to keep militia-type arms “unqualified,” it implied that it is subordinate to the collective militia rights. As to how Tennessee’s concealed carry law affected the individual right of self defense, this was not a matter before the court.

### The Supreme Court’s Interpretation

The Supreme Court is frequently a lightning rod for many of the major issues of the day. Abortion, civil rights, privacy, and free speech are all subjects of passionate debate, and usually a landmark Supreme Court decision is at the focal point. In stunning contrast to this situation is America’s great gun debate. Even a person seriously interested in this issue could probably not name even a single case on point. This is because the entire body of the Supreme Court’s Second Amendment jurisprudence comprises less than a handful of cases.

The only antebellum Supreme Court case to mention the right to keep and bear arms was the notorious Dred Scott decision. In that decision, Chief Justice Taney noted in dictum that keeping and bearing arms is a state right protected by the Article IV Privileges and Immunity Clause. Only two nineteenth century cases touch upon the Second Amendment, but neither one is relevant to the individual versus collective rights controversy.

The first Supreme Court Second Amendment case is United States v. Cruikshank. This case concerned an appeal of a conviction for violating the Enforcement Act of 1870. This act provided:

That if two or more persons shall band or conspire together, or go in disguise upon the public highway ... with the intent to prevent or hinder [a person’s] free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, such persons shall be guilty of a felony.

The issue before the court was whether conspiring to deprive another of his Second Amendment right to keep and bear arms was “a right or privilege granted or secured to him by the constitution.” The Court decided it was not: Bearing arms is ... not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government.

The Cruikshank court’s holding that the Second Amendment restricts only the federal government, and not the states, remains the law today.

The only other nineteenth century Second Amendment case arose nearly a decade later in Presser v. Illinois. An Illinois court fined Presser $10 for violating a statute prohibiting: “a body of men ... other than the regular organized militia of this state ... to associate themselves together as a military company or organization to drill or parade with arms in any city or town of this state.” Presser challenged his con-
victio n argu in g, inter alia, that the statute violated his Second Amendment Rights to keep and bear arms. In affirming his conviction, the Court stated that Cruikshank conclusively determined "the amendment is a limitation only upon the power of Congress and the national government, and not upon that of the state." Therefore, the Court concluded that since the Second Amendment is a restriction on only the national government, one must look to the state for protection of the right to keep an bear arms.

As to whether the state suffers any restraint in its authority to regulate the keeping and bearing of arms, the Presser Court noted the following.

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

In other words, as in the Aymette and Buzzard state decisions, the right to keep and bear arms is subordinate to the collective state right.

The most significant Second Amendment case is United States v. Miller. Miller is the only Second Amendment case of the twentieth century, and it is the Supreme Court's most detailed analysis of this constitutional provision. This case concerned two defendants charged with transporting in interstate commerce a shotgun having a barrel less than eighteen inches, in violation of the National Firearms Act of 1934. The district court quashed the indictment, holding that the Act violates the Second Amendment. The Supreme Court reversed.

Unfortunately, for proponents of either side of the Second Amendment debate, Miller is hardly a definitive answer. The text of justice McReynolds's decision spans only eight pages, four of which are devoted to extended quotations. Aside from two string citations, the Justice McReynolds cites only one state court decision, Aymette, in direct support of a conclusion. Given the essential role that Miller plays in all federal Second Amendment cases, it is worth quoting the Court analysis in its entirety.

In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. Aymette v. State of Tennessee, 2 Humph., Tenn., 154, 158.

The Constitution as originally adopted granted to the Congress power—'To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplin-
ning, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.' U.S.C.A.Const. art. 1, § 8. With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.' And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.45

The Court in Miller has, in essence, promulgated a rule of decision for the Second Amendment. It declared that courts are to interpret the amendment with the "obvious purpose to assure the continuation and render possible effectiveness of such [militia] forces."46 Such reasoning is in line with the collective rights doctrine. That Miller asserts the collective rights view is further supported by its citation of Aymette, which is one of only two antebellum cases supportive of this view.47 An individual rights advocate, on the other hand, could note the attention the court paid to the militia vs. standing army problem. Therein lies the opportunity to assert that the militia exists to resist tyranny, and how better to do that than to arm every citizen? However, this argument is inherently weak because Aymette, which Miller cites, directly rejects this proposition.

Another interpretation of Miller with respect to this debate may be that it is simply not on point. Whether the right to keep and bear arms is collective or individual right was not before the Court.48 Neither was the right to keep and bear arms, as it relates to self defense before the court. The issue was whether the government may regulate certain weapons not used in "civilized warfare" or of use only to the "assassin." State courts resolved that question over a century before Miller. A government may adopt reasonable manner of use restrictions on the right to bear arms in the interest of the general welfare. All but one antebellum state court agreed with that.

**Courts without Controversies: Federal Courts since Miller**

Almost as soon as cases could work their way through the appeals process following Miller, the rule that the Second Amendment does not embody an "individual" right emerged, and it has been with us ever since. Just three years after Miller, the third circuit declared in United States v. Tot.

"It is abundantly clear from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in maintenance of their militia or-organizations against possible encroachments by federal power."49

The 1942 decision *Cases v. United States*50 recognized the authority of Congress to abrogate any individual rights that might be embodied in the Second Amendment through federal weapons statutes. "The Federal Firearms Act undoubtedly curtails to some extent the right of individuals to keep and bear arms but it does not follow from this as a necessary consequence that it is bad under the Second Amendment." *Cases* also added its interpretation as to what Justice McReynolds meant to say in Miller.

The *Cases* Court recognized the problem that Miller created by prefacing its reasoning with the observation that the gun in question was not a militia weapon. Noting that "almost any modern lethal weapon" is probably in a military arsenal, the appeals court concluded that any rule of law based on the nature of the weapon is untenable.51 This prompted the *Cases* Court to observe: "However, we do not feel that the Supreme Court in [Miller] was attempting to formulate a general rule applicable to all cases."52 The court concluded that the rule laid down in Miller properly disposed of that specific case, but the Supreme Court intended it to go no further.53

The appeals court concluded that each Second Amendment case must be decided "like cases under the due process clause ... on its own facts."54 For the *Cases* Court, the dispositive factor in resolving Second Amendment cases is whether the circumstances surrounding the possession or use of a weapon in question "has any reasonable relationship to the preservation or efficiency of a well regulated militia."55 Applying this rule to the appellant in *Cases*, the court examined his intent in using, transporting, and possessing the proscribed weapon and ammunition. The court concluded that the appellant's conduct was a "frolic on his own and without any
thought or intention of contributing
to the efficiency of the well-regulated militia which the Second Amendment is designed to foster. At the same time, the court firmly tied its Second Amendment jurisprudence to the well being of the militia. Issues related to collective or individual rights were not relevant to its decision.

Since a federal statute detrimental to the militia would fail to pass constitutional muster, what is the nature of the militia? Is it a “select militia” of trained professionals or a “general militia” composed of individual citizens? The Miller decision invites this question given its description of the militia as “comprised of all males physically capable of acting in concert for the common defense.” However, so far, no federal appellate court has taken the bait and used this to conclude that Miller recognizes an individual right. On the contrary, at least one circuit has concluded that Miller expresses just the opposite.

In United States v. Waring, the court held that, “there is absolutely no evidence that a submachine gun in the hands of an individual ‘sedentary militia’ member would have any reasonable relationship to the preservation or efficiency of a well regulated militia. The Waring court, in a widely cited observation, also declared that “it is clear that the Second Amendment guarantees a collective rather than an individual right.”

That the Second Amendment embodies a collective right to a well organized militia has been the rule of law in many courts of appeal since Miller. Even when the village of Morton Grove, Illinois, passed an outright ban on handguns, the Court of Appeals for the Seventh Circuit held that the ordinance did not offend the Second Amendment. The court reasoned that the amendment restricted only the federal government, and secondly, “possession of handguns by individuals is not part of the right to keep and bear arms.” Even the judge who dissented in the panel decision did not raise a Second Amendment concern. His objection was that prohibiting handgun possession in the home violates the “fundamental right to privacy.” The dissent also argued that the ordinance violated “the fundamental right to defend the home against unlawful intrusion within the parameters of the criminal law.” In not raising the Second Amendment, perhaps the dissenting judge was implicitly agreeing with the majority, which stated that Second Amendment has never been incorporated into the Due Process Clause of the Fourteenth Amendment.

Late Breaking News from Texas

All the circuit courts of appeal that have examined the Second Amendment have uniformly concluded that this provision recognizes a collective right. However, not every circuit has passed on the collective vs. individual rights issue. In fact, right now there is pending before the Court of Appeals for the Fifth Circuit a case raising this very issue. In United States v. Emerson, the district court ruled that “the right to keep and bear arms is a personal right retained by the people, as opposed to a collective right held by the states.” In his opinion, District Judge Cummings extensively examined the history of the Second Amendment, from England through today’s law reviews. His conclusion is that English history, colonial history, the ratification debates, and the circumstances surrounding the drafting of the amendment all show that the Second Amendment’s purpose is to protect the individual right to keep and bear arms.

At issue in this case is a section of the Gun Control Act, 18 U.S.C. § 992(g)(8), prohibiting possession of a firearm by any person subject to a restraining order issued upon showing of a physical threat to another. During the course of a divorce proceeding, Emerson’s wife obtained a temporary restraining order, which is “essentially a form order frequently used in Texas divorce procedure.” The court did not notify Emerson when it granted the order that if he remained in possession of his firearm, he would be subject to federal prosecution. Emerson continued to keep his weapon, and the United States subsequently charged him with violating the Gun Control Act. The district court granted Emerson’s motion to dismiss the indictment, holding that the Gun Control Act violated his Second Amendment rights and his Fifth Amendment Due Process rights.

The district court started with a textual analysis of the amendment. It noted that the amendment’s introductory clause does not qualify the right to bear arms, “but instead [exists] to show why it must be protected.” It also noted that “the people,” as used in the amendment means exactly the same thing as in the Preamble, the First, Fourth, Fifth, and Ninth Amendments. Judge Cummings next devoted six pages to detailed examination of the amendment’s history, which supported the individual rights interpretation. Following this, he noted that the purpose of the Bill of Rights, is to protect individual rights, not state rights. Finally, for Judge Cummings, Miller simply was not controlling on this issue. “Miller did not answer the crucial question of whether the Second Amendment embodies an individual or collective right to bear arms.” Should the fifth circuit court affirm Emerson, perhaps the Supreme Court will finally resolve this issue.

Conclusion: The Revised Second Amendment

The Second Amendment: what could be clearer? Perhaps, quite a bit. This article examined the meaning of the Second Amendment, as interpreted by the judiciary. Its purpose is to drive home the idea that this short constitutional provision is not as obvious as many collective rights advocates assert.

What is the status of the collective vs. individual rights controversy
today? The Supreme Court, not having addressed this issue directly, appeared inclined in *Miller* towards the collective rights view. That is certainly the rulings of several different circuits in the federal Courts of Appeal, none of which the Supreme Court has disturbed. However, the Supreme Court has never actually ruled on the individual versus collective rights issue. Whether it would affirm the rulings of the various courts of appeal may be in doubt. Justice Thomas made his view clear in *Printz*: "Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right."86 The early state court decisions discussed herein are among this historical evidence.

The majority of antebellum state courts held that the state may regulate, but not prohibit, the carrying of concealed weapons. The common theme among these decisions is that a regulation of the manner of bearing arms does not infringe upon the individual and fundamental right of self defense. State courts recognize that the legislature's authority to promote domestic tranquility and protect the general welfare permit these relatively mild regulations.

Today on the other hand, the issue in the federal courts is whether the statute at issue infringes upon the efficiency or operation of a well regulated militia. The individual's self defense right does not even enter the picture. The federal Courts of Appeal uniformly hold that the Second Amendment simply does not embody an individual self defense right.

What has happened to this right? Early in our history, the Second Amendment embodied the individual right to keep and bear arms for self defense. Today it does not. Should we care? Justice Scalia provides an interesting comment by way of Judge Cummings in *Emerson*.

Other commentators, including Justice Scalia, have argued that even if there would be 'few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard, this would simply show that the Founders were right when they feared that some future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may tolerate the abridgement of property rights and the elimination of a right to bear arms; but we should not pretend that these are not reductions of rights.' (citations omitted).81

Is that the meaning of the Second Amendment today? Is it now merely a shorthand notation for the National Guard? Before we agree to this interpretation, perhaps we should pause to consider why the Founders adopted this constitutional provision in the first place. Justice Story called the right to keep and bear arms "a strong moral check against the usurpation and arbitrary power of rulers; and will generally ... enable the people to resist and triumph over them."82 The Founders had their civil liberties trampled by a tyrant. They understood that those sworn to protect the people may someday become its captors.83 Perhaps the framers of the Second Amendment, this short constitutional provision, had more to say than we realized. For after we have disarmed ourselves, whom shall we entrust with this awesome right?84

Greg Neugebauer is a third-year evening student. He is also a member of the Duquesne Law Review. His casenote on the recent Supreme Court decision Kimel v. Florida Board of Regents will soon appear in that journal. Comments on this article are welcome at bauer@sgi.net.

ENDNOTES

1 U.S. Const. amend. II.
4 The United States Constitution, Article I, Section 8 provides: The Congress shall have the Power ... To provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions. To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress, U.S. Const. art. I, § 8, cl.15, 16.
5 Kate, supra note 4, at 212.
6 Kate supra note 4, at 213.
8 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." U.S. Const. amend. X.
9 Dowlut, supra note 7, at 95 n.143.
10 See Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637, 644 (1989) (suggesting that the Second Amendment is the worst drafted provision of the Constitution).
12 Kate supra note 7, at 247.
13 12 Ky. 90 (1822).
14 Bliss, 12 Ky. at 93.
15 24 Tex. 324 (1859).
16 Cochrum, 24 Tex. at 400.
17 See State v. Reid, 1 Ala. 612, 614 (1840) (holding "The constitution declaring that 'Every citizen has the right to bear arms in defense of himself and the State,' has neither expressly nor by implication, denied the Legislature, the right to enact laws in regard to the manner in which arms shall be borne."). See also State v. Chandler, 5 La. Ann. 489 (La. 1856) (holding the Second Amendment guarantees the right to openly carry arms for self defense, but the legislature may properly prohibit concealed carry in order to "prevent bloodshed and assassinations committed upon unsuspecting persons.").
18 1 Ga. 243 (1846).
19 Nunn, 1 Ga. at 254.
20 See State v. Mitchell, 3 Ind. 229 (Blackf. 1853). A statute "prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional." Id. See also Senate Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 2d Sess., The Right to Keep and Bear Arms, 6 (Comm. Print 1982) (hereinafter Senate Subcommittee Report) (examining Mitchell). See also State v. Reid, 1 Ala. 612, 618 (1840) (ex-
make out a case of self-defense.
30 Kates, supra note 4, at 246.
31 Dred Scott, 50 U.S. at 416-17.
32 Dowlut, supra note 8, at 86.
33 92 U.S. 542 (1875).
34 Cruikshank, 92 U.S. at 547.
35 Cruikshank, 92 U.S. at 553.
36 116 U.S. 252.
37 Presser, 116 U.S. at 253.
38 Presser, 116 U.S. at 265 (citing Cruikshank, 92 U.S. at 553).
39 Presser, 116 U.S. at 265.
40 Presser, 116 U.S. at 265.
43 Miller, 307 U.S. at 177.
44 Justice McReynolds first recites the facts of the case, including a summary of the relevant statute. Next, he dedicates a page to quoting the statute itself. Then there are a few more facts followed by four paragraphs examining the Second Amendment, which is the only analysis in the opinion. The bulk of the remainder of the opinion includes three pages taken from a book on seventeenth-century colonial America. While this appears to be of some relevance, for it deals with the colonial militia, most of the text concerns the provisions militiamen were required to provide while on duty. Miller, 307 U.S. at 174-83.
45 Miller, 307 U.S. at 178-79.
46 Miller, 307 U.S. at 178.
47 But see supra note 30 (The Tennessee Supreme Court recognizes that the Aymette decision is not to be construed as abrogating the individual right to keep and bear arms for self-defense).
49 Our most recent treatment of the Second Amendment occurred in United States v. Miller, in which we reversed the District Court's invalidation of the National Firearms Act, enacted in 1934. In Miller, we determined that the Second Amendment did not guarantee a citizen's right to possess a sawed-off shotgun because that weapon had not been shown to be of any ordinary military equipment that could contribute to the common defense. 'The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment. (citations omitted).
50 131 F.2d 261 (3rd Cir. 1942).
51 131 F.2d 916 (1st Cir. 1942).
52 Cases, 131 F.2d at 922.
53 Cases, 131 F.2d at 922.
54 Cases, 131 F.2d at 922.
55 Cases, 131 F.2d at 922.
56 Cases, 131 F.2d at 923.
57 Miller, 307 U.S. at 179.
58 530 F.2d 103 (6th Cir. 1976).
59 Warrin, 530 F.2d at 106.
60 Warrin, 530 F.2d at 106.
61 Love v. Peppersack, 47 F.3d 120, 124 (4th Cir. 1995) ("the amendment does not confer a right to bear any firearm"); Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996) ("We follow our sister circuits in holding that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen."); Gillespie v. City of Indianapolis, 185 F.3d 693, 699 (7th Cir. 1999) (holding the federal Gun Control Act does not violate the Second Amendment because it regulates private individuals, not states.).
62 Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1989).
63 Quilici, 695 F.2d at 271.
64 Quilici, 695 F.2d at 271 (Coffey, J., dissenting).
65 Quilici, 695 F.2d at 280 (Coffey, J., dissenting).
66 Quilici, 695 F.2d at 278 (Coffey, J., dissenting).
67 Quilici, 695 F.2d at 270. See also Fresno Rifle and Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723, 730 (9th Cir. 1992) (concluding that no Supreme Court case suggests that the Second Amendment is incorporated into the Fourteenth). 68 46 F.Supp.2d 598 (N.D. Tex. 1999), appeal docketed, No. 99-10351 (5th Cir. 1999).
69 Emerson, F.Supp.2d at 601.
70 Emerson, F.Supp.2d at 601-07.
71 Emerson, F.Supp.2d at 599.
72 Emerson, F.Supp.2d at 599.
73 Emerson, F.Supp.2d at 599.
74 Emerson, F.Supp.2d at 611-12.
75 Emerson, F.Supp.2d at 601.
76 Emerson, F.Supp.2d at 601 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).
77 Emerson, F.Supp.2d at 602-07.
78 Emerson, F.Supp.2d at 607.
79 Emerson, F.Supp.2d at 608.
80 Printz, 521 U.S. at 938-39 & n.2 (Thomas J., concurring).
81 Emerson, F.Supp.2d at 609 (citations omitted).
82 Levinson, supra note 11, at 649.
83 For a modern example of governmental tyranny see Korematsu v. United States, 323 U.S. 214 (1944) (holding that the forced relocation of American citizens to concentration camps under the federal war powers does not offend the Constitution). See also WILLIAM H. RENSBURG, ALL LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME, 184-211 (1998). The Chief Justice, writes a passionate analysis of the law and the contemporaneous events leading up to this act of treachery. As for his prediction as to whether the Korematsu decision would be the same today, the Chief Justice writes: "Under today's constitutional law, quite certainly not. ... But the law was by no means so clear in 1943 and 1944 when these cases were decided." Id at 207.
Structured Settlements:

Alternative Solutions for Settlement of Damages in Lieu of Trial

BY JENNIFER L. GILLILAND

Judge Learned Hand once said, "As a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." As evidenced by the above quote, Judge Hand realized the inadequacies of the American legal system as early as 1921. Since then, two issues have continued to trouble the legal system as it relates to civil litigation: cost and delay.

In addition, uncertainty over jury verdicts remains as troubling today as ever, with verdicts running the gamut from pro-defense to excessive punitive awards.

Alternative Dispute Resolution, commonly referred to as ADR, is a catchall term for a growing number of processes developed as alternatives to traditional court-based litigation. Though ADR is not a new concept, it has garnered renewed interest because it reduces the time and money spent on conventional litigation, and it removes the uncertainty of questionable or excessive jury verdicts. ADR techniques are also useful in settlement discussions and in moving blocked settlement negotiations forward.

This article focuses on one of the less well known methods of ADR — structured settlements.

Structured Settlements are a form of ADR involving a settlement structured to meet the injured plaintiff's individual needs; they serve as innovative negotiation tools that can work to the benefit of everyone involved in the claims process. Essentially the parties create a settlement agreement that is structured to offer a plan for periodic future payments and which usually includes cash at settlement to cover immediate needs such as economic losses and attorney's fees. It is a way of settling a physical damage claim with a plan "structured" to meet specific needs of the injured party. A structured settlement ("Structure") provides a greater total payout than a lump sum payment, as payments are made over time and include investment earnings on the funding guaranteed contract. In essence, a Structure reduces the difficulties in predicting losses and economic events by paying damages periodically. Anyone who works in the settlement of damages should be familiar with Structures, as they offer significant advantages that are enjoyed by everyone involved in negotiating a settlement.

The first benefit is that damages for those who have incurred bodily injury are not subject to federal income tax pursuant to Section 104 (a) of the Internal Revenue Code and IRS Revenue Ruling 79-220. Claims for emotional distress alone are not exempt under this Rule, as they are not physical injuries. This tax advantage is substantial, as reflected in the following chart, adapted from Financial Settlement Services (FSS), a broker specializing in structured settlements:

<table>
<thead>
<tr>
<th>Structured Settlement Internal Rate of Return</th>
<th>Interest Rate Required to Equal Structure Rate for 15% tax bracket</th>
<th>Interest Rate Required to Equal Structure Rate for 36% tax bracket</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.00</td>
<td>5.88%</td>
<td>7.81%</td>
</tr>
<tr>
<td>6.00</td>
<td>7.06%</td>
<td>9.38%</td>
</tr>
<tr>
<td>7.00</td>
<td>8.23%</td>
<td>10.94%</td>
</tr>
<tr>
<td>8.00</td>
<td>9.41%</td>
<td>12.50%</td>
</tr>
</tbody>
</table>

Example if Structure 7% Rate of Return and claimant is in 36% tax bracket

Note — example is for federal tax brackets. Including state tax rate, assuming 3%, CD interest would have to increase as well to equal a 7% structure.

If claimant were to get lump sum and invest, such as in a CD, that tool would have to provide in excess of 10.94% to get the same rate of return after taxes paid with a 7% internal rate of return on structured settlement.
Once a structured settlement is reached, the defendant’s carrier purchases an annuity from a life insurance company, thus providing an advantage for insurance companies as well. The injured party is the beneficiary of the annuity and will receive all set payments. If the plaintiff dies, contingent beneficiaries are named to ensure the guaranteed payments are made, again tax-free.

If a plaintiff would collect damages and invest in the market, most earnings on the lump sum would be taxable. It is important to note that if the rate of return is low on the structure payment, the open market may be a better avenue if the needs of that particular plaintiff are to gain premium on a settlement. Mr. Kenneth Noce, Vice-President of Financial Settlement Services, advises, however, that “with the risks and volatile market, uncertainty is created when an investor looks to the open market versus the guaranteed payments of a Structure.”

The second advantage of a Structure is that payments are guaranteed no matter what happens to interest rates or the stock market, thus no worry is created about where to invest or reinvest a lump sum settlement. The tax advantage and the guaranteed payment by the defendant’s carrier in the form of a structured settlement create a binding contract and cannot be broken by the defendant.

Under certain circumstances, some plaintiffs may want to break the contract. Senate Bill 818 contains an amendment protecting structured settlement obligors and payees by requiring court approval that the transaction is in the best interest of the payee before a right to a payment stream can be sold to a factor. This legislation thus insures that plaintiffs are further protected when settling a claim for damages with a structured settlement.

A third advantage to a structured settlement, in addition to tax breaks and guaranteed payments, is that there are no money management fees when a structured settlement is utilized. A Structure helps in planning for future needs and in reducing the premature disposition of settlement dollars. Again, one must look to the needs of the plaintiff. If the plaintiff is a stockbroker, for example, the need for financial assistance may not be significant. On the other hand, if the claimant is an average individual without investment experience, the lack of a management fee is yet another reason to employ a Structure.

Traditional negligence claims involving dog bites, fractures, and claims with future needs such as neck and back injuries, head injuries, burns and quadriplegic injuries are all potential candidates for employment of a structured settlement. Situations in which there are minor children or other plaintiffs who may lack the capacity to handle money at the time of the settlement are situations that also lend themselves to the utilization of a Structure. Non-traditional tort claim situations as environmental, CERCLA, construction defects and asbestos liability claims also provide options resulting in better outcomes for all parties.

In any of the above-cited tort claims, a structure can be created to meet the flexibility of the claimant’s needs. This is the fourth advantage of a structured settlement, the ability to create a flexible settlement customized to the injured party’s needs. A Structure can be created to make payments either for life or for a stated period of time, but first, a need analysis must be performed to create a payment option that meets the injured party’s needs. While evaluating a claim for a potential structured settlement, gender, the severity of the injury and the damages that would likely be awarded, marital and familial status, disability, and present and future economic losses should all be considered. The following examples portray situations in which both the insurance professional and the plaintiff’s counsel created a structured settlement with a payment plan in order to successfully meet the injured party’s needs, thereby resulting in a favorable claim solution for everyone involved.

REAL TORT CLAIM CASE APPLICATION #1:

Timothy Foreman of Nationwide Insurance and plaintiff’s attorney Tim Shollenberger reached a positive resolution to a claim regarding a business auto accident with the help of a structured settlement. The claim involved a negligence cause of action in Eastern Pennsylvania in which the plaintiff incurred several injuries. The evaluation led the claims representative to offer a structured settlement, with the assistance of Financial Settlement Services, based on the long-term needs of the claimant. Shollenberger was receptive to this proposal. Both parties recognized that this particular plaintiff was not educated in investing and had a need to purchase a home for his family. A structured settlement was developed to compensate all of the plaintiff’s needs including the non-economic damages.

The settlement included a lump sum of $200,000 to cover economic damage expenses such as a lien and attorney fees, while the $125,000 guaranteed structure payments included monthly payments of $995 for fifteen years. This was used to finance a home, while resulting in actual net to the claimant of $179,100. As Mr. Foreman of Nationwide Insurance stated, “the structure was a successful tool in this case partially because the monthly payments helped to act as a financial planning device for the claimant, who was not accustomed to handling
substantial sums of money. The periodic payments also assured the attorney that he was acting in his client’s best interests."

**WHY WAS IT SUCCESSFUL FOR NATIONWIDE? REAL TORT CLAIM CASE APPLICATION #2:**

William Mokel, CCLA, of Nationwide Insurance and attorney Neil Rothschild also applied a structured alternative for settlement of damages in a negligence motor vehicle accident in Western Pennsylvania. Here, the forty-one year old plaintiff sustained injuries including a fractured left acetabulum. This plaintiff was an auto parts store manager, whose family relied on his income. Since his disability from the accident was likely to affect both his present and future earnings capacity, the claims representative initiated an offer to the attorney in the form of a Structure.

This case, a limits case of $50,000, was designed to meet the needs of the plaintiff’s future loss of potential income. A lump sum of $20,000 was paid for expenses, while the remaining $30,000 was structured into four guaranteed periodic payments to be received by the plaintiff at age fifty, fifty-five, sixty and sixty-five. These payments will net a guaranteed amount of $111,000. Damages were paid to the plaintiff to compensate for both his pain and suffering and to take care of his potential future economic losses.

Mr. Rothschild advised me that both he and his client were pleased with the overall result, because the structure eliminated risk in the open market while providing for retirement income in the future. The claims representative, Mr. Mokel, also emphasized how important it is “to secure the financial future of the injured person with complete tax immunity.”

As the above tort claim settlements illustrate, structured settlements don’t just settle the claim, they do so in a way that meets all of the parties needs.

Ultimately, in the proper circumstances structured settlements are one of the most effective forms of alternative dispute resolution. Structured settlements allow parties the flexibility to create a settlement customized to the injured party’s needs. They can promote quicker settlements, which then provide timely payments that can help remedy a plaintiff’s injury both at the time of the settlement and in the future, when he or she may have a greater need for the income. These payments are guaranteed for the life of the settlement and there are no management fees. Structures for physical injuries are not subject to federal income tax. Perhaps most importantly, structured settlements are supported by the judicial system and eliminate the risk of jury uncertainty. They afford the parties a forum to interact peacefully which helps facilitate better working relationships among all involved with the settlement process. And, just perhaps, they can help eliminate the inadequacies of traditional litigation. Thus an injured party may not, as a litigant, have to “dread a lawsuit beyond almost anything else short of sickness and death.”

Jennifer L. Gilliland, a graduating law student at Duquesne University School of Law, has enjoyed working for Nationwide Insurance throughout her law school studies. In addition to being recognized for her writing, Ms. Gilliland has also been honored for her oral advocacy skills, serving on the Appellate Moot Court Board and national team as well as the Trial Moot Court Board. She has recently been named Duquesne chapter of Phi Delta Phi Graduate of the Year. Upon graduation, Jennifer is proud to announce that she will be joining the law firm of Papernick & Gefsky, where she will be active in their civil litigation department.

**ENDNOTES**


3 Robert A. Creo, Esquire – About Alternative Dispute Resolution, page 1.


6 Financial Settlement Services Brochure, “Answers to Questions you may have about Structured Settlements’ 1997 Companies Agency, Inc.

7 Id.


9 Supra at note 66, in addition to Section 104(a) of the IRS Code and IRS Revenue Ruling 79-220.

10 Id.


13 Id.

14 Id at 6.

**Editor’s Note:** This article was excerpted from Jennifer L. Gilliland’s paper Tort Claims: Alternative Solutions for Settlement of Damages in Lieu of Trial, for which she received the 2000 John Langharn Scholarship from the National Structured Settlement Trade Association. Her essay was the unanimous pick of the judges.
Why The Second Amendment?

When I first arrived at the Duquesne Law School in August of 1999, I saw a display in the library questioning the appropriateness of repealing the Second Amendment. It is my position that this would be a grave mistake, for the reasons set forth in this editorial. Let us remember the importance of the Second Amendment and count it among our most important fundamental individual liberties, one which assures the continuation of the other freedoms set forth in the Constitution.

Tragedies such as the school shootings in Littleton, Colorado bring renewed calls for increased gun control among our fellow citizens as well as our nation’s leaders. In the wake of such tragedies, it is only natural to be lured by the temptation of passing more gun control laws. Before succumbing to such temptations, let us reflect on the purpose behind the Second Amendment and why the founding fathers deemed it important enough to include it in our Bill of Rights.

William Blackstone, an authority on English Common Law, viewed the individual right to keep and bear arms as necessary to securing the three great rights. He said, “After all, what good would be a right to property, liberty, or personal security if one did not have the right to protect these rights. Indeed the great right to personal security implies a right to defend one’s life through the use of arms.” 1 A glance at the writings of the founding fathers indicates this theme was shared by many of them. 2

Thomas Jefferson’s thoughts about the rights of the citizenry can be found in the Declaration of Independence, which he co-authored: “Governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it.” 3

Noah Webster, a contemporary of Thomas Jefferson, articulated a fear similar to Jefferson’s with respect to the maintenance of standing armies, “Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed and constitute a force superior to any bands of regular troops than can be, on any pretense, raised in the United States.” 4

Sanford Levinson, a noted modern Constitutional scholar, also supports the proposition that one of the purposes of the Second Amendment is to allow citizens to resist government if necessary. Levinson continues by stating that by this reasoning, militias refer to the whole population, not a sanctioned army. 5

Some would argue that if the Second Amendment was intended to allow for an armed populace to defend itself against tyranny, that argument would not stand today in light of the sophisticated weaponry of modern armies. However, this argument does not take into account such modern day reminders as Afghanistan, where a totalitarian nuclear power was unable to prevail against a modestly armed populace who lacked nuclear weapons, armor, or air power. Thus reinforcing the concept that even in modern day civil war, an armed populace can deter government oppression and successfully defend themselves. 6

It is my opinion that the paramount reason for the existence of the Second Amendment is to allow citizens to resist the forces of government and tyranny, should the need ever present itself.

One of the purposes behind the Second Amendment is guaranteeing individuals the right to have arms for protection and self defense. As many as 2.5 million crimes each year are thwarted by...
an average United States citizen who brandishes a firearm, in most cases without a shot being fired. The right to self defense is further evidenced in a recent Supreme Court case that did not deal with the Second Amendment, but rather the duty of the state to protect the people.

Desbaney v. Winnebago County Department of Social Services involved a child abuse case where a father beat his son repeatedly and so severely that the son eventually suffered severe and permanent brain damage. The County Social Service was aware of the abuse but only took minimal steps to protect the boy short of removing him from his father's custody. Rather, the caseworker assigned only recorded the incidents but took no affirmative action to provide for the child's safety.

The mother of the boy sued the Social Agency on the grounds that they had deprived her son of his liberty interest in his bodily integrity in violation of the Fourteenth Amendment by failing to protect him from abuse they knew or should have known was occurring. The Court ruled that a duty to protect only becomes an affirmative one when the state takes a person into custody, thereby preventing him from taking care of himself. The Court stated, “While the state may not deprive individuals of life, liberty or property without due process of law, it is not obligated to ensure that those interests are not harmed through other means. Its purpose is to protect the people from the state, not to ensure that the state protect them from each other. From this line of reasoning, it can be understood that the government has no obligation to protect individuals from harm caused by the violence of fellow citizens. By inference, if we have the right to life, liberty, and property, and if the government declines to take responsibility for the protection of these rights, then it must fall upon the people to protect those rights themselves. The role of the Second Amendment then becomes apparent: individuals must protect themselves and the only means available to effectively defend against an armed criminal is for the individual citizen to be armed.

It is tempting to pass expansive gun regulation that will undermine our right to keep and bear arms in response to tragedies such as Littleton, Colorado. However, we should keep in mind the importance of the Second Amendment and its purpose as the founding fathers saw it, as well as its importance to us today in maintaining our freedoms.

Michael S. Romano is a second-year evening student. He is a former Department of Justice employee with nine years experience in federal law enforcement.

ENDNOTES


3. Id. at 7.

4. Id. at 9.

5. Sanford Levinson, Comment: The Embarrassing Second Amendment, 99 Yale L.J. 637, 646, 647.


9. Id. at 41.


11. Id.


13. Id. at 118.


15. Id.


17. Id.


19. Id. at 202.


24. Id. at 850.

25. Id. at 851.

26. Id. at 851.

27. Id. at 852.

Do Right-to-Carry Laws Deter Violent Crime?

Over the past year, the gun control debate has increasingly caught the attention of America, as well as Pittsburgh. John R. Lott, Jr., senior research scholar in the School of Law at Yale University, posit that right-to-carry laws ("RTC") deter violent crimes and have no effect on the number of accidental deaths. This theme is pursued in greater detail in Lott's book, MORE GUNS, LESS CRIME, where he claims that "[c]riminals are motivated by self-preservation, and handguns can therefore be a deterrent."1

In order to support this hypothesis, Lott, in his own words, compiled "the most comprehensive data set on crime yet assembled,"2 using Uniform Crime Report Data, state-level gun permit data, and several other sources, in order to arrive at this conclusion.

Lott's research shows that the rate of violent crimes, including murder, rape and robbery, drops when gun permits are more easily accessible. A concurrent effect to this drop in violent crime occurs in the form of an increase in some levels of property crimes, including larceny and auto theft. But should Lott's research and statistics be taken at face value?

In order to understand the opposite side of the argument, I called upon Professor Daniel Nagin, the	

Teresa and H. John Heinz III Professor of Public Policy at Carnegie Mellon University. Professor Nagin, in collaboration with Dan Black, wrote Do Right to Carry Laws Deter Violent Crime? an article that also appeared in The Journal of Legal Studies. Professor Nagin, a critic of Lott's research, spoke with JURIS Mustard results could be driven by a single state for which their model does a particularly poor job of fitting the data. As it turns out, one such state is Florida. With the Muriel boat lift of 1980 and South Florida's thriving drug trade, Florida's crime rates are quite volatile. Further, 4 years after its 1987 passage of the RTC law, Florida passed several other gun-related measures, including background checks of handgun buyers and a waiting period for handgun purchases.3

Nagin and Black conclude that "without Florida in the sample, there is no detectable impact" for the two crimes that, according to Lott, account for 80 percent of the social benefit of RTC laws.4 Another important distinction in the research of Lott/Mustard and Nagin/Black is the source of their statistics. I asked Professor Nagin to comment on the use of larger counties, i.e. those with a population of at least 100,000, as opposed to Lott's methodology of using every county in the United States. "Both methods are legitimate," Professor Nagin stated, "However, large counties are more desirable." The reason for this is two-fold.

Nagin believes that large counties are better indicators of reductions, as smaller counties have less overall numbers of crimes. In addition, large counties do not have what Nagin terms "no-event" problems, whereas small counties may have no reported certain crimes for
a crime category, such as rape, thus creating an undefined number for that category. Nagin believes research focused on large counties can therefore ensure more homogeneity. When asked why he used populations of 100,000, Professor Nagin said it was a “judgment call” as counties with at least this number of people avoided the “no event” problem.

Given the fact that his findings contradict Lott’s hypothesis, I asked Professor Nagin to comment on whether Lott’s research was believable or outlandish. “No, it’s not out-

landish, Nagin responded, “it is just not nearly as firm as his writings suggest. That is to say, you could not build public policy on it.”

My final question to Professor Nagin was in regard to the Baumhammers and Taylor shootings of last Spring. Considering Pennsylvania’s right-to-carry law and Lott’s hypothesis regarding gun licensing, I asked Nagin if he felt these two shootings could have been prevented if more private citizens owned handguns. Professor Nagin noted the probability that these two suspects “have serious mental disorders” and said it’s then essential to ask whether or not such individuals are likely to be deterred by the potential of encountering a privately armed citizenry. He suggested that individuals with mental disorders are not likely to be deterred by the fear of encountering someone else with a gun. If armed private citizens had confronted either of these subjects, we must also consider the possibility that a gun battle might have ensued, possibly harming even more people, said Professor Nagin. Questions regarding the possible outcome of such a situation abound: could armed citizens have stopped these crimes? Would such citizens have the training to handle themselves and to shoot straight in such a stressful situation?

The “more guns, less crime” theme has become central to the contemporary handgun debate. Before coming to a conclusion on such an important public policy issue it is important to examine the research of Lott and Mustard in light of the reanalysis performed by Nagin and Black. The more objective the approach, the closer policy makers will be to a real solution.

John E. Egers, Jr. is a second-year day student. He hails from Washington, Pennsylvania, and has a BA in Criminal Justice, Summa Cum Laude, from Edinboro University of Pennsylvania.

ENDNOTES
1 John R. Lott and David B. Mustard, Crime, Deterrence and Right-to-Carry Concealed Handguns, 26 J Leg Stud 1, 12 (1997).
2 Lott p.5
3 Lott p.6x
Will the Death Penalty be Executed?

DO YOU FAVOR OR OPPOSE THE DEATH PENALTY?
It’s a tough question, and one that has always been controversial. Currently, both international and internal pressures are forcing federal and state governments to reexamine the necessity of the death penalty and institute possible reform. About four years ago, the American Bar Association issued a statement that executions should be stopped until a greater degree of fairness and due process could be achieved.1 A CNN/USA Today/Gallup Poll taken in June of 2000 showed that only 51% of people believe the death penalty is applied fairly and 80% believe that an innocent person was executed in the U.S. in the past five years.2 Other polls indicate that two-thirds of Americans favor a suspension of the death penalty while questions concerning whether or not it is fairly applied are resolved.3

Illinois helped set the stage for death penalty reform when the governor declared a moratorium on executions a year ago. Now, at least seven other states will consider moratoriums or abolishing the death penalty during their legislative sessions.4 On a larger scale, last year former President Bill Clinton ordered a Department of Justice study of the federal death penalty.5

There are currently 37 states with a death penalty.6 Several states, including Illinois, Arizona, Nebraska, North Carolina, Maryland, and Indiana, have launched capital punishment studies examining such issues as the quality of defense lawyers and the general functioning of the death penalty.7 Some think these studies were implemented in response to the number of wrongly convicted inmates who have been freed because of DNA testing.8 But, according to a Death Penalty Information Center study, only ten out of the 93 men released from death rows across the nation since 1973 are included among those freed because of DNA testing.9 So while DNA testing may exonerate some who have been wrongly imprisoned, it still may not be enough to save others.

What other safeguards are there against executing the wrongly convicted? States are considering the possibilities. Illinois is pondering legislation that would require pretrial reliability hearings before prosecutors could use jailhouse informants as witnesses.10 No other U.S. state has such a law, although some give the jury instructions suggesting that they use caution in considering such testimony.11 Virginia is working on other areas ripe for reform such as defining when evidence that’s been uncovered after conviction should be considered and whether there should be a relaxation of time limits for discovering exculpatory evidence.12 Will these types of reforms be enough to stop an innocent person from being sentenced to death?

There are plenty of other reasons more studies of the death penalty are needed. For one thing, there is a continuing question as to whether or not blacks are more likely to be given the death penalty. On death row in Maryland, Blacks outnumber Whites by one of the highest margins in America: ten of sixteen condemned men are black.13 Research conducted for the Cornell Law Review disclosed that in Philadelphia black defendants were almost four times more likely than whites to receive the death penalty for similar crimes.14

It is also widely believed that the death penalty discriminates between rich and poor.15 Once a jury renders a guilty verdict for murder in the first degree, mitigating factors are weighed against aggravating circumstances to decide the defendant’s fate.16 The more financial resources available, the more probable it is that expert witnesses will be brought in to justify leniency on grounds such as the defendant’s troubled childhood and/or a low degree of likelihood to commit more harm, etc.17 A court-appointed attorney with limited resources cannot provide his client with such luxuries.18

Yet another problem is the high degree of likeliness that a defendant possibly subject to the death penalty if found guilty will be found guilty.
More than one study suggests that jurors willing to impose the death penalty are more likely to convict defendants, including a study from the University of California at Santa Cruz, indicating that interrogating jurors about their willingness to impose the death penalty often convinces them of the defendant's guilt.19

Finally, there is the complaint that the cost of prosecuting capital cases isn't worth it.20 Elaine Jones, president of the NAACP Legal Defense and Educational Fund, recently posited that the enormous funds applied to capital cases are being wasted, that the death penalty doesn't work as a deterrent, and it would be better to donate the much needed money to worthwhile law enforcement and crime prevention programs.21

Despite all these problems, it's hard to imagine that America will eliminate the death penalty. For one thing, our new president, George W. Bush, is a staunch death penalty advocate; during his time as governor of Texas he presided over 152 executions in six years.22 He commuted a death sentence only once, when questions were raised about the guilt of the prisoner.23 Outside the U.S., Bush has been referred to as having an "addiction to the death penalty"24 and America is criticized by many nations as being the last modern democracy to cling to capital punishment.25

Given his strong convictions, however, it's unlikely that outside pressures will intimidate Bush into changing his position. Besides, although support for the death penalty within the United States may be declining, it's still well over 50% and few politicians seem ready to embrace abolition of capital punishment.26 Perhaps this is because so many atrocities are committed so many atrocities are committed in our nation, where the actions of the wrongdoers appear to truly warrant imposition of the most severe penalty.

For example, in Western Pennsylvania last year, on March 1, 2000, a 39-year-old black man, Ronald Taylor, allegedly shot five white men in Wilkinsburg, killing three.27 The attack appeared to be racially motivated.28 Police found hate-filled notes written by Taylor including angry attacks on a variety of racial and religious groups.29

The very next month, on April 28, 2000, while western Pennsylvanians were still mourning the Wilkinsburg incident, another group of apparently racially-motivated killings took place. Richard S. Baumbammers, a white man, is accused of going on a shooting spree in Allegheny and Beaver Counties, leaving a Jewish woman, an Indian man, a Vietnamese immigrant, a Chinese-American, and an African-American dead,30 and leaving a sixth victim, another Indian man, paralyzed.31 These hate crimes shocked and saddened area communities. The Allegheny County District Attorney is seeking the death penalty in both cases.32

On a national level, Timothy McVeigh is scheduled for execution by lethal injection on May 16, 2001.33 McVeigh was convicted in federal court of detonating the bomb that gutted the Oklahoma City federal building six years ago, killing 168 people, including 19 children, and injuring 500 others.34 The entire country was shaken that day.

In cases where guilt appears certain, do people who have been convicted of cruelly taking so much from others deserve to live? Do you favor or oppose the death penalty? It's a tough question, indeed.

Rebecca Keating Verdone is a second-year day student. She is Assistant Senior Editor of JURIS, SBA Day-Division Vice President and a student representative to the Law School Alumni Association.

ENDNOTES
2 Id.
3 Id.
5 Id.
8 Id.
11 Id.
12 Masters at B01.
15 Id.
16 Id.
17 Id.
18 Id.
19 Keidan, at E-1.
20 Herbert, at 23.
21 Id.
23 Id.
25 Keidan, at E-1.
26 Mills, at 1.
27 Roddy, Dennis B., DA To Seek Death For Taylor; Suspect Accused of Killing 3 in Wilkinsburg Shooting Spree, Pittsburgh Post-Gazette, Sept. 26, 2000, Local; at B-1.
28 Id.
29 Id.
31 Id.
33 Willing, Richard, To Watch Him Die Or Not, McVeigh Execution Poses Hard Choice, USA Today, Feb. 15, 2001, News; at 1A.
34 Id.
Let’s Put the Assist Back into Assisted Living:
Services for the Elderly Remain in Disarray

BY BRAD M. ROSTOLSKY

THE MANNER IN WHICH THE ELDERLY POPULATION receives long-term health care services throughout the United States reveals a complex and inconsistent approach to senior care. Although the full spectrum of senior health care involves the services of physicians, hospitals, and nursing homes,¹ the emergence and growth of the assisted living industry provides a unique set of concerns to the elderly population.

As of 1993, approximately 800,000 - 900,000 seniors were cared for by an estimated 30,000 licensed and unlicensed residential care homes.² In comparison, approximately 1.5 million seniors were cared for by an estimated 17,000 licensed nursing homes.³ Although slightly outdated, these figures indicate the impact of residential care facilities on the health status of the elderly population.

Without the guidance of consistent national, state, or local regulations, residential care facilities cannot maintain a dependable approach to the care they provide. Inconsistent criteria and the lack of a uniform understanding of what the term “assisted living” means impedes the success and effectiveness of assisted living facilities (“ALF”).

A 1999 study sponsored by the United States Department of Health and Human Services (HHS) warned that “[a]ny attempt to understand assisted living and its role in providing long-term care to the frail elderly is hindered by the lack of a common definition of ‘assisted living.’ Places known as ALFs differed widely in the ownership, auspice, size, and philosophy.”⁴

Although the financing and logistics associated with the provision of health care services to the elderly population embody essential concerns to policy makers and legislators, the considerable disparity between assisted living facilities throughout the states⁵ presents an often overlooked dilemma to the consumer.⁶ The inconsistent manner in which the definition of assisted living is presented by trade associations,⁷ assisted living housing experts,⁸ and magazines and news publications⁹ underlies this dilemma.

Because assisted living is still a relatively new industry, businesses offering assisted living services and the states that license and regulate them have been unable to agree on one definition of what “assisted living” means.¹⁰ This inability to adhere to a consistent definition, coupled with a lack of regulatory uniformity and service, strains the ability of assisted living consumers to adequately judge whether an ALF will fit their long term care needs.

Throughout the United States, facilities that offer assistance to the elderly under the rubric of long term board and care¹¹ are referred to by many different titles: personal care homes, residential care facilities for the elderly, adult congregate living facilities, homes for the aged, domiciliary care homes, and assisted living facilities.¹² Often, a facility within a given state will randomly insert any one of these categorizations into the name of the facility.

Without attaching any legal significance to the classifications of long term care facilities for the elderly in the form of uniform licensing and regulation, many facilities that use the same classification will continue to provide a very disparate array of services. Because these long-term care facilities are gaining in popularity and use, a large population of seniors is being affected by the significant discrepancies in the care and services they provide.

A more uniform definition of assisted living and the services provided at ALFs would help to resolve some of the confusion surrounding long-term care for the elderly. The National Center for Assisted Living, in its Assisted Living State Regulatory Review - 2000, examined the disparity between the states with respect to certain key definitions by focusing on the following terms:

**Licensure term** – This is the term used by the states to designate long-
Definition—This definition clarifies the licensure term. Discrepancies in the following states highlight the varied services offered throughout the states for seniors that need assistance, but do not require comprehensive nursing home assistance:

- **Alabama**—“An Assisted Living Facility provides room, board, meals, laundry, assistance with personal care, and other services for not less than 24 hours per week. Assisted living is classified according number of residents.”

- **Alaska**—“Assisted Living Homes provide a system of care in a home-like environment for elderly persons and persons with mental or physical disabilities who need assistance with activities of daily living.”

- **Arkansas**—“Residential Long Term Care Facilities serve individuals with impaired functioning who do not require hospital or nursing home care and who self-administer medication.”

- **Colorado**—“Personal Care Boarding Homes are residential facilities that make available to three or more unrelated adults, either directly or indirectly through a provider agreement, room and board and personal services, protective oversight, and social care due to impaired capacity to live independently, but not to the extent that regular 24-hour medical nursing care is required.”

- **Idaho**—“Residential and Assisted Living Facilities provide 24-hour care for three or more adults who need personal care or assistance and supervision essential for sustaining activities of daily living or for the protection of the individual.”

- **Illinois**—“Sheltered Care Facilities provide food, shelter, laundry services, and personal care to residents who do not need nursing care.”

- **Pennsylvania**—“A Personal Care Home provides food, shelter, and personal assistance or supervision for four or more adults who do not need nursing home care. Residents may require assistance or supervision in matters such as dressing, bathing, diet, financial management, evacuation, and medication prescribed for self-medication.”

- **Pennsylvania**—“The facility must supervise residents, provide assistance with activities of daily living and instrumental activities of daily living, and deliver services to meet the needs of the residents. Residents are permitted to contract for services with third parties.”

- **Illinois**—“Facilities may provide general watchfulness and appropriate action to meet the total needs of residents, exclusive of nursing care. Home health agencies may provide services under contract with residents.”

- **Pennsylvania**—“The facility may provide assistance with activities of daily living and self-administered medications. Home health is permitted as per physician’s orders.”

Admission/discharge requirements—This description addresses the criteria upon which residents may be admitted and discharged from the facility. Again, the discrepancies indicate the need for uniform regulation. Note that some of the prohibited resident characteristics in the sample states below are representative of conditions that seniors will develop through the natural aging process, despite not having a need for nursing home care:

- **Alabama**—“To be admitted, residents may not require restraints or confinement; have severe senility; or have chronic health conditions requiring extensive nursing care, daily professional observation, or the exercise of professional judgment from facility staff. Residents must be discharged when care ‘beyond the capabilities and facilities’ of the facility is required.”

- **Alaska**—“There are no limits on admission; however, facilities must have a residential services contract in place for each resident. Twenty four-hour skilled nursing care may not last for more than 45 consecutive days.”
Terminally ill residents may remain
the facility if a physician confirms that
needs are being met. At least 30 days’
notice is required before terminating
a residential services contract.36

- **Arkansas** — “The facility must
not admit or retain residents whose
needs are greater than the facility is
licensed to provide. Residents must
be independently mobile; be able to
self-administer medications; be ca-
pable of understanding and respond-
ing to reminders and guidance from
staff; not be totally incontinent of
bowel and bladder; not have a feed-
ing or intravenous tube; not have a
communicable disease; not need
nursing services which exceed those
provided by a home health agency;
not have a level of mental illness or
dementia that requires a higher level
of treatment than can be safely pro-
vided in the facility; not require reli-
gious, cultural, or dietary regimens
that cannot be met without undue
burden; not require physical re-
straints, lock-up, or confinement; and
display violent behavior.”37

- **Colorado** — “A facility may not
admit or keep any resident requiring
a level of care or type of service which
the facility does not provide or is un-
able to provide, but in no event may
admit or keep a resident who: is con-
sistently, uncontrollably incontinent
of the bladder unless the resident or
staff is capable or preventing such in-
continence from becoming a health
hazard; is consistently, uncontrolla-
ibly incontinent of the bowel unless the
resident is totally capable of self care;
is totally bedfast with limited poten-
tial for improvement; needs medi-
cal or nursing services on a 24-hour
basis; needs restraints; and has a com-
municable disease or infection unless
the resident is receiving medical or
drug treatment for the condition.”38

- **Idaho** — “Residents may not be
admitted or retained if they require
ongoing skilled nursing, intermediate
care, or care not within the legally li-
censed authority of the facility. In
addition, residents who are in need of
restraints or have physical, emo-
tional, or social needs not homog-
enous with the facility’s population
may not be admitted.”39

- **Illinois** — “Residents with seri-
ous mental or emotional problems or
in need of nursing care may not be
admitted or retained.”40

- **Pennsylvania** — “Admission of
nonambulatory residents is allowed
only if the facility complies with cer-
tain additional staffing and physical
plan requirements. Residents may be
discharged if they require a higher
level of care or if they become a dan-
ger to themselves or others.”41

The following guidelines are com-
monly accepted as the "key philo-
osophical principles or tenants that dis-
tinguish assisted living: services and
oversight available 24-hours a day;
services to meet scheduled and un-
scheduled needs; care and services
provided or arranged so as to pro-
mote independence; an emphasis on
customer dignity, autonomy and
choice; an emphasis on privacy and
a homelike environment.”42 Thus, in
order to combat inconsistencies in
care, the term “assisted living” must
stand for more than general principles
of service; the leaders within the as-
sisted living industry must also agree
on a detailed expansion of these key
principles. This lack of clarity has
prompted the National Center on
Assisted Living to describe the ser-
vice offered by ALFs as a "cloudy
nexus.”43

Lack of uniformity remains a key
concern to states as they continue to
develop regulations pertaining to the
assisted living industry. Although a
majority of states had enacted legis-
lation addressing assisted living pay-
ment and regulation by 1998, "Inno-
conensus has emerged among state
policy-makers on the appropriate
regulatory model for assisted liv-
ing.”44 Across the states, the current
regulatory policy regarding assisted
living does not achieve a uniform set
of goals. While some states focus on
ensuring “distinctive environmental
features,”45 other states disregard en-
vironmental issues affecting senior
cares. Another key distinction among
state plans involves the regulation of

the housing component of the facil-
ity, as well as the service compo-

tent.46 Despite this nationwide dis-
parity among services and facilities,
some states now offer long-term care
services that were previously re-


served for the nursing home setting.47

The extension of assisted living ser-


vices to include higher levels of care
previously provided only by nursing
homes will enable assisted living resi-
dents to maintain a consistent quality
of life and allow them to “age in
place.”48

Additionally, discrepancies exist
between the states regarding the man-
ner in which medication is man-
aged at the facilities, requirements of
the physical plant, number of resi-
dents allowed per room, bathroom
requirements, staffing requirements,
and the training necessary to become
and maintain status as a facility ad-
ministrator.49 The disparity among
states in the aforementioned areas
represents an obstacle the assisted liv-
ing industry must overcome if federal
funding—similar to that provided to
nursing homes—may be considered
applicable to ALFs. “Because some
evidence suggests that assisted living
predominantly serves a private-pay
market of well-to-do elderly,”50 the
ability of the assisted living industry
to benefit seniors of all economic
groups may require federal assistance.
In order to meet the potential fund-
ing eligibility requirements of a fed-
eral plan, ALFs will have to standard-
ize the scope and definition of ser-


vices offered.

Furthermore, the development of
a standardized model for assisted liv-

ing facilities faces challenges at the
federal, state, and local levels. Fed-
eral policy barriers include housing
regulations set forth in the Ameri-
cans with Disabilities Act, the Fair
Housing Amendments Act, the HUD
232 loan program, and advertising
and marketing regulations that apply
to and protect seniors.51 State
policy barriers include licensing
regulations and procedures, medica-
tion management policies, issues sur-
rounding the care of Alzheimer’s
patients, and the Certificate of Need process.\textsuperscript{52} Local policy barriers are often found in both zoning laws and fire code regulations.\textsuperscript{53}

Pennsylvania currently classifies senior long-term care facilities as "personal care homes." The current regulations for personal care homes in Pennsylvania provide only a basic level of supervision by the state.\textsuperscript{54} Codified in the Pennsylvania Code, the regulations set forth requirements for the physical plant of the personal care home, the services provided by the personal care home, medication policies, and staffing and training requirements.\textsuperscript{55} In response to Pennsylvania's current regulation of personal care homes, House Bill 1930\textsuperscript{56} was introduced to the Pennsylvania General Assembly on September 25, 2000. The purpose of the bill is to "[provide] for the licensure and regulation of adult living residences, conferring power and duties on the Department of Public Welfare; and providing for penalties."\textsuperscript{57}

Acknowledging the rapid growth of the assisted living industry in Pennsylvania, HB 1930 recognizes that "it is in the best interest of all Pennsylvanians that a system of licensure and regulation be established for assisted living residences ...."\textsuperscript{58} The bill adds a second level of care available to elderly who are not yet in need of nursing home care. In addition to the licensure of personal care homes, the bill now defines and encompasses "assisted living," "assisted living residence," and "assisted living services."\textsuperscript{59} "Personal care homes," in their current form, are relegated to a "Category I license," while the newly defined "assisted living residences" receive "Category II license[ure]."

Unfortunately, this bill is only a starting point for the successful development of assisted living facilities in Pennsylvania. Although it provides basic definitions of assisted living services, the bill stalls when it merely indicates that the "department [of Human Welfare] shall promulgate rules and regulations for adult living residences ...."\textsuperscript{60} The introduction of HB 1930 presents two challenges to the development of substantial improvement. First, the bill needs to become law. Second, even if it becomes law, the bill requires subsequent rules and regulations.

Uniform standards must be developed in order for assisted living services to maximize potential benefits to the elderly population throughout Pennsylvania, not to mention the rest of the country. Although there remains no consensus as to what this standard should include, a collaboration between legislators and industry leaders may spark the necessary changes. The long-term health care options available to seniors cannot remain disjointed and inconsistent; as the "Baby Boomer" generation reaches retirement-age, addressing the issues surrounding assisted living care will become essential to legislators, industry leaders, and the elderly population. Because long term care insurance and long term care provider tax cuts are at a fledgling level of development, the children of today's seniors may not be able to effectively provide for the long-term care of their parents without assisted living services. Reliable and consistent assisted living services must become available to the elderly population in order to align available care with long term needs.

Brad M. Rostolsky is a second year day student. He has a Masters in Health Care Policy from Emory University and is a member of Law Review (Associate Recent Decision Editor), the Trial Moot Court Honor Society; and the Health Care Law Society.

\textbf{Endnotes}


Between 1990 and 2030, the U.S. elderly population is expected to double to a total of 65 million people, an estimated 7.5 million of whom will be frail elderly. Costs of nursing home care for the elderly, both in public and out-of-pocket costs, are estimated to grow to more than $100 million annually by 2020. The special combination of housing and non-medical services that characterize assisted living is identified with greater independence and dignity for the frail elderly and is better able to address the challenges and constraints of aging. Because of its unique physical and philosophical characteristics, assisted living may be a preferred living arrangement for the elderly and, at least in prime - a less expensive alternative to nursing homes.

2 Id., at 14. These estimates are extrapolated from the data of a 1993 survey that included data from ten states. The study's reference to "residential care home" includes any facility embraced by the term "board and care" home. Therefore, term "residential care home" reflects a broader meaning than that usually associated with "assisted living facility."

3 Catherine Hawes, at 14.


5 The critical differences between services offered throughout the United States are heightened by similar disparities within the states themselves.

6 In the context of health care services, specifically those available to the elderly population, it is critical to include within the definition of "consumer" the elderly population for which the health care service is provided, as well as to include that population's children and caretakers; Family members often incur the responsibility of investigating and paying for long term health care services. The failure to provide information relating to long term care options to either of these groups will thwart the ability of the elderly population to take full advantage of many viable long term care options.

7 National Study of Assisted Living, at 2-2 - 24. The following definitions are those of formal associations that focus on the long term health care needs of the elderly population:

\textbf{American Association of Homes and Services for the Aging (AAHSA)} - Assisted living is a program that provides and/or arranges for the provision of daily meals, personal and other supportive services, health care, and 24 hour overnight to persons residing in a group residential facility in accordance with activities of daily living and instrumental activities of daily living. It is characterized by a philosophy of service provision that is individualized, flexible, personalized, and maximizes consumer independence, choice, privacy and dignity.

\textbf{Assisted Living Facilities Association of America (ALFA)} - Assisted living is a special combination of housing, supportive services, personalized assistance and health care designed to respond to the individual needs of those who need help in activities of daily living. Supportive services are available, 24 hours a day, to meet scheduled and unscheduled needs, in a way that promotes maximum independence and dignity for each resident and encourages the involvement of a resident's family, neighbors, and friends.

American Association of Retired Persons (AARP) - A group of congregate living arrangements that provide a room and board as well as social and recreational opportunities; assistance to residents who need help with personal needs and medications; availability of prearranged overnight or more
8 Id. at 2-4 - 2-5. The following definitions are those of assisted living researches and experts:

Rosalie A. Kane - Assisted living is any group residential program that is not licensed as a nursing home, that provides personal care to persons with need for assistance in the activities of daily living (ADL), and that can respond to unscheduled need for assistance that might arise.

Donna Yee - Assisted living is defined ... as programs that offer congregate housing and supportive services with explicit or implicit commitment to respond to individual preferences for help with health-care access, personal and household maintenance.

JoAnn Hyde - Assisted living is a service-rich residential environmental designed to enable individuals with a range of capabilities, disabilities, frailties and strengths to reside in a homelike setting as long as possible.

9 Id. at 2-5 - 2-9. The following definitions are those presented in various magazines and news publications:

Wall Street Journal - A new style of housing for frail elderly people who don’t have serious medical problems.

New York Times - Residents live independently ... while receiving 24-hour supervision, assistance in daily living, meals, housekeeping, transportation, and recreational programming. Minimum health care or nursing assistance is provided as needed.

New York Times - Hotel style rental project for elderly people who may need help with daily chores but do not need constant medical care.

Washington Post - Bed and breakfast like homes provide service citizens with shared or private apartments, meals in a communal dining room, daily housekeeping services and limited medical care.

PR Newswire - Assisted living is an alternative lifestyle for individuals not requiring the medical surroundings of nursing home care.

10 Catherine Hawes, at 4.

11 Id. at 13.

Other than nursing homes, the most common form of residential setting with services for people with disabilities is the entity generally known as "board and care" homes. ... Board and care" refers to nonmedical community-based residential settings that house two or more unrelated adults and provide some services such as meals, medication supervision or reminders, organized activities, transportation, or help with bathing, dressing, and other activities of daily living.

12Id. at 13.

13Alabama.

14Alaska.

15Arkansas.

16Colorado.

17Idaho.

18Illinois.

19Pennsylvania.


22Id. at 5.

23Id. at 8.

24Id. at 16.


26Id. at 54.

27Id. at 11.

28Id. at 1.


30Id. at 5.

31Id. at 8.

32Id. at 16.

33Review 2000, at 17.

34Id. at 55.

35Id. at 1.

36Id. at 2-3.

37Review 2000, at 5.

38Id. at 8.

39Id. at 16.

40Id. at 17.

41Review 2000, at 55.

42Id. at 15.

43Id. at 17. Furthermore, the Myers Research Institute suggests that "the degree to which this model predominates in the industry is unknown." Id.

44Catherine Hawes at 19. Specifically, "30 states had passed legislation or issued regulations, and 22 states had licensing regulations using the term 'assisted living.'" Additionally, "32 states [as of 1998] reimburse or plan to reimburse services in assisted living or board and care facilities as a Medicaid-covered service."

45Id. at 19. For example, the state could specifically require "that assisted living facilities provide apartments with kitchens." Exemplifying resulting discrepancies in the facilities, bedrooms can range from single bed/private full bath (42%) to semi-private bed/4 people share a bath (8%). Regulations that disregard environmental features do not focus on privacy issues; problems with resident privacy can certainly result in an unsatisfactory living experience.

46Id. Some states choose to only regulate the service component. This allows for a potentially large inequality between facilities across the states. Although this disparity may remain unnoticeable between facilities in Texas and Pennsylvania, the disparity would be of potentially great concern when comparing facilities near the border between two states.

47Id. Through the employment of cost-effectiveness studies, states have attempted to include additional long-term care services within assisted living facilities. Some states have "created new licensure categories and expanded Medicaid waiver programs to include coverage of these additional services."

48"Aging in place" refers to allowing a senior to continue through the aging process throughout the provision of long-term care. Although nursing homes are adept at providing the additional services that some assisted living facilities may begin to provide, a nursing home provides a more institutionalized and regimented atmosphere than assisted living facilities.

49Id. at 11.

50Catherine Hawes, at 17.


52Barbara B. Manard, at 11-13.

53Id. at 13-14.


55State Assisted Living Policy: 1998 (U.S. Department of Health and Human Services), June 1998, at 119. The services and scope of care provided in a personal care home and the admission/discharge requirements have been detailed above. The staffing and training requirements are fairly comprehensive and require, in part, that administrators complete 40 hours of Department of Human Welfare approved training in areas such as first aid, fire prevention, personal hygiene, nutrition, and financial record keeping and budgeting. State Assisted Living Policy, at 119.


57H.B. 1930.

58Id.

59Id.

60Id.

61Assisted living residence – A residential setting that: (1) Offers, provides or coordinates a combination of personal care services, recreation and social activities, 24-hour supervision and assisted living services, whether scheduled or unscheduled and that coordinates other health related services for consumers. (2) Has a supportive service program and physical environment designed to accommodate changing needs and preferences. (3) Has an organized mission, service programs and a physical environment designed to maximize consumer dignity, autonomy, privacy and independence and encourages family and community involvement. (4) Provides that costs for housing and services are independent of one another and that provides consumers with the ability to choose their service provider and the services to be provided. (5) Has a goal of fostering aging in place and promoting consumer self-direction and active participation in decision making while emphasizing consumer privacy and dignity.

61H.B. 1930.

62Id.
Preview:
The Cyril H. Wecht Institute Of Forensic Science & The Law

BY: DEBORAH L. KUTZAVITCH AND N. S. KOERBFI.

This article is based on interviews with Dr. Cyril H. Wecht and Duquesne University School of Law Associate Dean John T. Rago, assorted material from the October 2000 Forensic Science & The Law Conference held at Duquesne University and additional outside sources. JURIS would like to extend special thanks to Dr. Frederick W. Fochtman, Director and Chief Toxicologist, Allegheny County Coroner’s Office, Forensic Laboratory Division, Joseph T. Dominick, Chief Deputy Coroner of Allegheny County, and their respective staffs for their time and assistance in completing this article and in obtaining the accompanying photographs.

Introduction

Over the past several decades, interest in forensics has been heightened by a phenomenal combination of events—the utilization and application of DNA testing in the early 1980’s, the increased broadcast of television series and movies dealing with forensic science, the availability of books, both fiction and non-fiction, written about the O.J. trial, the Jonbenet Ramsey case, and other famous cases, the advent of new technologies—all have helped spur a dramatic increase in forensic science. “You take any given day or period of time, and you look at news media reports of what’s happening in the world, and you will find references directly and indirectly to the forensic sciences,” Dr. Wecht told JURIS.

There is an “incredible desire for people to know more about forensics,” said Dr. Wecht, “people cannot seem to get their fill—they are constantly calling and writing to inquire about the programs available concerning forensics. Therefore, the need to educate people to work in the field is really very great, and there are insufficient numbers of people who are properly trained.”

Currently, there’s very little formal training in the area of forensic science, especially not once people have gone out into their respective fields, said Associate Dean John T. Rago, but certainly not at the undergraduate or graduate level. Forensic science is gaining widespread acceptance and support in the legal community for its ability to help illuminate complex legal issues and its capacity to uncover valuable pieces of evidence.

Duquesne has stepped to the forefront of the forensic science and the law movement by establishing The Cyril H. Wecht Institute of Forensic Science & the Law—a one-of-a-kind endeavor that will offer an eleven-month Institute Certificate Program beginning this fall. Also starting this fall is a five-year program that will enable students to earn a Master of Science degree in Forensic Science & Law. The masters program is closely affiliated with the Institute, and eventually the Institute plans to be involved with masters programs at Duquesne related to forensics studies in related areas such as nursing, psychology, and pharmacy, among others.

Named for Dr. Cyril H. Wecht, Allegheny County Coroner, world-renown pathologist and adjunct professor of Law at Duquesne, the Institute is designed to identify new methods and approaches for achieving civil and criminal justice through an interdisciplinary approach. What is particularly unique about the Institute is that it encourages a collective understanding of what science can do and how the various professions who meet at the juncture of forensic science and the law can help each other. Dr. Wecht sees the Institute as a golden opportunity for Duquesne, Pittsburgh and the surrounding area to capitalize on the critical need for trained professionals in forensic science and the law.

“The University generally, and the law school specifically, have recognized that the level of training and academic opportunities for understanding forensic science
in a variety of disciplines just plain doesn’t exist,” said Dean Rago. “Notwithstanding the tremendous talent that this region has in the sciences, in law and in law enforcement, we’ve never put it all together. It’s not a small effort to begin that process.”

Rago believes that the character of the institution and the quality of the people involved, led by Dr. Wecht and the people he’ll bring to the Institute, will allow Duquesne to make an immediate and substantial impact on the application of sciences and to criminal and civil proceedings, at least from the point of view of lawyers. “There’s probably other applications out there that we’re not even thinking about right now,” Rago said, “but we think we need to begin that discussion. We have all the tools that we need.”

The Forensic Science & The Law Conference — October 2000

The idea for the Institute originated with Dr. Wecht just over a year ago. “We really started talking in earnest about the Institute last March,” said Dean Rago, so just to test the water we held the fall Conference, and the response was overwhelming, to say the least.”

Sponsored by Duquesne University and co-sponsored by the Allegheny County Coroner’s Office, the Allegheny County District Attorney’s Office, the Allegheny County Public Defender’s Office and the Pittsburgh Institute of Legal Medicine, the October 2000 Forensic Science & The Law Conference was held over two days and was by all accounts a great success. Conference faculty was composed of a cast of medical and legal luminaries including Leslie Abramson, Esq., Michael Baden, M.D., Johnnie Cochran, Esq., Dr. Henry Lee, Barry Scheck, Esq. and Dr. Michael Welner. Dean Rago said the Institute will likely build a strong CLE series around continued annual conferences of this caliber.

Forensic Science: A Brief History

The origins of forensic science date back to the 6th century Chinese doctor, Hsu Chich Ts’i, who wrote a treatise on the subject of legal medicine. Other prominent figures in the field of legal medicine include Alphonse Bertillon, who developed the system of anthropometry, a system of personal identification based on a series of body measurements, and William Herschel and Henry Faulds, whose early efforts led to the employment of fingerprints as a personal identification device. August Vollmer, chief of police in Berkeley, California, set up the first laboratory in a police department in the United States in 1923, and Edward Oscar Heinrich and Dr. Paul L. Kirk, fostered the development of academic programs and crime laboratories.

According to Dr. Michael M. Baden, Forensic Pathologist and Director, Forensic Science Unit, New York State Police, it wasn’t until the 19th century that forensic science “first reared its intelligent head — and it was at Harvard, around 1840.” The most famous crime of the day was the murder of Dr. Parkman, a professor at Harvard who was killed by another Harvard professor, Dr. Webster the chemistry department. “The case was solved because they found fragments of teeth and jawbone in Dr. Webster’s chemistry kiln that were identified by Parkman’s dentist,” Baden told the audience during his presentation at last October’s Conference.

Jumping ahead to England in 1888, Baden next discussed the famous Jack the Ripper case, which he compared to the O.J. Simpson case “because it raised consciousness and awareness of the deficiencies in the criminal justice system.” Marie Kelley, Jack the Ripper’s last victim, was brutally murdered — her abdomen was cut open, and half a kidney was removed and sent to the London Museum. Authorities felt it had to be a doctor or a butcher who did it — somebody who knew how to cut people open — but the murder went unsolved. Queen Victoria was very upset with this state of affairs, and it was an embarrassment for the London police. But the failure to solve Jack the Ripper led to the development of a specialized force in London for homicide investigation – the detective squads began — up until that point the cop on the beat did everything, Baden said. It also led to the development of the first real forensic pathologist devoted to the criminal justice system.

Again jumping ahead, according to Baden, there was “more attention paid to motive, to opportunity, to trace evidence, to the crime lab,” during the seventies and eighties. “DNA brought a big explosion to the value of trace evidence in the forensic sciences around 1989, and then the Simpson case happened in 1994,” Baden said. “If you had to look at the silver lining to the O.J. case,” commented Dean Rago, “it really brought to life how forensic science works and popularized it and made it a part of our culture.”

Challenges in the Practice and Application of Forensic Science

In practice, forensic science draws upon the principles and methods of all the traditional sciences, such as physics, biology and chemistry. Yet there are important differences between forensic science and the traditional sciences, due to the fact that forensic science
has some unique objectives, such as using evidence to prove a person's guilt or innocence, and to its continuous and necessary interaction with the legal system.\(^2\)

Unfortunately, this interaction is often marked by conflict, misunderstanding, and sometimes—outright hostility. Robert K. Tanenbaum, former Chief Assistant District Attorney in both Los Angeles and New York, told attendees at the October Conference that the relationship that exists between medical examiner and prosecutor is often strained and governed by political agendas. Although they should be working for a common goal, finding the truth, prosecutors and medical examiners often function as "two independent entities—not a team" said Tanenbaum.

The Institute, through its interdisciplinary approach to these problems, will provide an ongoing forum for both sides to address their disagreements over the issues. Dean Rago sees the Institute as a forum for helping to resolve some of the traditional conflicts between doctors and lawyers, "although you never really will quite eliminate the battle between the experts," he said, "to a large extent this puts experts on the same page. You will be eliminating a lot of the negative aspects of the adversarial proceeding."

Another significant problem in the field of forensic science is lack of training. Dr. Wecht believes that the role of the forensic scientist is clear—"the professional must be highly skilled in applying the principles of a variety of disciplines, including both the physical and natural sciences, to the analysis of all types of evidence."

In addressing why there are so many mistakes in death penalty cases, Tanenbaum told the Conference, most will be investigated, as with President Kennedy, by pathologists or coroners who have no training to conduct that investigation.

People say, "this can’t just be the normal mistakes that are made every day but they are the normal mistakes that are made everyday," Tanenbaum said, "there’s a long way to go in this country to educate the medical profession, let alone the public, as to the proper ability to determine causes of death, collect trace evidence, to look for trace evidence...autopsys are being done mostly by non-forensic pathologists—there is great loss of evidence."

This lack of consistent training extends to other medical professionals and to law enforcement, as well. "Certain hospitals shy away from wanting their staff, particularly in the emergency rooms, to get involved in this sort of thing, because they're more focused on treatment. And I think, as a practical matter, they don't want to be dragged into any litigation, whether it's criminal or civil," Dean Rago told JURIS, "but the reality is that hospitals are at the juncture of that event and they need to be informed of what they can be doing to help us—to help all of us."

"Law enforcement suffers with the same deficiencies—there are many wonderful cops out there but they’re not aware of investigation techniques that continue to unfold, particularly in the forensic science area," Rago continued, “certainly they’re aware of custodial issues, chain of custody and the like. But maybe they can use refresher courses on crime scene processing or crime scene reconstruction or certain evidentiary issues with respect to how to maintain or discover or develop certain evidence...a lesson in how medical science is applied to this country’s criminal laws.

Dr. Wecht has guided my audiences through our coverage of crimes ranging from the Kennedy assassination, to the O.J. Simpson trial, to the Jonbenet Ramsey murder mystery. And whether or not my audiences knew it, they were getting an education in forensic science—a lesson in how medical science is applied to this country's criminal laws.

Unlike most other expert testimony, which has the disturbing tendency, I think, to favor the side paying the expert's bill, forensic science removes much of the bought and paid-for opinion, exchanging it often for hard, harsh, objective scientific fact. Of course, the findings are a lot more reliable when someone like Cyril Wecht is doing the research. But without a doubt, the ever-evolving, ever-improving field of forensic science is a key factor in the administration of justice in deciding guilt or innocence, in deciding even who lives or who dies.

As Dr. Wecht has said, the future has arrived for forensic science, but the problem is the lack of enough professionals—true professionals—people with the skills, the energy, and the imagination to integrate the modern day high-tech knowledge in science and medicine with traditional Sherlock-Holmesian intuition. Duquesne University School of Law's new Institute of Forensic Science and the Law in Cyril's honor.

\[\text{Introductory remarks of Geraldo Rivera to the October, 2000 Forensic Science & The Law Conference:}\]

I've known Cyril Wecht for most of my 30-year broadcasting career, and my respect for him has only grown over the decades. His skills as an attorney, as a pathologist, as a medical examiner are legendary, and it is all together appropriate, I think, that Duquesne University is recognizing his vast contributions by dedicating its new Institute of Forensic Science and the Law in Cyril's honor.

Dr. Wecht has guided my audiences through our coverage of crimes ranging from the Kennedy assassination, to the O.J. Simpson trial, to the Jonbenet Ramsey murder mystery. And whether or not my audiences knew it, they were getting an education in forensic science—a lesson in how medical science is applied to this country's criminal laws.

Unlike most other expert testimony, which has the disturbing tendency, I think, to favor the side paying the expert's bill, forensic science removes much of the bought and paid-for opinion, exchanging it often for hard, harsh, objective scientific fact. Of course, the findings are a lot more reliable when someone like Cyril Wecht is doing the research. But without a doubt, the ever-evolving, ever-improving field of forensic science is a key factor in the administration of justice in deciding guilt or innocence, in deciding even who lives or who dies.

As Dr. Wecht has said, the future has arrived for forensic science, but the problem is the lack of enough professionals—true professionals—people with the skills, the energy, and the imagination to integrate the modern day high-tech knowledge in science and medicine with traditional Sherlock-Holmesian intuition. Duquesne University School of Law's new Institute of Forensic Science and the Law marks, I think, a giant step toward that necessary and very important goal. I congratulate Dr. Cyril Wecht, the University and everyone involved in this very invaluable endeavor.
or on profiling in the area of forensic psychiatry."

A perfect example of just such a situation would be the sort of work that Pennsylvania Senate Bill 589, which provides for post-conviction DNA testing, would require of local district attorneys and police departments if it becomes law. As technologies become more advanced and these kinds of laws become more popular, both prosecutors and police will need to revisit whose responsibility it is to maintain certain evidence, how long that evidence should be kept and in what fashion, Pennsylvania Senator Jay Costa told JURIS. The Institute is designed to provide practical training with respect to these kinds of issues in addition to creating a forum for open discussion among all parties involved: police officers, prosecutors, and defense counsel.

According to Barry Schneck, there are some 300,000 kits on shelves nationwide that contain physical evidence of one sort or another that, theoretically, was not effectively used in a criminal trial. "The question," says Rago, "is what methods are we going to employ to get to those? It's not a matter of how do we get to the evidence, though in some cases it is, but how do we determine what cases to pursue? Whether it's work through the Innocence Project or private counsel representing someone in a post-conviction petition, you have to ask yourself, what criteria am I following before I can persuade a judge? Or if you're the court, what criteria do I follow to authorize this kind of action? What rights exist?"

**If You Build It They Will Come**

The Institute has stirred unprecedented enthusiasm both locally and nationally, in the forensic science community and beyond. "I think the most remarkable thing about it was that within hours of putting the five-year program on line they were admitting people. Within hours! And I don't know what the enrollment is but I understand it's pretty robust," said Dean Rago. The Law School is in a unique position to house the Institute as a result of Duquesne's long-standing relationship with Dr. Wecht and the strength of its practice in trial advocacy.

Dr. Wecht's vision for the Institute encompasses two distinct programs—a certificate program and a masters program. The certificate program is designed for those individuals who are active in a particular professional field, either directly or tangentially related to medicine. Dr. Wecht is particularly excited about Duquesne's creation of the five-year entry level program for a Master of Science in Forensic Science & Law which begins this fall.

Members of The Institute's Advisory Board include prominent criminals, lawyers and doctors, including Henry C. Lee, Criminalist and Director of the Connecticut State Police Forensic Science Laboratory, Barry C. Schneck, professor of law and author, and Dr. Michael Weiner, Chairman of The Forensic Panel and professor of psychiatry in New York.

**The Certificate Program**

The twelve-month Institute Certificate Program is basically a five-module program that a subscriber can enter at any point. Admissions are rolling and each module will treat a particular interest. Though it will not lead to licensure of any kind, Rago told JURIS, it will certainly provide an advantage to participants because they will be exposed to things, such as witnessing lab testing or serology, that their peers haven't seen. Recruiting for the Certificate program will begin in mid April, with a target enrollment of forty. Response has been very strong, said Rago, the Law
School has received over 600 inquiries so far.

Dr. Wecht believes the Institute Certificate Program will attract candidates interested in pursuing careers as law enforcement officers, nurses, attorneys (practicing in the areas of personal injury, defense and criminal law), prosecutors, crime scene investigators, judges, counselors and related professionals working for rape and drug abuse centers, physicians (working in emergency rooms and trauma units), and those generally interested in expanding their knowledge in this exciting and growing field.

The two largest potential groups of likely prospects for the certificate program include law enforcement officers and nurses. Law enforcement officers are more and more expected to recognize, identify, properly preserve and collect forensic scientific evidence even though they are not homicide or rape detectives. Further, a younger law enforcement officer who can include a recognized certificate in forensic science on his or her resume is a more attractive candidate for promotion.

Nurses have become more and more involved in the justice system on the civil side, including working for personal injury firms, and on the criminal side working for the public defender's office, prosecutor offices and firms providing criminal defense work. Obtaining a certificate in forensic science will make them more suitable, attractive candidates, expand their horizons and broaden their knowledge. Of course, two other potential pools of candidates include civil and criminal attorneys and physicians.

"In my opinion," said Rago, the biggest attraction of the Institute Certificate program is that it will offer professionals the opportunity to sit down with other professionals who handle the same crisis and the same injured parties, in both a civil and criminal context. Right now, we don't communicate with one another, we don't understand collectively how science can help all of us, not to benefit the government or to benefit the defense, or the defendant or the victim but just in our collective pursuit of the truth. Science is invaluable in that process, and the more we familiarize one another with what science can do, the sooner we can begin to set up societies between or among us and start collaborating."

"These are exciting times if you're a practitioner who has a little understanding of science, and if you don't, that's what this Institute is designed to do. Though you may not want to come and listen to a discussion of the fundamentals of evidence, when you're ready to talk about ballistics testing, or blood testing, or anthropology, psychiatry, psychology, all of the various forms of forensic treatments, you may subscribe to come hear lectures, either through the annual series or the smaller sessions—this will be an opportunity not only to listen but to interact with others. We plan on bringing in Scheck, Baden, Lee, Welner, and many others serving on the advisory board."

The Master of Science in Forensic Science & Law

"The MA program is literally designed to give people formal training that they'd typically get on the job," said Rago. "Students who study in the Masters program will not only be specifically trained to work in various fields, they will be in a position to assume management roles in forensic laboratories across the country. Having law professors interacting with this truly makes it, to the best of our knowledge, a one-of-a-kind program in the country," said Rago. "Professor James E. Starrs, of George Washington University, has taught in this area for the better part of thirty years. He has joint appointments with other graduate schools, but his law school does not actively participate in the interdisciplinary approach, so when he saw what we were doing he said the law school has really come across something here that is truly unique."

"We need to nurture it—and we need to be dynamic in our nurturing, we're still in an embryonic stage because of planning, but the Institute will spur all sorts of things." Rago said. "In addition to giving people the tools that they need, we may be able to serve one way or another as a think tank for legislators who want to come up with policy with respect to the use of this kind of evidence, because it's
not going to go away. The use of DNA evidence is one thing, but what about the use of physical evidence generally? What do you do with blood evidence that wasn't used at trial when there are later allegations that a scientific investigation could have been done? Can you work from photographs? You have to look at all of the cases sitting there in inventory now."

The Future

The third program to be involved with the Institute is a two-year masters degree program. "I'm hopeful that the University does something with that within the next two years or less," Rago told JURIS, "because there are people currently in law school with science backgrounds who previously felt they were limited to pursuing a career in health care, but this is precisely what they want to do—they want to work in a lab—they want to work on investigations."

"This Institute should serve as an impetus, if nothing else, to other academic developments institution wide," Rago said, "so if nursing comes on line with a graduate program or if psychology comes on line with a graduate program tied to forensics, and the law school can be a part of that, we're excited about it. It's not a traditional use of law school resources—it really does bring other curriculums into the fold."

"For the Law School curriculum," said Rago, "we will be introducing a forensic science and the law course. But our students won't be taking courses in the Institute. They can sit in, they can subscribe, but the courses won't be available to law students for academic credit. My hope for law students is that when this two year program comes on line, that it will be available to them as a joint-degree opportunity because it would give our students another career option that I guarantee you no other students are getting right now."

"With the right focus, the right funding and the right energy, I think Duquesne can be a leader in area this almost instantly," Rago said, "because of Dr. Wecht, the caliber of the people his name brings to the program, the caliber of people here in the city, and the level of interest that we have as a University. Nursing, sociology, psychology, pharmacy, chemistry, biology, our environmental sciences—all of these disciplines can coalesce—and we can really come up with something that is special here. I fully suspect that the curriculum, much like our constitution, is going to be a living document, and I think it will change as we get better at this and further understand what we can do. A lot of folks are excited about it."

Institute faculty will, of course, play an important role in providing a first-rate, quality program. Dr. Wecht is "very pleased and truly heartened by the fact that the faculty at Duquesne Law School have enthusiastically embraced the program and voted to support it in every way." Several of the full-time faculty members have already spent a considerable amount of time in attending meetings and developing the program. Dr. Wecht will also play a significant role in selecting Institute faculty for courses offered outside the Law School. He has already reached out to and been in contact with local scientists, private attorneys, public health officials, law enforcement officers and physicians to discuss potential faculty positions.

"In the months and years ahead, I am confident that the Institute will play a critical role... not only for the professional development of many individuals throughout the region and beyond, but also in the critical area of multidisciplinary scholarship that will inform us all of the efficacy of this emerging force in the administration of justice," noted the Dean of Duquesne University School of Law, Nicholas P. Cafardi.

"We know we've got something here and we know we've captured the right audience," said Rago, "nobody else will be able to do it the way Duquesne's going to do it."

Excerpts taken from the September 25, 2000, and October 23, 2000, issues of The Duquesne University Times and the Executive Summary of The Institute's Curriculum.

Deborah L. Kutzavitch is a third-year evening student and Executive Editor of JURIS. She is a legal assistant with the Hillman Company.

N. S. Koerbel is a graduating fourth-year evening student. She is Editor-in-Chief of JURIS and teaches legal and business writing at the University of Pittsburgh.

ENDNOTES


2 Id. at 21.
Senate Bill No. 589
The Use Of Post-Conviction DNA Testing
Pennsylvania Begins To Respond

Senate Bill 589 is a strong indication of the fact that Pennsylvania is responding to the use of physical evidence in a post-conviction setting. "In light of what's taking place in Illinois and elsewhere," Pennsylvania Senator Jay Costa, one of the sponsors of Bill 589, told JURIS, "we must now recognize that technology has advanced to a point that it can clearly exonerate individuals in a way that didn't exist fifteen or twenty years ago." Senator Costa noted that support for Bill 589 was mostly strong at the public hearing held on March 26, 2001, "provided that safeguards are in place" and "people are not able to test everything under the sun." He expects to see some action on Bill 589, at least in the form of a committee vote, before the Senate's summer recess.

The substance of Senate Bill 589, as it was referred to Judiciary March 9, 2001, appears below:

Senate Bill 589 proposes to amend Section 1. title 42 of the Pennsylvania Consolidated Statutes by adding section 9543.1. Postconviction DNA Testing.

(a) MOTION

(1) An individual convicted of a criminal offense in a court of this Commonwealth, and who is serving a term of imprisonment or awaiting execution because of a sentence of death may apply by making a written motion to the sentencing court for the performance of forensic DNA testing on specific evidence.

(2) The evidence may have been discovered either prior to or after the applicant's conviction, and shall be available for testing as of the date of the motion. If the evidence was discovered prior to the applicant's conviction, the evidence shall not have been subject to the DNA testing requested because the technology for testing was not in existence at the time of the trial, or the applicant's counsel did not seek testing at the time of the trial, or the applicant's counsel sought funds from the court to pay for the testing because his client was indigent and the court refused the request.

(b) NOTICE TO THE COMMONWEALTH

(1) Upon receipt of such a motion, the court shall notify the Commonwealth and afford it an opportunity to respond to the motion.

(2) Once such a motion, or notice of such motion, is filed with the court both the Commonwealth and the court shall take the steps reasonably necessary to ensure that any remaining biological material in the possession of the Commonwealth or the court is preserved pending the completion of the proceedings under the Section.

(c) REQUIREMENTS

Applicants for such motions will be required to:

(1) (i) assert actual innocence of the offense for which the applicant was convicted;

(ii) in a capital case, assert actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d) (relating to sentencing procedure for murder of the first degree), if the applicant's exon-
eration of the conduct would result in vacating a sentence of death; or

(iii) in a capital case, assert that the outcome of the DNA testing would establish a mitigating circumstance under section 9711(e).

(2) present a prima facie case demonstrating that the:

(i) identity of or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing; and

(ii) DNA testing of the specific evidence, assuming exculpatory results, would establish:

(a) the applicant's actual innocence of the offense for which the applicant was convicted;

(b) in a capital case, the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d), if the applicant's exoneration of the conduct would result in vacating a sentence of death; or

(c) in a capital case, a mitigating circumstance under section 9711(e).

(d) ORDER

Except as provided in paragraph (2), the court shall order the testing requested under reasonable conditions designed to preserve the integrity of the evidence and the testing process, upon a determination, after review of the record of the applicant's trial, that the:

(i) requirements of subsection (c) have been met;

(ii) evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been altered in any material respect; and

(iii) motion is made in a timely manner and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice.

(2) the court shall not order the testing requested in a motion under subsection (a), if after review of the record of the applicant's trial, the court determines that there is no reasonable possibility that the testing would produce exculpatory evidence that:

(i) would establish the applicant's actual innocence of the offense for which the applicant was convicted;

(ii) in a capital case, would establish the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d), if the applicant's exoneration of the conduct would result in vacating a sentence of death; or

(iii) in a capital case, would establish a mitigating circumstance under section 9711(e).

(e) TESTING PROCEDURES

(1) Any DNA testing ordered under this section shall be conducted by:

(i) a laboratory mutually selected by the Commonwealth and the applicant; or

(ii) if the Commonwealth and the applicant are unable to agree on a laboratory, a laboratory selected by the court that ordered the testing.

(2) the costs of any testing ordered under this section shall be paid:

(i) by the applicant; or

(ii) in the case of an applicant who is indigent, by the Commonwealth.

(f) POST-TESTING PROCEDURES

(1) Based on the results of DNA testing conducted under this Sec-
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