

DECEMBER 1985
LASCHER AT LARGE
By Edward L. Lascher

This seems an apt time to annotate a view I've expressed before (if not in this forum) concerning the death penalty. It should be abolished nationwide, with the conceivable exception of violent felonies by persons under life sentence. It is not the nature of the year-end holidays which motivates my timing, though; my chief reason comes not from deep principle -- or at least not the type generally associated with theology, humanitarianism or things of that sort.

Rather, the year's end is traditionally a good time for taking a hard and realistic look at where we've been and where we may be going. More immediate impetus comes from reports of interviews with the Chief Justice, in which she is quoted as reassuring us (in what tones, we must guess) that there will be plenty of executions quite soon enough.

PRAGMATIC PROTEST

My reason for urging abolition of capital punishment is, I submit, realistically pragmatic: We can't afford it. This is not posited simply on the cost ineffectiveness of capital punishment, but rather is compelled by its affirmative destructiveness, more importantly, our national obsession with the issues it creates.

That fixation squanders too many assets, ranging from Canadian forests leveled to provide newsprint for the endless debates to the bootless use of the most precious asset in the world: minutes, hours and days of human thought and effort. Backlighting that tangible waste is the more deeply troubling sense that there simply is something amiss about a society whose attention is riveted on killing -- killing of any sort, justified or unjustified, merciful or barbaric, willed by the majority or not. The simple if elusive truth is that it is sick to dwell constantly on the question of whether or not to kill a few dozen young men.

But coming back to practicality, I am simply incapable of believing that Mike Bradbury and George Deukmejian, Tony Amsterdam and Tony Murray couldn't produce far more useful benefits with the time and talent they currently devote to soliloquizing over To Kill or Not to Kill. I know, without needing an iota of assumption, that our judicial machinery notably the Supreme Courts, but by no means exclusively they -- could contribute vastly more in the way of rational answers to the unsolved problems of judicial administration, garden variety civil law and, yes, even criminal law and procedure as it affects other crimes and misdemeanors, if they weren't embroiled in multi-front warfare over that horrible handful of death penalty cases. Police and prosecutors could do us all a great favor if they could turn the resources they currently must target to the specific degree of punishment to be visited on approximately a hundred and fifty felons to the task of increasing the certitude, rapidity and legitimacy of response to all crimes.

We don't get enough in return for what we expend. Capital punishment doesn't deter;

not even the most vehement of its many rational proponents claims to find any difference in the safety of the streets of, say, Grand Rapids, Michigan, and Fort Wayne, Indiana, one of which is "protected" by the death penalty and the other "victimized" by its absence. If there has been a decrease in homicides in California since capital punishment was reintroduced, it has escaped me. More to the point, it has escaped those who have committed murders since that time.

I am sensitive to the primal, and valid, instincts which deem it unfair that the hundred and fifty people on the Row who snuffed out the lives of innocent people should continue to live when their victims don't. But there is unfairness inherent in all societies. We found it appropriate recently to allow the lives of a few dozen young men to be just as snuffed out in order that our great country could occupy a blob of land in the Caribbean; several hundred Marines are no longer sharing life because we sent them to Beirut for reasons nobody has yet been able to figure. A shy, awkward, bookish kid from my hometown was killed in Germany on VE Day and I wasn't, and he's not sharing the beauties and wonders he earned at least as much as I did. None of those things is fair.

If we can, as we must, accept the fact that a certain number of innocents may be required to lose their lives in the interests (often misguided) of our society, we ought to be willing to accept equally the proposition that some vile, guilty people may be allowed to continue to live, in cages, if that is less socially costly than killing them would be. I say that the time has come to get this national obsession behind us, on purely cost-benefit grounds, and to get on with the business of living. At least it's worth a year-end thought.

HELLO, OUT THERE!

Burt Gindler is one of the really outstanding among our colleagues. He is a gentleman of tact and discrimination, while simultaneously a conscientious, dedicated and effective advocate for his clients. In all things, also, a person of utmost integrity.

All that said, you're probably suspecting that I am about to say something which represents less than press-agentry. Your suspicions are founded.

Burt writes in the current issue of the Los Angeles Lawyer on the "Whys and Wherefores of Recording Time for Legal Services". My problem is not with the substantive tips and observations on record maintenance, but with the antic premise from which he starts: "When a lawyer asks, 'How do I bill this time,' the shorthand simple answer is: 'You don't.' 'Billing' is done by an experienced lawyer who reviews a report of the time put into the matter by the lawyers with their usual hourly rates and a description of the services provided by each lawyer. The billing lawyer also knows the history of the matter, its size and substance, its prognosis, client predilections and other relevant factors. Guided by experience and good judgment, the billing lawyer will 'bill' the matter."

Uh, Burt, not everybody:

- Works as a unit on a double- or triple-digit roster of lawyers;
- Is only one of a "team" working on any particular case or matter;
- Even has a more experienced lawyer with good judgment around to function as a "billing lawyer"; or
- Deems his or her function to be merely that of keeping the time clock turned on and off at kick-off and time out, rather than feeling any responsibility for setting the client's fee.

The fact that a person with the widespread contacts and sensitive antennae of Burt can nevertheless be unaware that not all of his profession operates in manner identical to his own demonstrates much, much too vividly, just how far we've gone down the American Lawyer, national law firm, Finley Bumble road.

It apparently is true: Some people really don't know there are lawyers who practice alone or in small firms, who handle cases or matters all by themselves, who consider the relationship between them and their clients, and its obligations (in both directions), to be highly personal. For that matter, they evidently don't perceive that the reason lawyers record hours is to quantify in rough terms the amount of their stock in trade (in Lincoln's apt terms) they deliver to Client A at the latter's behest, rather than as a means of (1) arriving at the appropriate melon slice for each partner, (2) setting the salary of each associate, and (3) raising the wherewithal to pay items 1 and 2 while still leaving a healthy profit.

I fear we can no longer communicate in our profession. If its princes, like Burt, don't know that we yeomen exist – let alone what we do or how we go about doing it is inescapable that we cannot speak or listen sensibly to each other.

(By the way, one of those sycophant gossip sheets about lawyers recently did a survey on what corporate clients like and dislike about their lawyers. There was almost unanimous, and startlingly vociferous, protest at the packing of hearings, meetings and appearances with squads of lawyers when one would do -- not to mention packing the ultimate billing to explain why one wouldn't do. That should tell the megafirms something. Or should it? After all, the identical clients who complain go right on hiring the same firms and failing to resist, let alone report, the rape they suffer.)

LEADING THE BLAND

There aren't many around as to whom I will yield in terms of unhappiness with the State Bar's disciplinary process. That it needs drastic overhaul is a song I've been singing for many years, to scant avail.

For more years, I may say, than Stanford Law Professor Deborah Rhode has been heard on the subject. As a matter of fact, for more years than the brilliant young lady

has been seeing law books.

It seems that Professor Rhode also thinks lawyer discipline needs some changes. Despite that facial agreement between us, I was more than a little distressed at the profile which recently ran in this paper, describing her as the self-appointed guru on the subject.

Now, as I may have said before, I don't think one has to have lived in Pompeii to be a seismologist or to have been driven out of the Steppes of Central Asia to study Genghis Khan. But to understand the realistic functioning, malfunctioning and nonfunctioning of a contemporary human institution, I rather believe one needs some empiric exposure to it. A person who spends two years clerking for one court, one year for another, and the rest of his or her professional life on a law faculty – without 15 minutes' exposure to what the world of law practice really is like – may indeed still have valuable contributions to make to any study of that institution. But not styled as the world's leading expert thereon – not even when given the added input of one research project conducted on a clinical poverty law seminar at Yale Law.

With respect, I feel that the area of lawyer discipline has suffered as greatly from too much theory as it has from too little attention. There is a vast pool of skill and determination – significantly plus experience – available in the form of the vast majority of responsible practicing lawyers. The average member of the bar wants effective discipline more than anybody else does and he knows a hell of a lot more about where it's needed and how to deliver it. The wheeze that lawyers are soft on each other is sheer myth, generated to confirm a preconceived assumption, with no connection to real life.

Neither do most of those who caterwauler about professional responsibility have a nodding acquaintance with reality. Until we get realists into command, the whole disciplinary process is going to resemble the typical law review treatment of any problem: a bar graph analysis of the zloty cost of de-re-establishment of the Six Carpenters Case. I.e., sound and flurry signifying nothing.