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Confronting the Abuse Excuse

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Recommended Citation
Rutberg, Susan, "Confronting the Abuse Excuse" (1997). *Publications.* Paper 211.
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Comment

Confronting the 'Abuse Excuse'

Paul Harris' new book confronts vexing questions of race and criminal justice

By SUSAN RUTBERG

Nobody likes a whiner. And with the publication of Alan Dershowitz's 1994 book, *The Abuse Excuse* — which ridiculed the use of psychiatric or other context-based evidence as a defense in a criminal case — the public got a "buzzphrase" that has effectively dumbed down any serious discussion of the causes of crime.

Dershowitz's argument, gleefully

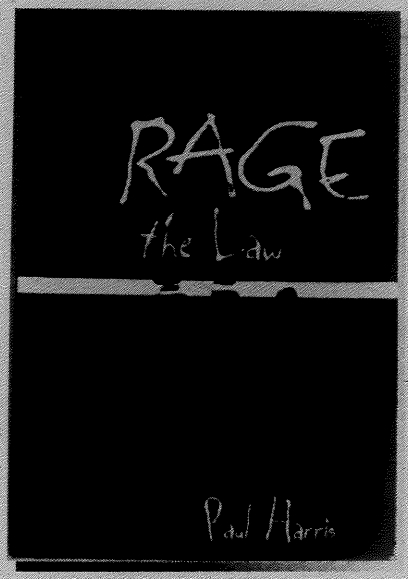
Pages

pounced upon by talk show hosts and the other intellectual giants who shape public discourse, is that no matter how poor a hand life has dealt, a criminal defendant should "just get over it." What criminal trials ought to be about is: Did he do it or not? And anybody who thinks differently is a sniveling sycophant — probably a "card-carrying member of the ACLU" — who subscribes to outdated notions that criminals ought to be coddled.

This view of the law didn't originate with Dershowitz. Nearly a century ago, Anatole France pointed out that "the poor have to labor in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

__Susan Rutberg__ teaches trial advocacy and criminal litigation at Golden Gate University School of Law in San Francisco.

In an immensely readable new book entitled *Black Rage Confronts the Law*, Paul Harris deals head-on with Dershowitz's attack on social-context defenses. Using well-documented historical evidence, Harris shows us that dismissing evidence of defendants' state of mind — as some irrelevant ploy by unscrupulous defense attorneys to help a guilty client avoid personal responsibility — is about as helpful as Marie Antoinette's response to the plight of the poor who had no bread.



"Black Rage" as defined by Harris is not an apologistic defense of "don't blame me; I'm just a victim" thinking. Instead it represents the legal strategy of bringing into court environmental and cultural evidence to shed light on the defendant's mental state. As Harris writes: "The 'Black Rage' defense refutes the idea that there is a lower class of people who are inherently criminal and can be written off by society. It tries to educate people about the oppressive structures and behaviors in society that produce and increase criminality."

If accepted, such evidence brings the defendant within some recognized rule of law: self-defense, mistake of fact, diminished capacity, unconsciousness or insanity. If ever there was a powerful argument that every criminal defendant can benefit from a kind of individuated cultural defense, Harris' book is it.

LAW ON A MISSION

It's a subject matter that Harris has been boning up on throughout a long and distinguished career.

In the early 1970s, Harris and a group of colleagues formed the San Francisco Community Law Collective. This no-frills law office, located across the street from Dolores Park, became house counsel for an array of community groups, health clinics and job-training programs.

***Black Rage Confronts the Law*, by Paul Harris. New York University Press, 1997. 275 pages, $26.95.**

Grounded in genuine respect for the struggles of poor people and people of color to obtain fair treatment under the law, these lawyers rebelled against the conventional wisdom that a lawyer's role was to tell the client what was best. The way Paul Harris practiced was to listen to his client's story, put it into social, political and historical context, explain the legal rules in a demystifying fashion, and then fight like hell to translate that story into a legal victory.

Today, academics call it "client-centered" lawyering. But in those days, what the Community Law Collective and other like-minded groups did was considered revolutionary.

From 1970 to 1986, when he actively practiced law, Harris developed a reputation as one of the best criminal defense lawyers in the country. As a member and eventual president of the National Lawyers Guild, Harris represented leading Bay Area civil rights activists, including members and supporters of the Black Panther Party and the United Farmworkers Union, draft resistors and others arrested in connection with political protest. Today, Harris is Charles Garry Professor of Law at New College School of Law in San Francisco.

See RUTBERG page 6

Dodging Death

The Supreme Court rejected a constitutional right to die. But can states go their own way?

By STUART TAYLOR JR.

Has the U.S. Supreme Court ruled out the possibility that anyone will ever be found to have a constitutional right to a physician's assistance in committing suicide?

Not quite. But it is difficult to imagine the current court ever upholding such a right, as distinguished from a state statute allowing assisted suicide, which the court probably would uphold — even in a case brought by a mentally competent, terminally ill patient who wants a suicide pill to hasten what would otherwise be a wrenchingly slow death.

That's because a close reading of the

Closing Argument

separate opinions filed by six justices in two big June 26 decisions, *Vacco v. Quill*, 97 C.D.O.S. 5027, and *Washington v. Glucksberg*, 97 C.D.O.S. 5008, suggests that a majority of the court would proba-

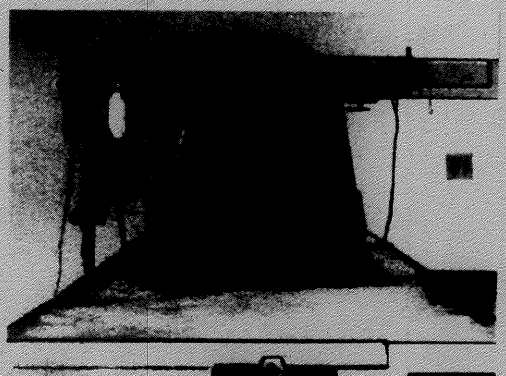
these cases "to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death."

O'Connor apparently agreed to provide the critical fifth vote for the opinions of Chief Justice William Rehnquist in each case only if he would leave open (as he grudgingly did) the possibility that some future plaintiff might win an "as applied" challenge against a statute barring assistance in suicide. Rehnquist was joined by Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas. Justice Ruth Bader Ginsburg said that she "substantially" agreed with O'Connor.

Meanwhile, both Justices John Paul Stevens and David Souter, in their separate opinions concurring in the judgments, sounded willing

judgments, that of Justice Stephen Breyer.

Breyer begins with the droll explanation that "I concur in [O'Connor's] separate opinion, except insofar as it joins the majority." That suggests that he is more open to the idea of what he calls a "right to die with dignity" than is Rehnquist's



state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life — then . . . as Justice O'Connor suggests, the Court might have to revisit its conclusions in these cases.

So it might. But the copious record before the court does not disclose the existence of any state law, anywhere, that would condemn any patient, ever, to die in severe physical pain.

Many patients do die in pain, of course — but not because state law leaves them and their physicians no alternative. In Breyer's words:

> [A]s Justice O'Connor points out, the laws before us do not force a dying person to undergo that kind of pain. . . . Rather, the laws of

Comment

TAYLOR: Dodging Death

Continued from page 5

of pain-relieving drugs sufficient, except for a very few individuals for whom the ineffectiveness of pain control medicines can mean, not pain, but the need for sedation which can end in a coma."

Such "terminal sedation," as it is sometimes called, appears to be legal in most or all states, and would end not only the patient's pain, but also other species of suffering, such as what O'Connor calls "the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions."

In other words, while state laws prohibit doctors from prescribing suicide pills to put terminal patients to death, they allow doctors to prescribe sedatives to put such patients to sleep. So the paradigmatic case invoked (at least for rhetorical purposes) by many assisted-suicide advocates — the patient condemned by state law to die in agonizing physical pain — seems unlikely as a real-world matter ever to reach the court.

Be that as it may, it is altogether clear that not one of the nine justices upheld the freewheeling liberal activist approach of Judge Stephen Reinhardt. In an 8-3 opinion for the Ninth Circuit U.S. Court of Appeals, sitting *en banc*, Reinhardt had struck down the Washington statute as applied to the entire class of terminally ill, mentally competent patients who might seek assistance in suicide.

JUDICIAL HUBRIS

Relying on the doctrine of substantive due process, the Supreme Court's abortion precedents and myriad other sources ranging from Homer and Socrates to recent polling data, Reinhardt touted his giant step down the road toward active euthanasia as "more enlightened" than the contrary views of nearly all state legislatures and courts, and of most physicians throughout history — views that

> Justice O'Connor found no need to address 'the narrower question' of whether a mentally competent person has a constitutional right to control the circumstances of death.

the ever-confident Reinhardt dismissed as "ludicrous," "untenable," "cruel," "disingenuous and fallacious" and "nihilist." This display of judicial hubris moved Judge Andrew Kleinfeld to respond, in the principal dissent: "The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary."

The Supreme Court was also unanimous in rejecting Judge Roger Miner's peculiar holding for the Second Circuit that — while it would be wrong to emulate Reinhardt by stretching substantive due process to strike down the New York law — that law nonetheless violates equal protection. How? By "irrationally" discriminating, Miner explained, against terminal patients who seek suicide pills from their doctors, which the statute prohibits, as compared with terminal patients who seek to have life-sustaining machinery disconnected, which the statute allows.

The justices agreed that there are good reasons for state laws to draw a line between prescribing a suicide pill and pulling the plug. The latter amounts to letting nature take its course, and is rooted in patients' traditionally respected right to refuse unwanted medical treatment, both as a matter of state law and (under the various opinions in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990)) as a matter of substantive due process.

As O'Connor put it, "the state's interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide."

This is not to say that there is any consensus on the court, or elsewhere, that state laws like those of New York and Washington sufficiently safeguard all patients' constitutionally protected liberty interests to die with dignity.

'TRAPPED IN THAT MURK'

Professor Laurence Tribe of Harvard Law School, who urged the court to adopt a limited constitutional right to assisted suicide in *Vacco v. Quill*, cautions against reading the Breyer opinion as "a definitive resolution of the issue." Tribe hopes that Breyer, and the rest of the court, might ultimately find a constitutional right to a suicide pill at least when the only alternative for patients is to choose what Tribe's brief called the "particularly gruesome method [of] 'terminal sedation' . . . [and thereby] to have their minds chemically shut down and to be imprisoned in their decaying bodies and deliberately starved to death, while loved ones keep a gruesome vigil."

In addition, says Tribe, the state laws allowing doctors to prescribe heavy doses of morphine and other "double effect" medications — those that have both the (ostensible) purpose of easing pain, and the (ostensibly incidental) side effect of hastening death — "are murky, and people are trapped in that murk." Some doctors, for example, may feel pressured by legal uncertainty to allow patients to die in pain, rather than risk being accused of acting with intent to cause death by prescribing what may turn out to be a lethal dose of morphine.

Justice Stevens seems receptive to Tribe's argument that the Constitution requires that patients who would otherwise die in pain be given an assisted-suicide alternative to terminal sedation. "[T]here are situations in which an interest in hastening death . . . is entitled to constitutional protection," Stevens asserts, with particular stress on the patient's "interest in dignity, and in determining the character of the memories that will survive long after her death."

Similarly, Justice Souter asserts that:

> [W]ithout a physician to assist in the suicide of the dying, the patient's right will often be confined to crude methods of causing death, most shocking and painful to the decedent's survivors. . . . [T]he [now dead] patients [who sued] here sought not only an end to pain (which they might have had, although perhaps at the price of stupor) but an end to their short remaining lives with a dignity that they believed would be denied them by powerful pain medication, as well as by their consciousness of dependency and helplessness as they approached death.

Stevens and Souter thus seem sympathetic to what Dr. Marcia Angell, execu-

See TAYLOR page 7

RUTBERG: Confronting

Continued from page 5

Given his approach to clients, it was only natural for Harris, in 1971, to transform what police and prosecutors saw as a run-of-the-mill armed bank robbery case into an acquittal with an innovative defense strategy he called the "Black Rage Defense."

The book tells the story of that case — *United States v. Steven Robinson* — with Harris' trademark passion and unsentimental prose. A 29-year-old volunteer music teacher and talented, but unemployed, draftsman, Robinson became increasingly embittered by his inability to find paying work. With his wife and daughter needing medical care he couldn't afford, Robinson became temporarily deranged and robbed a bank in his own neighborhood. Harris defended Robinson by putting the evidence of his

> *Black Rage* refutes the idea that there is a lower class of people who are inherently criminal.

client's personal circumstances in the context of what it meant to be black in America. He then showed the jury how his client's mental state fit within the then-prevailing definition of temporary insanity under the law. Robinson was acquitted.

In story after compelling story, *Black Rage* provides other examples of how festering anger caused by years of race-based humiliation and abusive treatment prompted mental illness, and caused previously nonviolent people to commit acts of violence.

The first of these — the earliest recorded "Black Rage" defense — tells of William Freeman's 1846 trial for an unprovoked double homicide. Freeman, an ex-slave, had been sent to prison at age 16 for a crime he didn't commit. When he was released, five years later, his spirit and mind were greatly deteriorated. Freeman became fixated on finding someone to hold responsible for his unjust imprisonment. In this delusional state he killed a white couple with no previous connection to him. The prosecutor in his case was the son of a president; the defense lawyer, William Henry Seward, had served as governor of New York. Seward presented a psychiatric defense for Freeman, arguing that the social conditions under which Freeman lived had caused his insanity. Though the jury convicted him, Freeman's case was reversed on appeal.

OTHER OUTSIDERS

Harris extends the "Black Rage" concept to other "outsiders," like the Latina rape victim who killed one of her attackers; the Hawaiian accused of killing a white soldier; a white ex-convict charged with six bank robberies; a young woman raised amidst violence in an urban warzone who killed another teen-ager for a leather jacket; a Native American who killed a white police officer in self-defense.

One compelling story is that of Patrick "Hooty" Croy, a 22-year-old Native American born & raised in Yreka. One night Croy, a sister and some friends stopped at a convenience store on their way to go deer hunting. While Croy waited outside, an argument ensued between the two Indian women with Croy and a white store clerk. Croy's sister picked up a can opener and waved it at the clerk. The scared clerk ran out of the store yelling, "I think they are going to rob me." Croy tried to calm him down and went into the store, but as Harris says, "by now the historical burden of dysfunctional race relations had taken hold." An officer in a passing police car thought he heard the clerk say the store had been robbed.

Knowing that the police would never believe them over the clerk, Croy and his friends drove away. Two police cars gave chase. During the 5-mile chase, one of Croy's passengers shot at the police car's tires. Croy drove to his grandmother's cabin outside of town, where he and his sister ran into the woods. Twelve to 14 law enforcement cars responded and the shooting started.

Carrying his .357 loaded with hollow-tipped bullets, Officer "Bo" Hittson joined the chase. Croy and his sister hid behind some trees as bullets rained around them. One of the Indian men was shot in the groin. When Croy's sister Norma Jean tried to run, she was shot in the back. Croy was trying to get into his grandmother's cabin, climbing through a window, when shots from Hittson's gun hit him in the spine and the arm. Croy fired back, killing Hittson with a shot to the heart. Four days later, more than 1,000 people attended Officer Hittson's funeral. Croy and four other Indians were charged with conspiracy and first-degree murder.

Croy's original attorney — a former prosecutor who had never represented an Indian — raised no claim of self-defense nor evidence of local police-Indian relations. Only a weak "diminished capacity" defense was raised, based on the fact that Croy had been drinking. Croy spent 11 years in prison on his first-degree murder conviction, seven of them on death row, before he won the right to a new trial in a case defended by Tony Serra.

CHANGE OF CULTURAL VENUE

Serra's first victory for Croy was a change of venue from Placer County to San Francisco, after the judge heard testimony detailing the historic oppression of Native Americans in Placer and Siskiyou counties. Then at trial, Serra introduced evidence that explained Croy's decision to run from the police even though he hadn't done anything wrong.

Though a good student, Croy felt out of place in his predominantly white school and dropped out in the 10th grade. Once when he was 13, Croy was chased by police who were pursuing another Indian boy. Croy ran through the snow and jumped into a nearly frozen river in an unsuccessful effort to hide. Police dragged Croy out of the river and kept him in custody overnight. Police then barged into his family's home, taking "poached" deer from the freezer. After several other teen-age juvenile offenses, Croy was made a ward of the court and eventually spent six months in the California Youth Authority.

With this evidence, Serra was able to portray the shooting of Officer Hittson as the act of an Indian with lifelong memories of police abuse. Croy was acquitted.

Croy's story, like the others in *Black Rage Confronts the Law*, will give criminal lawyers compelling reasons to investigate and present individuated cultural defenses for their clients. By presenting the racial, sexual and economic contexts that helped shape a defendant's life, Harris hopes defense counsel may succeed in inviting jurors to overcome facile stereotypes of "whining" defendants and instead enter into difficult lives pushed over the brink by intolerable injustices. ■

In Bri

MoFo Elevat

Morrison & Foerster half-dozen lawyers to pa second round of elevatio

In November, the firn promotions of a dozen la effective Jan. 1. While a the bulk of those elevati lawyers elevated at a par Friday were lateral hires of counsel status with th

The latest promotions Aug. 1.

Mid-year partnership have taken place at Morr in the past ten years, are for more senior laterals, chairman Stephen Dunha

Three of the new part Francisco.

Tax lawyer C. Jean R Morrison & Foerster in 1 Martin where she was a p received her J.D. from U Law in 1977.

Labor and employmer Elizabeth Allor, 37, starte Morrison the year after g Boalt Hall School of Law went in-house at Pacific l years between 1988 and returning to the firm.

Robert Saltzberg is a p who specializes in the ele software industries. He jc 1995 after a four-year stir Sokoloff, Taylor & Zafma Angeles. The 35-year-old J.D. from Boalt Hall and in electrical engineering, f University.

In Palo Alto MoFo ele Konski, 36, a biotech pate joined Morrison in 1994, Macey, 44, a patent lawye in medical devices.

Konski moved to MoF Diego's Campbell & Flor joined after a stint in-hou Cyanamid. She is a 1988 University School of Law

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TAYLOR

Continued from page 6

tive editor of the *New En Medicine*, calls the longir simply . . . to get it over justices welcome what R ongoing "earnest and pro state legislatures and else morality, legality, and pra cian-assisted suicide."

But could Stevens find votes for recognizing a c to physician-assisted suic through contrary state la

Not from Rehnquist, S who have long condemne er ventures down the roa due process, especially t dents. And not from Brey analysis is correct.

Stevens might get one That is hardly assured, h the high value placed by ly reasoned opinion on t in dying with dignity is c his concern about the ris rowly defined right of as might push some termina voluntary death. "The ba sisted suicide and euthar porous, and the line betw involuntary euthanasia a Souter. The raging factu how substantial this risk concludes, is "not open tion with any substantial ance at this time."

Two more possibilitie Ginsburg, whose separat noncommittal on whethe