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Confronting the Abuse Excuse

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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 potboiler got a “buzz” that has effectively dummied down any serious discussion of the causes of crime.

Dershowitz’s argument, gleaned 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who thinks differently is a sniveling sycophant — probably a “card-carrying member of the ACLU” — who subscribes to outdated notions that criminals ought to be coddled.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 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 defendant’s state of mind as irrelevant is an 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 apologetic 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 individualized cultural defense, Harris’ book is it.

LAW ON A MISSION

It’s a subject matter that Harris has been honing 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.

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 clients’ 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 resisters 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.

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Dodging Death

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

By STUART TAYLOR JR.

H as the U.S. Supreme Court ruled out the possibility that anyone will ever be found to have a constitutional right to commit 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 separate opinions filed by six justices in two big June 26 decisions, McCreary 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 probably rule that those 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 H. 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 Sandra Day O’Connor. 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 to join the majority — 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.

Breyer begins with the droll explanation that “I concur in O’Connor’s separate opinion, except to the extent that it rules that 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 judgments, that of Justice Stephen Breyer. Breyer’s decision with the droll explanation that “I concur in O’Connor’s separate opinion, except to the extent that it rules that 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 revise 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 agony. Without the laws of
Comment TAYLOR: Dodging Death

Continued from page 5 of pain-relieving drugs suffi­ cient, except for a small number of whom the ineffectiveness of pain control measures can mean, not pain, but the need for action which can end a life.

Such “terminal sedation,” as it is sometimes called, appears to be legal in most or all states and not only in the patient’s pain, but also another source of suffering, as is depicted in a recent editorial in The New England Journal of Medicine. A disappointment 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 paradigms case involved at least for at least one case in which the newborn infant died from a run-of-the-mill armed robbery, causing an acquisitive with an innovative defense strategy he called “Black Rage Defense.”

The book tells the story of that case - United States v. Stevens Robinson - with Harris’ trademark passion and personal voice. A 29-year-old volunteer music teacher and biologist, and unemployed, Braunstein, then becamefemale, then gender identity, it was inadmissible before the jury because it was not in the community, and the court, “The defense counsel may succeed in feeding work. With his wife and daughter nurturing medical care he couldn’t afford, Robinson became ten­ sionally deranged and robbed a bank in his own neighborhood. Harris defended Robinson by putting the evidence of his

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Continued from page 5 Given his approach to clients, it was only natural for Harris, in 1978, to turn to what police and prosecutors saw as a tool of Black Rage. Harris’s defense of Robinson, a white-collar bank robber, was a run-of-the-mill armed robbery, causing an acquisitive with an innovative defense strategy he called “Black Rage Defense.”

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