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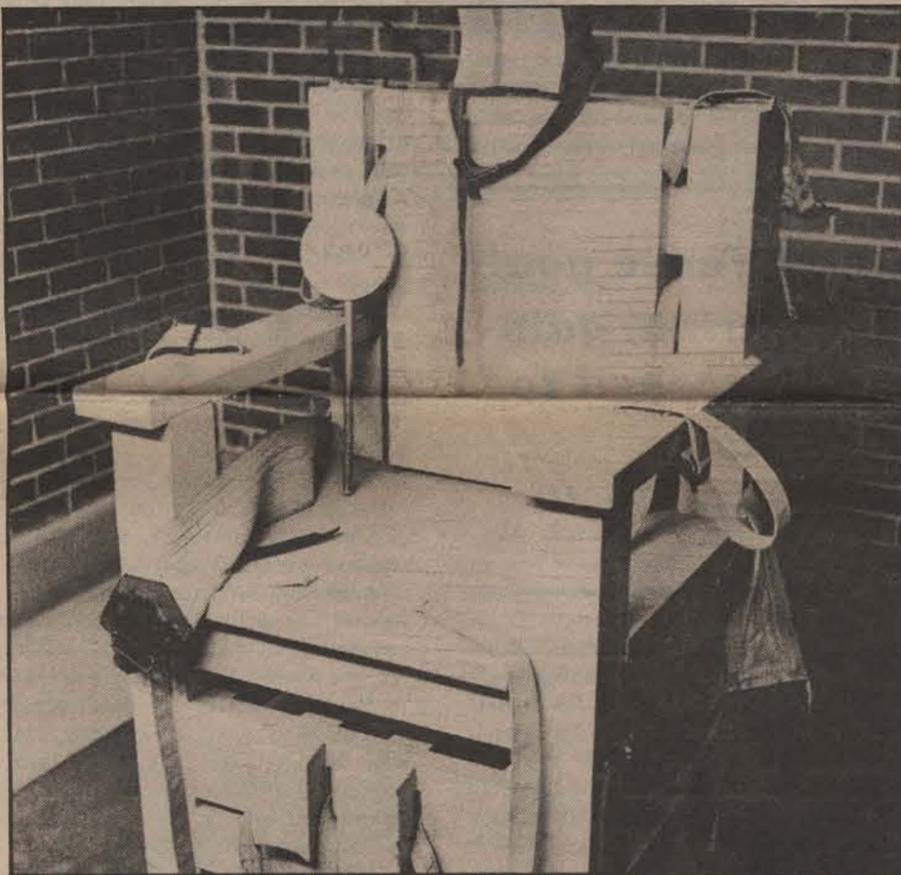
poverty law **Report**

A REVIEW OF ADVANCES IN THE LEGAL RIGHTS OF THE POOR

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The electric chair (above) at Alabama's Holman Prison, where 26 whites and 125 blacks have been electrocuted since 1927. A psychiatrist will testify in January at the trial of the Death Row conditions suit in Mobile that waiting for execution can be equally inhumane.

Psychiatrist criticizes Death Row conditions

Death Row in Alabama is much the same as it is everywhere else, only worse. Physical confinement is more severe. Visits with family and friends are more restricted. Contact with each other is more circumscribed. The isolation of the Death Row inmate is almost total.

On top of that, conditions generally are unsanitary, the food is bad, opportunities for pastoral counseling are rare, and reading is regulated.

*In 1978 the Center challenged these conditions on behalf of Alabama's Death Row inmates. After many delays, the case, *Jacobs v. Britton*, has been set for trial in federal court in Mobile January 9.*

One of the plaintiffs' key witnesses is Dr. Bernard Rubin of Chicago, a respected psychiatrist and psychoanalyst. His credentials are extensive, and his professional experience with prisons and inmates is broad.

Below are some of Dr. Rubin's observations on Death Row conditions in Alabama. They are excerpted from a deposition taken by an attorney for the prison system.

What about the physical facilities do you find to be wrong...?

What's wrong with it is I don't think it meets basic hygiene sanitary needs of human beings...

All right. That's sanitation, which I assume that your judgment of sanitation would be like my judgment of sanitation...

Well, I'm talking about it also in another way. I think psychologically those conditions under which people live have an impact...

I saw the food when I was there, I put it in my hands. I must admit I was afraid to eat it...

There used to be a shelf in these cells. It was removed for reasons that I cannot understand. I mean, I know it was said to be for security reasons, but the shelf was made of the same material as the bunk, as was the table, which was also removed, and they were removed for security reasons. Yet the bunk sits there, welded to the wall and one wonders what's the difference in security. And so there is nothing to

(Continued to Page 4)

Governor seeks receivership; judge says 'maybe'

MONTGOMERY — A federal court that has waited nearly eight years for the State of Alabama to comply with its order requiring improvements in the way the state cares for the mentally ill and retarded now has given the governor till January 3 to submit a report setting out plans to achieve compliance.

The deadline was imposed by U.S. Circuit Judge Frank M. Johnson, Jr., after Alabama Governor "Fob" James asked to be named Receiver of the state's mental health-mental retardation system.

James made the request in October at a pretrial conference for hearings

on compliance with the court order when it became clear that Johnson was prepared to take responsibility for the system out of the hands of state mental health officials by placing it under receivership.

The judge's willingness to take such drastic action was strengthened by the admission of the officials on the eve of the pretrial conference that minimum requirements set out in the 1972 order for the care of the mentally ill had not been met.

Whom Johnson eventually appoints as Receiver depends in part upon the scope and thoroughness of the compli-

ance plan James submits. If Johnson finds the report inadequate, he may name as Receiver someone outside state government.

Attorneys for the Justice Department and U.S. Attorney Barry Teague, together representing the United States as a friend of the court, joined with attorney Stephen Ellmann of the Poverty Law Center, representing the plaintiffs, in opposing James' nomination.

In a motion filed with the court the parties argued that James could bring to the assignment neither the professional expertise nor the time that the mental health system needs. They asked

that the Receiver be an independent mental health professional, and in a later motion they made several nominations.

The parties proposed that the Receiver be required to submit to the court for approval a Plan of Implementation by which progress toward compliance could be measured. They also asked the court to require adequate funding.

The court has not ruled on either side's nominations. Instead, it now awaits the filing of the Governor's plans, plans which are to set out his proposals for achieving and funding compliance within 18 months.

LEGAL AID

Starting over: the sentencing hearing

By Dennis N. Balske

Unfortunately, this phase of a capital case only follows a guilty verdict, and no matter how prepared for it you are, a guilty verdict is very painful. Fortunately, on the other hand, if you have tried the case properly, you will have set the stage for the final and victorious act, a life sentence. Therefore, rather than scurrying around to discover information to save your client, your job will consist of administering the most persuasive presentation possible from the wealth of information already accumulated, in such a way as to compliment, through consistency, your trial presentation.

Timing, of course, is important. No matter how well-prepared you are, it is usually preferable to seek a continuance, both to further prepare and to allow emotions to cool. You must yourself treat the sentencing phase as a separate trial and convince the jury that this is a new proceeding with a new issue.

Your first concern should be the preparation and presentation of pre-hearing motions. Since you will have made numerous pretrial motions, some of which are relevant to the penalty phase, renew all of these motions. In addition, consider motions seeking: (1) funds for additional expert witnesses; (2) discovery of the prosecution's sentencing evidence; (3) limitations on evidence the prosecution intends to introduce; and (4) dismissal of aggravating circumstances, either because the evidence at trial did not prove them or because the evidence the prosecution intends to introduce cannot establish them. At this stage, as with pretrial motions, utilize motions to gain the offensive, to discover the prosecution's case and to draw out reversible error. Be creative.

In order to plan the most effective presentation, familiarize yourself with current law. Generally, both sides are entitled to wide latitude. The prosecution will merely be restricted to evidence that is not prejudicial to the defendant, whereas the defense will be free to present any and all evidence relevant to the nature and circumstances of the crime involved and the history and character of the defendant. Thus, you are free to introduce any and all evidence which arguably mitigates toward a life sentence, including hearsay in some instances.

In addition, the sentencing process in a capital case must comport with due process. According to Mr. Justice Stevens, "(I)t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." In this light, at least two state supreme courts, in their seminal decisions interpreting their respective post-*Furman* capital statutory schemes, have held that the prosecution must prove alleged aggravating circumstances, beyond a reasonable doubt, even though the statutes themselves do not require this particular burden of proof.

Essentially, then, capital punishment cannot be imposed unless the jury finds at least one aggravating circum-

stance to exist, beyond a reasonable doubt. If it makes such a finding, the jury must then employ a "weighing" process, which varies from state to state, by which it determines the sentence.

Because the state must prove the existence of aggravating circumstances beyond a reasonable doubt, one of your first decisions will be to determine whether to dispute the prosecution's evidence of aggravation. For instance, if the prosecution has charged every conceivable aggravating circumstance, including ones not even arguably applicable, and the judge has denied your motion to exclude these charges of aggravation, you will most probably want to discredit the prosecution's arguments. On the other hand, if the prosecution has charged only those circumstances which it can, to your knowledge, establish, you will probably fare best by admitting the existence of aggravation at the outset.

Perhaps the most important consideration you must take into account is how to best utilize the client. When making this decision, keep in mind the

the truth and appreciate the honesty; (3) the defendant will make a much better witness, not having to hide any untruths; (4) the jury will perceive the defendant as a person; and (5) you will be able to tell the jury that you have hidden nothing from them and that you will expect the same honesty from them.

It is also important that the client, where appropriate, express remorse, both for the victim and the victim's family. In addition, members of the defendant's family should be encouraged to express any remorse that they feel. Finally the client must honestly express contrition and seek the mercy, as opposed to forgiveness, of the jury.

In the sentencing phase, there are essentially two kinds of cases: those where family, friends, clergy, experts and combinations of these groups are available, and those where there is no one to speak in the client's behalf. Although most cases fall somewhere between these two extremes, separate analysis best demonstrates the considerations which must be taken into account, depending on whether you have a

number of tragic stories will surface. This process takes time and requires repeated visits, especially with the client's immediate family.

Once you have obtained as much information as possible from family and close friends, you will have access to other individuals who have either had an impact on the client's life or observed some significant developments during the defendant's lifetime. Generally, anyone who feels strongly for the client, or who can be made to feel so, is a potential witness, if he or she can provide one piece of the puzzle of the client's life story. These persons can also lead you to other important witnesses.

The life story must be complete. That is, it must include information up to the day of the sentencing hearing itself. Testimony from jailers, clergy members, family, friends and the defendant must address changes in the defendant since the commission of the murder.

Expert witnesses should also be considered. In most cases the defendant will have been psychiatrically and/or psychologically evaluated. Any results pointing toward mitigation should be presented, provided that the results do not open up new and damaging areas. In addition, if the defendant has an alcohol or drug problem, you should consider calling an expert to testify to the effects of the particular substance on your client at the time the killing was committed.

The last type of witness to be considered should be the anti-death penalty witness. Before calling such a witness, make certain that this kind of testimony is absolutely necessary. In most instances, you are trying to focus the jury's attention on the defendant and reasons for not killing him or her. If you have accomplished this goal, you will run the risk of shifting the jury's attention to the propriety of the death penalty in society as a whole, an issue which you already know the jury favors. Therefore, in most instances such testimony can best be utilized in the case of the unsympathetic client.

When no one is willing to go to bat for the defendant, and utilization of only the client will not be enough, you must consider attacking the death penalty itself. Three general categories of witnesses can be used for this purpose: religiously-oriented witnesses; deterrence experts; and experience-hardened officials.

Most jurors, and particularly Southern jurors, have religiously-based reasons for favoring or for hesitating to impose capital punishment. Your voir dire will have disclosed the religious sentiments of each juror. Take these sentiments into account and tailor your religious testimony to these jurors by locating a clergy person who can relate to them. When no such witness is available, at least present religious arguments against capital punishment yourself during closing argument.

Deterrence experts are especially important in cases where voir dire has disclosed that many of the jurors based their support for capital punishment on their view that it acts as a deterrent.

(Continued to Page 4)

"Keep in mind the defense goal of the penalty-phase hearing, gaining a life sentence, as opposed to the usual guilt-phase goal... establishing reasonable doubt."

following caveat: the jury wants to know why your client committed the crime, or at least why your client thinks he or she did it. If your client does not testify, or testifies and evades this question, you will run the risk that the jury will look upon the client as a "Manson" or machine, rather than as a person with faults. Stated differently, once the jurors see that there was a reason, no matter how revolting the reason might be, they can say to themselves, "Taking away this reason, would this person kill again?" or "Can I have mercy on a person who kills for such a reason?" If you can then convince them that the reason no longer exists, that life imprisonment can remove the reason, or that your client is a human being, who has admitted his or her faults and is entitled to mercy, you will have taken giant strides toward a life sentence.

In order for this strategy to succeed, the client must be totally honest. In some instances this is most difficult, because the client, perhaps not wanting to totally disgrace himself or herself, will have given the police a false reason. For example, a client hooked and hiding his or her addiction to drugs might want to keep this fact from his family, and will fabricate a non-drug-related reason for a killing that was related to drugs. Nevertheless, the truth will serve you best, because: (1) it is the truth; (2) a perceptive jury will see that it is

sympathetic or an unsympathetic client.

Too many attorneys thoughtlessly present the testimony of a few friends of the defendant, who say the defendant is a nice person, and rest. Many are also inclined to keep seemingly damaging testimony from the jury, when such testimony in fact can prove helpful. For example, the attorney may suppress his client's heavy drug usage, feeling that the jury will react negatively toward his client when the disclosure may play an important part in establishing mitigation. Keep in mind the defense goal of the penalty-phase hearing, gaining a life sentence, as opposed to the usual guilt-phase goal of the defense, establishing reasonable doubt. Thus, when you have a "sympathetic" client, you must relate his or her life story in a way that will make the jury want to give the client a second chance on life.

In order to have access to the real story, the defendant's family and friends must be advised of your strategy. Unless you tell them that damaging things in the defendant's past are as or more important than the good things, you will be unable to demonstrate the problems the defendant has faced since childhood. Let the parents know, for example, that by confessing their failures and sharing the blame for their child's actions, they will be making a major contribution. Once the word spreads through the family circle, a surprising



Garry Nungester



Linda Maxwell

Hundreds of recruits have signed up with the Ku Klux Klan in Decatur, Ala., in the past year. Thousands of other people in the area are Klan sympathizers and attend the almost-weekly rallies. One night last summer, in the twenty-fifth year since *Brown*, the Klan Youth Corps burned a schoolbus to protest integration, and then ended the rally with the traditional cross-burning (right).

Decatur: justice here still for whites

DECATUR, Ala. — This is where the "Scottsboro Boys" were once tried.

Today it's a place the Ku Klux Klan calls home. It's where a racially mixed couple is harassed at a restaurant, and a young white woman is threatened for performing in an interracial band.

Worst of all, it's a place where a city cop works part-time, without apology, for a self-acknowledged Klansman, and an Alabama State Trooper refuses to talk with most sheriff's deputies about confidential plans to protect black civil rights demonstrators because he knows some of the deputies are KKK-sympathizers.

Center attorneys say it is impossible for a black to get a fair trial here, so they have asked that Curtis Robinson's case be moved out of the county.

Robinson, a black maintenance man, is a client of the Center who was charged last May with assault-with-intent to murder a Klansman during a protest march by blacks that was attacked by a Klan mob. The incident culminated a year of demonstrations by blacks in support of a retarded young black man convicted of raping a white woman in a trial that attracted national attention in 1978.

Center attorneys Morris Dees and John Carroll are preparing for a hearing in January on their motion to move Robinson's trial. They will tell the court that racial passions are so hot that Robinson could not get justice in Morgan County.

Dees and Carroll will show that prejudice against Robinson has even contaminated the legal system. For this they will draw on their personal experiences with it.

Twice in recent weeks Center attorneys trying to take the testimony of police officers who witnessed the May violence

have been thwarted by last-minute legal maneuvers of the local prosecuting attorney.

The first time was last July. Less than two days before Robinson's long-scheduled preliminary hearing, he was abruptly indicted by a specially convened session of the county grand jury. Inexplicably, 70 subpoenas for witnesses called by the Center never went out. For more than a week prior to the date of the hearing they sat undelivered in the sheriff's office.

Dees thinks the clerk of city court with whom the subpoenas were filed passed the word to the prosecuting attorney, who sent word back down to the sheriff not to deliver them. The prosecuting attorney then assembled a grand jury to indict Robinson and cancelled the preliminary hearing.

Something similar happened just after Thanksgiving. In response to a \$750,000 civil suit filed by the wounded Klansman against Robinson and the organizers of the May march, Center attorney John Carroll arranged to take the depositions of the plaintiff, several Klansmen, and the same officers that Dees had subpoenaed in July.

Five minutes before the first police depositions were to begin, the prosecuting attorney hand-delivered an order issued by a judge that morning, without a hearing, which prohibited the depositions.

Last year in the case of the retarded black man, Tommy Lee Hines, the same judge ordered his trial moved from here in Morgan County, which is about ten percent black, to Cullman County, whose population is barely one percent black.

Robinson faces a maximum sentence of 20 years, if convicted.

Although three blacks were shot at the march last May, no one has been arrested in those cases.

Court opens Savannah files to SPLC

SAVANNAH, Ga. — A federal judge has ordered the Savannah Police Department and district attorney to open up to SPLC attorneys all their files relating to the arrest, prosecution, and conviction of Earl Charles for two murders it was later proven he didn't commit.

The ruling was necessitated by the refusal of the police and the district attorney to turn over the documents to Center attorneys preparing for trial of the \$7.2 million lawsuit Charles filed against the city and police officials last June. The police department had contended that the files were pri-

vileged, because the investigation into the murders is "active" again.

"The files will help us prove that the detectives working Earl's case had strong reason to believe they had the wrong man but proceeded to build a case against him anyway," said Dennis Balske, who is handling the case for the Center. "They will also assist us in demonstrating that the police falsified information to obtain the conviction."

Balske recently took the depositions of several police officials. All claimed there had been no wrongdoing.

The case is set for trial early in

March, almost five years after Charles was tried for the killings.

Charles, who is black, spent more than three years under a death sentence in the Chatham County jail here. He was sentenced to the electric chair for the robbery-murder of the co-owners of a Savannah furniture store. At his trial several alibi witnesses, including his employer in Tampa, Fla., testified that he had been in Tampa on the day the murders were committed.

Charles was released in 1978 after a Tampa lawman was found who could also verify his alibi.

In test case

Law denies inheritance to woman

Phyllis Everage is luckier than many illegitimate children; she knows her father's identity. In the small, south-Alabama community where both lived it was not a well-kept secret.

As Phyllis grew up many years ago, her father voluntarily gave money to her support, but never adopted her nor took any action to recognize her legally as his daughter.

Recently he died without leaving a will. After his death, his widow and four legitimate children sold part of their inheritance.

Before the proceeds were divided, Phyllis learned of the sale and filed suit to acquire her share of them.

At the time, Alabama law prohibited a child not legitimated by its father from inheriting any of his estate in the event he died without leaving a will, so the state court ruled against Phyllis' claim.

The case, *Everage v. Gibson*, was appealed by Phyllis' attorneys to the Alabama Supreme Court. This court, guided by recent decisions of the U.S. Supreme Court, acknowledged that the inheritance law as it applied to illegitimates was unconstitutional and resolved to rehabilitate the law by judicial action.

Before *Everage*, the law provided only two means of legitimation. One was by the marriage of the two parents, provided the father specifically recognized the child as his own. The other was if the father filed a declaration of legitimation in probate court.

Both options rested with the father.

With the self-expressed intent of making the law constitutional, the Alabama Supreme Court in *Everage* pronounced that in the future the traditional paternity proceeding would be allowed as a third means of legitimation.

Without explanation the court applied the new interpretation of the statute to *Everage* and, finding that the paternity of the reputed father had not been proven, affirmed the lower-court ruling.

The paternity-proceeding solution, while taking away the father's exclusive right to start legitimation procedures, invests it only in the mother, who alone has the right to file a paternity suit. The post-*Everage* law offers no direct remedy of legitimation for the illegitimate child.

Southern Poverty Law Center attorneys, who have joined the appeal of the case to the U.S. Supreme Court, contend that the post-*Everage* law is still unconstitutional and that retroactive application of the 'new' law violates due process.

Courts allow great latitude in jury instructions

(Continued from Page 2)

The authors of some of the leading works in this field often make themselves available for such testimony, depending on the time and location of the case. If the case indicates the likelihood of a need for such testimony, these experts should be contacted at the earliest possible date.

Experience-hardened officials include two kinds of execution witnesses, reporters and corrections officials. Many reporters who once favored the death penalty changed their views after witnessing executions, and their testimony can bring home the brutal realities of executions. A smaller number of corrections officials have had similar experiences, and their testimony can have dramatic impact on the jury. Additionally, these same officials can testify to the availability of secure facilities for lifetime incarceration, including extra-security precautions, the paucity of escapes and available rehabilitative services.

In summary, no matter how desperate the case, you can always argue against capital punishment in closing

argument. Your chances of succeeding will increase significantly if you can base your arguments on the testimony of these kinds of experts.

Defense-tendered jury instructions play a vital role in the sentencing phase. Without plain, full and proper instructions, all of the defense presentation can go for naught. Do not underestimate or overlook the importance of defense-tendered instructions. For example, under the Georgia statute the jury can recommend a life sentence, even if it finds no mitigating circumstances. Thus, in Georgia, or in a state with a similar provision, the defense should always insist on an instruction to this effect. In a case where the aggravating outnumber the mitigating circumstances, the defense should seek an instruction that the procedure to be followed is not a mere counting process, but rather is a process in which the jurors must apply their reasoned judgment in deciding whether the situation calls for life imprisonment or requires the imposition of death, in light of the totality of the circumstances present. Only by closely studying your state's statutory scheme

and relevant court interpretations will you be able to effectively prepare such instructions.

The area compelling the most attention in designing effective instructions should be the instructions regarding mitigating circumstances. Remember, under the *Lockett* decision, the sentencer cannot be precluded from considering as a mitigating factor any aspect of the defendant's character or record and any of the circumstances of the offense proffered by the defense as a basis for a life sentence. Therefore, tender instructions which list, in simple language, all of those circumstances which the defense contends mitigate toward a sentence of less than death. The potential list is endless, and as long as you introduced evidence to support these circumstances, refusal by the court to so charge would constitute reversible error.

Moreover, most states list statutory mitigating circumstances, such as the age of the defendant at the time of the crime, the fact that the defendant was an accomplice whose participation was relatively minor, and the lack

of a significant history of prior criminal activity. An instruction should be sought relative to each relevant statutory circumstance, in addition to the non-statutory circumstances.

Last, be certain to request that the jury be permitted to take a copy of the list of mitigating circumstances with them into the deliberation room. Post-trial interviews in one of this writer's recent cases indicated that after reviewing the state's exhibits, the jury was leaning toward death. However, when one of the jurors picked up the list of mitigating circumstances to be considered, the jury shifted its attention from the brutality of the crime to the life of the defendant and proceeded to discuss every circumstance, one by one, until they eventually returned with a life-sentence verdict.

LEGAL AID is a column for SPLC attorneys. This piece is excerpted from an article written by staff attorney Dennis N. Balske for publication in the *Akron Law Review*.

Doctor describes conditions on Death Row as inadequate

(Continued from Page 1)

write on, nothing to put food on, nothing to put belongings on . . .

Lighting is inadequate for reading. I would get a headache. I think anybody would get a headache if they are forced to read in there. So, and if one spends twenty-plus hours per day in there, then that would be an excessive amount of time spent in such a small space. It would be inadequate in terms of general habitation and it would be inadequate in terms of activity and movement. That's what I'd say about the cell.

What other minimal standards are we talking about that you feel are in question . . . ?

Visits . . . There should be, and I'm talking about contact visits, now, I'm not talking about — visits in which another human being can be touched — not talking about on the telephone, through a plexiglass screen, because I think that's inhuman. Contact visits should occur at least once a week. They presently occur once a month. They should occur for a few hours and they presently occur for one hour or less . . . I think that the number — the kinds of visitors should be broader than simply family.

What kind of length of stay are we talking about as having some bearing on whether or not you should keep the inmates isolated as opposed to social contact?

I don't think that has anything to do with it. I think that — I'm not suggesting that death row inmates be mixed in with the general population of any prison. I'm saying if you want to isolate them to a death row, that's one thing. But it seems to me once you have done that, you have to treat them in a way that meets certain minimum standards because, after all, their punishment is execution. That's their punishment. They haven't been sentenced to disciplinary segregation. They haven't been sentenced to torture . . .

I'm a proponent of social contact. I think that that's a basic need of human beings, and I think that men, even men condemned to death, should have an opportunity to sit together at meals. I think the men should have opportunities together recreationally and athletically. If you do it with twos, threes, fours or eights in terms of numbers, I wouldn't argue about that.

What else about the prisoners themselves, the way in which they are handled or the physical setting comes to your attention as being, in your judgment, something less than minimal treatment?

Well, it seems to me both medical and psychiatric care, basic care, is lacking. Maybe lacking in all of Holman, for all I know. But it's certainly lacking on Death Row.

Did you find any of the inmates mentally ill?

There are two who are certainly mentally ill, seriously mentally ill. I would raise a question as to whether they are fit to be executed.

And it's your opinion in the legalistic term that the present condition (on Death Row) is cruel and unusual punishment?

That's the way the Constitution, I think, looks at it. I'm not a lawyer, and I'm saying that this doesn't meet certain basic physical and psychological needs for human beings, whether they have been sentenced to death or not. But having been sentenced to death, it makes the whole business of the fact that they are awaiting execution from a philosophical and moral point of view even more of a farce, and I'm saying that from a basic physical-psychological point of view something is missing. And I'm saying that, in addition, that the whole notion, you know, taking a man and condemning him to death and then degrading him further is — should be considered — somewhat reprehensible.

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Law student ends clerkship

Barbara Lowe, a student at Northeastern University School of Law, recently completed a clerkship with the Southern Poverty Law Center.

While at the Center, she researched the issues behind a motion to compel the Savannah Police Department and the district attorney to open to the SPLC their files relating to the prosecution of Earl Charles (see story page 3); met with inmates on Alabama's Death Row in connection with *Jacobs v. Britton*, the suit challenging conditions there; investigated the case of a prisoner, subsequently freed, who had been jailed for his inability to pay fines assessed on a misdemeanor conviction; and did research for a brief filed with the U.S. Supreme Court challenging Alabama inheritance law as it applies to illegitimate children (see story page 3).

Ms. Lowe is a second-year law student. She received her B.A. from Wellesley College.

Before entering law school, she was

legislative coordinator and assistant to the chief attorney of the Executive Office of Economic Affairs for the state of Massachusetts.



Ms. Lowe