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Alumni Convocation Probes the Expansion of Criminal Law

The theme was as timeless as humankind itself, but a generation's worth of rapid change took center stage at the UB Law

School's 15th Annual Alumni Convocation, on March 2.

Approximately 200 alumni took advantage of the program, titled "Crime and Punishment: What Every Lawyer Should Know About the Expansion of Criminal Law."

As Dean David B. Filvaroff noted in his welcoming remarks, "The conference this morning is particularly timely. Whether your practice is in civil or criminal law, it will offer knowledge to help you keep your clients out of trouble."

Under the leadership of co-chairs Professor Dianne Avery, of UB Law, and Paul Suozzi, of Hurwitz & Fine, the convocation looked at crime and punishment from several perspectives. The panel of speakers — mostly UB alumni/ae — presented what at times became a dizzying overview of recent changes in criminal law. Following a luncheon the 1991 Edwin F. Jaeckle Award was presented to a distinguished UB Law-educated jurist, the Hon. M. Dolores Denman.

"Some of the greatest issues of the day have their first introduction in criminal courtrooms," began the day's moderator, criminal defense attorney **Mark J. Mahoney**. "The drama of criminal law is expanding and reaching into new areas." For example, he said, judges now are looking increasingly to state constitutions, rather than to the U.S.



Three of the panelists, left to right: Kathleen M. Mehlretter, Hon. Joseph P. McCarthy and Joel L. Daniels.

Supreme Court, as the benchmark for their decisions. Similarly, he said, in civil law, state statutes rather than federal are becoming the dominant factor.

Mahoney noted that one area of expansion in criminal law is in sheer numbers. In the past decade, he said, New York State's prison population has increased by an astonishing 163 percent.

Erie County Assistant District Attorney **Sheila A. DiTullio**, the first speaker, surely has played a part in that increase. But as chief of the county's Grand Jury Bureau, she spoke first of the movement to eliminate grand juries by those who say they have become merely a "rubber stamp" for the prosecutor's office.

Not so, DiTullio said. In fact, of

the 1,467 cases brought to the Erie County grand jury last year, 159 were dismissed outright. "That means that 159 people's reputations were literally saved — not subjected to public scrutiny, ridicule and the press."

The grand jury, she said, is necessary as a shield. "Without it, anybody could come into city court, lodge a complaint against you or me, and after a brief hearing it would be brought to court."

DiTullio went on to discuss the state's new forfeiture law - Penal Law 480, which took effect on Nov. 1, 1990. "No area more clearly illustrates the expansion of criminal law," she said.

The law has two purposes, she said: to reward the efforts of law enforcement agencies in controlling the sale and use of narcotics, and to direct money — 40 percent of all

forfeiture proceeds — to the Division of Substance Abuse Services to combat drug addiction.

She noted that the statute includes a number of clauses granting due-process protection to defendants undergoing a forfeiture motion. For example, a separate trial is required for a forfeiture, and the standard of proof is the highest: "beyond a reasonable doubt."

DiTullio also touched on the growing area of environmental crime prosecution — "a very challenging and worthwhile area of the law, and one that has taken off and will continue to grow."

"Most of these cases come to the state's attention through the employees, some of them those who are required to dump these hazardous wastes," DiTullio said.

"These cases are very expensive to prosecute. There's no way to execute an environmental crime subpoena discreetly. You'll see machinery all over and a whole lot of people in moon suits, dressed up like astronauts."

Noted criminal defense attorney **Joel L. Daniels** approached the issue of crime and punishment from the other side, sharing some practical tips on winning an entrapment defense. Referring to the recent war with Iraq, he drew an analogy: "Entrapment and insanity defenses have a lot in common with Saddam Hussein, because you often find yourself in the mother of all corners."

More seriously, he went on: "In defending an entrapment case, the magic word is always predisposition. Was the defendant an opportunist or merely a victim of a law enforcement sting?"

With insanity pleas, Daniels said, "the key is psychiatric evidence. To many distinguished prosecutors, that is a oxymoronic term." There are two components to making such a defense work, he said. The first is to establish



Professor Charles E. Carr

"Like many aspects of society, the criminal justice system is reeling under the strain of cases involving illegal drug use."

that a mental illness exists. The second, and more difficult, component is to establish that the defendant did not know what he was doing during the crime, or did not know that the act was wrong.

Daniels also advised his colleagues in the audience that it's good strategy to impeach the credibility of the state's psychiatrist on the stand. "This is an area that perhaps isn't taken advantage of as much as it should be," he said.

Tactics include:

- * File a Freedom of Information Act request to determine how much money the doctor was paid for his testimony.

- * Examine prior transcripts of his testimony; some psychiatrists say essentially the same thing at every trial.

- * Subpoena the doctor's hospital credential files and university teaching records, to search for derogatory material.

All this, Daniels conceded, sometimes becomes tangential to the issue at hand — the defendant's guilt or innocence — but serves the function of providing "entertainment for people watching what would otherwise be a very dull criminal case."

In the 30 years since he graduated from UB Law School, Erie County Court Judge **Joseph P. McCarthy** has seen plenty of the human misery that makes the criminal courts necessary. "We are exposed," he said, "on a daily basis to violence, ignorance, incompetence, tragedy — you name it, we see it."

McCarthy explored the historical theme of the movement from exclusion to inclusion in criminal law — that is, from a focus on limiting what is admissible as evidence, to today's focus on the growing field of expert testimony.

"It does get to be a battle of experts and the ability of lawyers to

impeach those experts in psychiatric testimony," he said. "Experts are being called to testify in just about everything."

One major instance of this, McCarthy said, is the rise of "profile proof"—psychiatric testimony that, for example, battered wives as a group behave in certain abnormal ways and that the jury should not expect normal reactions from such a defendant.

Another important "inclusion" is expert testimony on the validity of an eyewitness' identification, taking into account such factors as the witness' stress and the race of the defendant.

Discussing jury selection, McCarthy reviewed 30 years of progress toward the constitutional guarantee of "a jury of his peers." "When I started practicing in 1961, almost all jurors were middle-aged men," he said. Now, he said, juries tend to be more racially balanced and to include women and young people — "a broader range of jurors."

In reviewing the peremptory (without cause) challenge to prospective jurors, McCarthy outlined several cases in which verdicts were set aside because of errors in jury selection that formed "a pattern of discrimination" — the exclusion of all Hispanics from a jury, for instance. He summed up the recent case law in this area: "The simple fact is, jurors may not be measured by an unconstitutional standard. Period."

Kathleen M. Mehlretter, assistant U.S. attorney in Western New York, gave a wide-ranging review of the expanding investigative and prosecutorial powers of the federal government. These powers extend into such areas as environmental law, securities fraud, labor and food and drug cases.

"There are areas of law now that the federal government never got into when I first became a federal prosecutor in 1978," Mehlretter said.

"These changes are examples of how the federal government expanded into areas formerly considered civil. Part of this is the public's attitude: They want to see these people punished, not just have the cost built into the product or service they buy (from an offending company). This is especially true in environmental crimes — people want to see punishment as well as a deterrence factor." The same outcry, she said, has accompanied the nation's savings-and-loan scandals.

Mehlretter pointed to the Comprehensive Crime Control Act of 1984 as the keystone to these expanded federal responsibilities. "For the first time," she said, "the federal government was given tools to prosecute credit card crime and computer crime."

Discussing the federal laws to fight money laundering by requiring participants to report large cash transactions, Mehlretter warned those in attendance that lawyers were not exempt from that statute. "It's not illegal to deal in cash of more than \$10,000," she said. "It's not illegal to take that much out of the country. But it has to be reported to the government, in the same way that your income has to be reported to the government every year at income tax time."

The final speaker, UB Law Associate Professor **Charles E. Carr**, explored how near-hysteria over the use of illegal drugs threatens to erode Americans' Fourth Amendment rights.

The drug problem, he acknowledged, is very real. Almost 40 percent of Americans over age 12 have used a controlled substance, Carr said, and the United States uses more than half of all the illegal drugs consumed worldwide.

"Like many aspects of society, the criminal justice system is reeling under the strain of (cases involving)

illegal drug use," Carr said.

"It seems to me that the 'war on drugs' is principally aimed at low-level traffickers. But pretty soon this is an unmanageable situation financially, not to mention the social costs of warehousing (in prison) large segments of the population."

Public defenders' offices, he said, are overburdened because of this emphasis on the low-level dealer. "I fear that what we have now is less justice and more case management" in that setting, Carr said.

Moreover, he said, public pressure to stop drug use "tends to lead to rousting activities on the part of police, and I think that tends to lead to abuses by the police." He referred specifically to a case in which a man who fit a law enforcement "drug profile" had his luggage searched on a bus, without a warrant. The police found cocaine, but Carr said the precedent is troubling.

"Don't misunderstand me," Carr said. "I don't think it's OK for people to be running around from town to town carrying cocaine. But I also don't think it's OK for police officers to be rummaging through our things."

The results of such abuse, he said, include the erosion of our freedoms as guaranteed in the Bill of Rights, and an erosion of public confidence in the criminal justice system.

Carr also expressed reservations about the forfeiture laws, saying that attorneys are becoming reticent about taking on drug cases because they're afraid the government will confiscate the money that would pay their fee.

"As lawyers, I think we should demand to be treated with the same respect as other professionals," he said. "If they're not taking (a criminal's) dentures and taking money from his dentist, I don't want them taking my money." ■