ADVANCE SHEET– JULY 24, 2020

President's Letter

In this issue, we continue presenting materials relating to the unfortunately always timely subject of criminal justice in Baltimore City, this time in the form of a symposium conducted by the Calvert Institute for Policy Research 17 years ago, which includes contributions by two of our long-time members, former State's Attorney and Court of Special Appeals judge Charles Moylan and former Chief Public Defender Elizabeth Julian. The suggestions made 17 years ago have not borne all the fruit that might be desired, though there has been some increased authorization of citation authority in connection with minor drug offenses. The current coronavirus crisis and the demands it places upon the jury room and jury selection makes the symposium's appeal for reduced numbers of peremptory challenges especially timely now.

We also provide a link to the remarkable article in the New York Times Magazine for March 12, 2020 by Alex Mac Gillis of Pro Publica relating to Baltimore City's criminal justice problems: https://www.nytimes.com/2019/03/12/magazine/baltimore-tragedy-crime.html

In addition, we include as an attachment *above (http://www.barlib.org/Web4.html)* a link to a letter that I and three other senior Baltimoreans sent to the federal attorney general more than two months ago relating to the Baltimore City police consent decree, to which no direct response has as yet been received.

As always, comments and articles by our readers on this and other subjects are welcomed.

The rhetoric accompanying the recent Black Lives Matter demonstrations makes appropriate a reminder of how far the civil rights movement has come since its nadir in the Wilson administration. To that end, we reprint here H. L. Mencken's tribute to an almost forgotten figure, Kelly Miller, an eminent scientist who was the first black graduate of Johns Hopkins, as well as Kelly Miller's open letter to President Wilson appealing for a more vigorous response to racist outrages in East St. Louis, Illinois in 1919. We also include a biographical sketch of the undeservedly forgotten Miller, who tried to steer a middle course between Booker Washington's almost exclusive emphasis on vocational education as the way forward for blacks

and W.E.B. Du Bois renunciation of it as a survival of slavery in favor of emphasis on 'the talented tenth' in the professions..

Finally, we include a tribute by Judge Paul Grimm of the United States District Court to one of Maryland's most distinguished modern state court judges, Judge Joseph H. H. Kaplan.

George W. Liebmann

Open For Business

Whenever I compose something for the Advance Sheet I probably spend as much time thinking of an appropriate title as I do writing the article. Any of you who have ever read any of the articles are probably thinking/saying to yourself "Well, that explains a great deal."

Enough. To the point. **WE ARE NOW OPEN.** Open that is to I**n-Person Use** by our members. The reason for the debate over the title is twofold. First, we never really closed. During the course of the past few months we have e-mailed cases, parts of treatises and a myriad of other material to Library users. We were doing curbside pick-up before curbside pick-up was the thing to do. Since March we have met members and messengers at the various doors of the Courthouse who have come to retrieve books and, in a number of instances, multi-volume sets. They came on foot, by car and jeep, and in several instances, by bike. One of the promotional ads for the Army used to say "Be the best that you can be." Well, since March, in a very

different way, we have endeavored to be the best that we could be, and do all that was in our powers in providing you material for your practices.

We did not, however, stop there. Board President George Liebmann who was the driving force behind the creation of the Bar Library Lecture Series thirteen years ago, was of the opinion that the Library owed it to its members to continue to move forward, to, in a sense, use the pandemic not as an excuse to slow down, but as an opportunity to reach out more than it previously had. Scheduled in-person lectures were moved to zoom, and whereas the Library had traditionally went on "lecture hiatus" in the summer, this year Steven M. Klepper, Esquire of Kramon & Graham presented "The Personal Divide Between Jefferson & Marshall" on June 25, and two other pre-Labor day presentations are in the works, one by Bar Library regular Prof. Jonathan White on "The Emancipation Proclamation" slated for July 30 and a second by Prof. Kenneth Lasson on the current state of civil liberties.

In addition to our lectures, the other advancement has been the transformation of the humble Bar Library newsletter into the publication you have before you, featuring thought provoking articles on a myriad of subjects. Our objective is to engage and to stimulate thought.

The second hesitancy that I have with the title is that it evokes images of the conduct that has accompanied the pronouncements around the country of "Open For Business." Unlike what we have seen in so many places such as Arizona, Florida and Texas, a Bar Library opening does not mean do what you want, throw caution to the wind and your mask in the trash. Our policy and philosophy is fairly well encompassed in the opening announcement that we sent out to the membership last Friday:

"After several months, the Baltimore Bar Library will be reopening to all of you, this Monday, July 20 at 8:30 A.M. In order to enter the Courthouse you will be subject to having your temperature checked with a scanning thermometer and to wear a mask. All rules pertaining to entry and use of the Courthouse will apply while in the Library. While we do not anticipate crowding, Library staff may ask users to separate themselves by utilizing one or another of our numerous separate rooms. Our reopening will also allow our members who are continuing to work from home or on reduced schedules to inspect and borrow books from our Horwitz, Joseph, Mitchell and other collections. Unlike almost all the City's other libraries, we have remained staffed without interruption and anticipate few if any problems of adjustment. We will do our utmost to insure your use of the Library is both a safe and productive one and we look forward to welcoming you back."

All of you take care, be safe, and we hope to see you soon. The doors to the Courthouse and to the Library are now open to you.

Joe Bennett

One of the more popular services offered by the Bar Library is providing information on Maryland drivers and registered vehicles. The information, which comes directly from the Maryland Motor Vehicle Administration (sorry we cannot search for out of state drivers or registered vehicles), includes three year driving records as well as information on drivers such as their address. You can find out who owns what vehicles, as well as whether there are any lien holders and who the insurer for a vehicle is. Searches are only thirteen dollars and are done, with very few exceptions, immediately. So, call (410-727-0280) or e-mail (jwbennett@barlib.org) your requests today.

Chapter I

Criminal Justice

A. The Baltimore Criminal Justice System: The Judges Speak

April 30, 2003

MODERATOR: We are honored to have with us this evening four distinguished judges, Judge Charles Moylan, Judge J. Frederick Motz, Judge John Glynn, and Judge Timothy Doory. This symposium has five focused subjects, which were suggested by various participants in the panel in discussions prior to it.

We are going to have each of the panelists give a talk for 10 or 15 minutes on the five subjects, following which we will proceed subject-by-subject seeking the views of our designated commentators, Page Croyder of the State's Attorneys Office, Elizabeth Julian of the Public Defender's Office, and Peter Saar of the Police Department.

The five subjects are: 1) the possible curtailment of the trial de novo, 2) the possible curtailment of peremptory challenges, 3) the possible reduced use of mandatory minimum sentences, 4) the possible creation of minor offenses which have penalties of a level which do not trigger the right of jury trial and removal to the circuit court, and finally, 5) possible changes in police retirement practices.

JUDGE MOYLAN: I have always looked upon statutory interference, legislative interference, with what is inherently a judicial problem as very much of a problem. And I hate to see the legislature jumping in by way of mandatory minimum sentencing or even fooling around too much with what the sentences are with the judicial process. Over the years I felt that, particularly with mandatory minimums, what we tend to get is what I think

of as legislated hysteria, an ad hoc response to what seems to be in the daily papers the problem of the month. I think back by way of example a few years ago when we had a very notorious case, of automobile hijacking, in the State of Maryland, and as a result the legislature rushed into session and almost on an emergency basis created a new major major felony of automobile hijacking; whereas, those who have been involved in criminal law, prosecuting/ defending/whatever it may have been over the years, figured with the murder laws and manslaughter laws on the books, with the robbery and armed robbery and the larceny laws on the books, there are plenty of criminal laws that covered the subject of automobile hijacking, why are we simply crowding the statute books with another special crime?

You also find sometimes that there is a tendency on the part of individual legislators to make a reputation for themselves by appearing, generally speaking, tough on crime. And before I leave this subject to the one that really is closer to my heart at the moment, I think back to the early 1970s to a recently-elected state senator from Baltimore City who decided after a notorious incident or two of attacks on policemen here in Baltimore that he was going to prove to his constituency that he was tough on crime and particularly tough on anyone who did not respect the authority of the police officer and would dare to make an attack upon an officer. Lo and behold, the senator who wanted to get tough on assaults on policemen ended up imposing a 10 year ceiling on a crime that otherwise had no limits. I'm always a little bit fearful when the legislature gets involved.

In the world of peremptory challenges, I think the 1986 decision of Batson v. Kentucky is the catastrophe of catastrophes. The Supreme Court thought that it was supplying a solution to what it perceived as a very limited problem of the moment, which at that moment was the use of peremptories in the southern states of the United States, the old confederacy, probably by white prosecutors against black jurors in cases against black defendants. There is no way once you unlimber the heavy artillery of the equal protection clause of the 14th Amendment on this little thing called the peremptory challenge that you will ever be able to confine it to that limited problem. Once on the slippery slope, there is no principled place to stop short of the absolute bottom of the hill and I think that will ultimately be the absolute elimination of the peremptory challenge Batson v. Kentucky is applied not simply in the case of black jurors and black defendants, but white defendants/black jurors, white defendants/white

jurors, any race whatever. Soon in Alabama, Ex rel T.V. v. J.E.D, it was applied to gender. It was applied to the civil case as well as the criminal case. It was applied to the defense side of the trial table as well as the state side of the trial table. There was nothing wrong with the original use of the peremptory challenge.

I offer just one example. Imagine for a moment anyone here in the room is a prosecutor. And your case of the moment is to prosecute a middle-aged woman of the name of Minnie O'Brien for having thrown a rock through the window of the local abortion clinic. You as the prosecutor I dare say knowing nothing about the background of the potential jurors brought before you would instinctively strike with the peremptory challenge from your jury anybody whose last name was Clancy or Rafferty or Flynn. Now, were you in such a situation utilizing group generalization? You're damned right you were. Would you be well advised to do it notwithstanding? You're doggone right you would. But the difficulty with the system as it has evolved is that the system, and a little bit of the myth that we have promulgated, would insist that you be intellectually dishonest in attempting to disguise what you were doing with all kinds of other reasons.

You would be explaining to the judge, who might or might not believe you, that you had struck Clancy because you didn't like the look of that funny little mustache he was wearing, or you had struck Flynn because he declined to make square eye contact with you as you put a question to him. We have totally lost sight that the criminal trial is about the guilt or innocence of the defendant, not about all of these other procedural peripheral questions. I think as a matter of pure efficiency the only way out will be as Thurgood Marshall and Warren Burger both predicted back in 1986, the ultimate elimination of the peremptory challenge. If we could overrule Batson v. Kentucky, I'd be happy to keep it with us forever. But absent that overruling, I think the only intelligent thing to do is to get rid of it.

My last comment is on the de novo trial. Whenever anyone wants a second bite out of the apple and seeks to go from the District Court of Maryland up to the circuit court of this state, there's the de novo trial. After 1971, after the massive effort to create the District Court of Maryland and to upgrade the quality of that court to where everyone is a carefully-

selected full-time professional wearing a robe in a courtroom, no longer sitting in the police station house, to simply say that anyone unhappy with the results automatically is entitled to a trial de novo downtown in the Mitchell Courthouse or in Courthouse East simply by demanding a trial de novo, is an extravagant anachronism. To change the system, to make these true appeals on the record, would create some immediate dislocation, but in the long run would I think be far far more efficient than what we are doing now which is simply a duplication of efforts.

JUDGE GLYNN: The few cases that are going to be tried to a jury, the ultimate sort of trial in our system, tried to a verdict, the end result is a rather bizarre one. The end result is you are inevitably forced to buy off people's jury trial rights with lucrative offers at sentence, in sentencing. People refer actually trying the case to a jury as 'rolling the dice', which implies it has nothing to do with justice so much as dumb luck, which may say more about our system than anything else I could say. But as we look out over the city, I think we need to look at the situation in context, and remember that one of the big problems whenever we discuss fundamental changes in the system is that these are not problems that many people outside of the larger urban areas really care about. As a result, you always have to put things in context and realize that many of these changes discussed here are intelligent things to consider,, but they are not really perceived as a problem in most other jurisdictions, which is why it's going to be very difficult to change them.

Now, to discuss in detail some of the things I really deal with every day, all too often every day, the subject was raised of trial de novo in the district court. Judge Moylan is absolutely correct. The old cry used to be," I'm not going to trust the freedom of my client to those fools." And I'm told Judge Sweeney did not appreciate that. I was on the district court and now I'm on the circuit court. From having been on both courts, I can say there are no bigger fools on one than the other. I know there is always the complaint about a particular judge and there may be at times some justification. But that can happen to you on either court. You can pray the case up to the circuit court and have an equally unsatisfactory experience. So I think the argument that the quality of justice is weaker on the district court is not a valid argument anymore.

I think in fact what is really going on here is something that really does

plague our system generally, which is that from the perspective of the lawyers involved in the case, it's really all about how many tools they have in their arsenal to game the system, which is why I think that the phrase rolling the dice is probably particularly apt because I perceive sadly on a day-to-day basis that our system, for a variety of reasons, historical and current, is a system that gives a great many tools to the lawyers to enable them to game the system, to manipulate the process to improve their chances of getting the result they want in a particular case. It gives very short shrift to anything that might conceivably relate to or be relevant to truth or justice, getting a fair result to a particular case.

On the issue of trials de novo, most of the ones that I see either come from judges that for some reason they are scared of or they come for a variety of strange reasons such as it's 9:30, the lawyer doesn't want to wait any longer, the lawyer has a variety of other reasons for requesting a jury trial. They come into circuit court, very few of them are actually tried by a jury. I might get—if you do misdemeanor jury trials, you might get 25 on a docket, 30, sometimes more, the most you're going to try on a day really after you process that pile is really one. Most of them are looking for a better deal, which they often get, or they are looking to avoid a particular judge. In a discussion with some of my colleagues, — someone came up with the brilliant idea that actually probably relates to a couple of these topics in terms of the relationship between district and circuit court of saying that, well, the way we've modified the rule is you can have a trial de novo in the circuit court, but you're required to try it first in the district court; if you don't like the outcome, you then can come up and try it again.

To persuade you to do this, we'd offer you the right if you didn't like the outcome, you can actually appeal to the Court of Special Appeals instead of having to ask for permission. I believe you have to ask for permission if you appeal from the district to the circuit. The idea being that a lot of cases will probably stay there, a lot of cases will be satisfactorily resolved. The people are scared of the judges, but once they hear the case, they may very well be happy with the result and it would force people to focus more of their energy on these cases in district court. Now, this would end up being argued as an excessive interference with someone's right to pray a jury trial. Whether it would prevail, I do not know. Probably the biggest fear relating to that would be that you would be potentially incarcerated. The only way around that is to create a situation where the

judge of the district court would automatically be required to set a reasonable bail on appeal if the person were incarcerated.

My concern about other trial de novo issues affecting the district court is that the more you make the district court a record court, the more cumbersome the process becomes. The more you're required to generate records, the more expensive the process becomes. The other issue that was mentioned was a high maximum penalty with respect to the right to a jury trial and the 90 day sentence triggering that right. I will tell you what a great irony about that argument is, and I've argued with my good friend George Lippman, who is a lobbyist for the public defenders office and is a district court judge, about this. If you suggest, well, we should lower the maximum for crime X to 60 days, you could have some lower creature of drug possession, possession of less than three grams or something, maximum sentence 60 days. And what happens when you argue that to someone like the lobbyist for the public defenders office is they will vehemently oppose that. I said, George, think about this, we can have this editorial in The Sun: Public defenders oppose lower maximum sentencing. Intuitively this makes no sense. And the fact that it is the way it is is part of the perversity of the system. The benefit of having these higher maximums, which are rarely going to be imposed, is that you can play this game with the system.

You can torture the victims, torture the process by bringing the case up to the circuit court, requiring the victims to appear again and again and again and eventually get a much better deal for your client even though that may have very little to do with justice in any particular case. But when you discuss these reduced maximums, you invariably run up against the wall that I've just discussed in that there will be vehement opposition on the grounds that it inhibits people's rights to a jury trial. Warren Brown said in a Sun papers article that the tail is wagging the dog. What's plaguing the city is that in the city the defendants really have most of the cards. Now, I don't envy them their wait in the city jail for trial, but they do have most of the cards and that's what drives a lot of the issues that we are discussing here.

As for the issues raised about mandatory minimums, like most judges, I always assume that I can figure out what the right sentence is without any help from people who have already told me they don't care about the facts.

I'm not a prosecutor and I've never been a prosecutor, but I'm sure mandatory minimums help prosecutors in terms of plea bargaining, they almost have to.

I think the sad thing is they produce an occasional truly aberrant result. You will occasionally get a person who qualifies, most of the people who qualify for the mandatory minimums frankly richly deserve them and are going to get a sentence greater than the mandatory minimum in any event, but you do occasionally get a truly abusive case of some elderly person who has a prior assault conviction, is therefore charged as a person in possession of a handgun who was previously convicted of a crime of violence and the mandatory minimum was five years, and sometimes it doesn't make any sense, and nonetheless you're stuck with it. I have a colleague who, after hearing the facts on a plea, found the guy not guilty basically because he didn't like the mandatory minimum. That's the kind of perversion you get.

Peremptory challenges and the jury. They are truly an embarrassment. Judge Moylan discussed the Batson issue on an intellectual level, we'll skip right over that part. The lawyers only know how old you are, what race you are, your degree of education, whether you're a male or a female, that's about all they know when they pick a jury. All of those are things that we would think you shouldn't be picking the jury based on if you wanted a fair jury to hear your case. I've had jurors in the jury panel come up, to ask me after we've picked a jury, saying: How can you allow this? Don't you see one party struck all the white jurors, the other party struck all the black jurors? And it is truly embarrassing to watch this happen. And when you have nothing to base your decision on but these factors, what else are you going to base your decision on. It's an embarrassment. It's a disgrace.

The Batson case is now written such that if the lawyers come up and give you any halfway plausible reason, you say, fine, fine, I know you struck everybody and deep down inside I know why you struck everybody from one race or the other, but let's keep going, and that's the way it is. And my view of it is the peremptory challenges are another device that lawyers, God love them, use to game the process that has nothing to do with justice. Sometimes it is said: 'But the judges, they won't strike the right people.' In theory, if not in practice, the only person in the room who has legitimate reason to care that the process is done in a just and fair way is the judge.

The prosecutor may care personally, but legally wants to win his case, as does the defense attorney. It is the judge's job to make sure the jury that is picked is fairly picked. It's a cumbersome process, it's an embarrassing process, but it's also a process that the defense bar would vehemently oppose being changed because it's in their interest, even though it has absolutely nothing that I've ever been able to detect to do with justice.

JUDGE DOORY: First, as to de novo appeal, it is not any challenge to my talent as a skeptic to point out what's wrong with the system. But I suggest that the logical system, the one that is proposed, may be one about which there are many hidden problems, and sometimes it is better to stay with the devil we know than to invite a new devil into the house. Some of the problems if we were to switch and eliminate de novo appeals and make all appeals from criminal cases in the district be on the record are associated with I think not preliminarily getting all of the facts. How big is the problem right now in what is happening in the court system? Are these appeals clogging the system?

I think they have to be analyzed in terms of two questions. Are people appealing cases from the district court because they are aggrieved with decisions that were made, or are they simply looking for a sentence review? Because I think statistically we may find that for those people who were given a sentence in district court, appealed, and by the time it got to circuit court, that sentence has been served or whatever it was that they were concerned about, probation, be it community service or something, has been done, that those appeals are withdrawn. So maybe the solution is not necessarily doing away with the de novo appeals, but rather putting in some other process for some sentence review of a district court sentence. If we did have de novo appeals at the circuit court, that would require an appellate practice at the circuit court not only for all of the attorneys involved, it would require that practice for the judges involved, and I'm not sure that that is a minor problem.

And think in terms of the defendant in jail. If his only remedy is an appeal on the record, he's got to sit in jail while that appeal, that transcript, is being developed, and for many of the sentences coming out of district court, that time waiting for the transcript is longer than the sentence. You also have to realize that if you have a trial in a district court, all the facts are presented, all the witnesses are heard, it is appealed on the record, and

the remedy is that there was an error in the district court, the solution then is retrial in the district court, which means you have necessitated a whole other trial after you have necessitated a transcript in an appellate case. Just some observations from a skeptic.

Moving on to the next topic that was presented : mandatory minimum sentences. As a district court judge, as a circuit court judge on loan, as a judge assigned to the dreaded sentencing commission, I understand how much judges hate minimum sentences of any sort. What I must point out, and this maybe is getting back to my years as a prosecutor, particularly 10 years watching 3,000 homicides in this town, that when it comes to handgun offenses, I firmly believe that those minimums are necessary. It may be a most distasteful medicine, but the medicine I believe was necessary because there are far too many light sentences for people with handguns. And as I sit there and frequently do bail reviews and see someone who comes back in a most dreadful circumstance, it is uncanny how frequently that person has a handgun conviction on his record. If you wanted to do away with all minimum sentences, I'd have no objection so long as it didn't touch anything that dealt with the handgun situation. Now, we've also been challenged to consider changing the maximum penalty for de minimis crimes and presenting something along those lines to the legislature.

Eight years ago, I worked on this very thing in presentation to the legislature, and in fact I was with the States Attorneys Association Legislative Team that actually presented to the Article 27 Commission the restructuring of the assault laws. At the same time we presented that package, the state's attorneys from Baltimore City, put in an entire plan for a series of de minimis crimes such as possession of less than three grams maximum of marijuana, some minor forms of assault such as like spitting on someone or something along those lines, we had a whole series of suggestions involving minor larcenies to cover shoplifting where the penalties would all come in under the 60 day limit. We thought it would make the system much more efficient and make the system actually work by having these crimes charged and tried in the district where the decision would be quickly made and pressure would be taken off the circuit court. We were resoundingly ill-received in the legislature. Outside of Baltimore City, there is no sentiment that it's a problem and legislators, they explained to me and have since explained many times, are very opposed to voting for

anything that is captioned as a reduction in the penalty of crime because they will be then listed as being soft on crime, which even though they may be doing it to make the system more efficient, and even though that may in essence be a crime-fighting tool, they would be viewed as being soft on crime and would be opposed to it. So I really don't think there is much hope of relief from Annapolis on that issue.

I've also proposed possibly having the city through its own ordinances address these very crimes. But for the crimes that we are talking about such as the theft crimes, the assault crimes, and the narcotics crimes, there is a substantial problem of preemption. When we talk about peremptory challenges and doing away with them, once again I think that this is a logical suggestion. Once again, as a skeptic, I see many very very serious problems with doing this. I share Judge Moylan's views, his lack of confidence in the Batson decision. I have always had great difficulty in understanding Batson, which is an equal protection case, and it deals with the rights of the juror. I have never seen a juror struck in my 30 years who didn't leave the courtroom with a smile. So if they forfeited their constitutional rights, it was not terribly obvious. After Batson, trial practice is different. The selection of a jury is uglier. It is uglier for the attorneys, it's uglier for the jurors, and it's uglier for the judge.

Because, in essence—and truly I seriously thought about giving up trial practice because of this ugliness— in the early days the only way to get a Batson challenge on the floor was for one lawyer to stand up and point at the other one and say: He's a racist. I find that after 20 some years of a gentlemanly practice to be a most offensive way of going about things. But, change it around, from the attorney's point of view why do we need peremptory challenges? The truth of the matter is in order for the attorneys and their clients, be it a defendant sitting there, the victim sitting in the hall, to have a level of confidence in the process. If you do away with peremptory challenges completely, you create some substantial problems, one of which is this, and I don't know if you've ever been there in a trial where a juror has been seated and you know in your heart of hearts that juror has the door closed to you, there is not a chance anymore, that hopelessness on the part of attorneys can lead to an attitude of sabotage of the trial. The best outcome, if you think that there is one juror that must vote against you, is a mistrial. A mistrial is better than nothing. And believe me, that is what trial attorneys will reach for.

I suggest that we should do something to change the process that we have, to take up a position on this slope that Judge Moylan has described somewhere slightly above the bottom, and along those lines a few suggestions. One would be to substantially reduce the number of challenges involved because, once again, I'm thinking in my old homicide prosecutor mode, a man is a far more aggressive and dangerous character if he's walking down the street with a semi-automatic pistol in his pocket with 17 rounds than a man walking down the street with a Derringer in his pocket with two shots. With two shots you can't afford to miss. Right now we have a system where it is either four per party, ten and five or twenty and ten. If we reduce the system down to one that was two, three and four, at least the potential for abuse is substantially reduced, and if you have ever picked a jury you know that when you get down to your last two strikes, you are most judicious in what you're doing because who is coming up may be a whole lot worse than who you're striking, and particularly if you're striking someone who is in the box. If you strike someone who is in the box, you create a vacancy that has to be filled and you may need a strike to stop someone from filling the void that you have just created.

So reducing the number down may be part of the solution. It may also be wiser to do away with the Batson preliminaries of requiring somebody to stand up and point the finger at the other side, rather require an explanation for every peremptory challenge that's used. You want to strike this juror, you strike the juror, fine. You have the right to, but you have tell me why you did it. You have to put that on the record. And even if you had a larger number of challenges than the minimum I'm suggesting, that may be a sufficient brake on the system to avoid some of the abuses.

A third thought is this: Each party would be given the right to strike one person for cause in addition to those struck by the judge. You may strike a person for cause, but you must in private announce the reason that you've done it. And if the judge is so impressed that you have done so in the furtherance of justice, in the hopes that a more fair trial will be had, you can get another one, but that's only after you've expressed yourself about why you used the one that you did. I'm suggesting that we have to be imaginative here, that no challenges creates great problems, that some challenges have a place in the system, but that we have to do it much better than the way we are doing it right now.

And the fifth topic is the pension system in Baltimore City. I must confess in advance that I am a retired Baltimore City prosecutor. I can tell you that I stayed longer and turned down other opportunities later in my career because the prospect of obtaining a pension was there. So that is a factor to consider.

JUDGE MOTZ: We don't think through the implications of things we talk about. And that is certainly true in the criminal justice system. Let's face it, it's not only people in Talbot County who don't worry about the problems in the city, it's the people out in Baltimore County, the people in Anne Arundel County, in the metropolitan area. As a state, we survive in the city. In this area, the people out in the suburbs don't care. They don't understand. They love to go to cocktail parties and they love to say, oh, lock them up and throw away the key. Do they want to spend any kind of money to have a civilized incarceration system? No. Are they going to do anything about the city jail? We can't get a federal detention center in this state which we've needed for 25 years. That's partially geography. But nobody is going to do anything about the problems, they are going to talk about them.

They are going to say, we want mandatory maximums and minimums and enact stupid legislation like the one that Tim just referred to where the maximum and the minimum are the same so that you can't have any plea bargain. I mean, let's face it, they are going to rail against plea bargaining. Everybody says, oh, plea bargaining is a terrible thing. The fact is that any professional knows that the system won't work without plea bargaining. They are going to pretend that they have evenness and uniformity in sentencing by having mandatory minimums and by having strict sentencing guidelines. This is something that I can bring from the federal perspective because we have far more strict sentencing guidelines than the state does.

What really offends me about that is the intellectual dishonesty of it because discretion is not something you can destroy. Discretion is something you can just disperse. And anybody who knows anything about the system knows that you're simply transferring the power to the prosecutors and indeed sometimes the police officers when you have strict sentencing guidelines. What do I mean? Well, if your guideline is determined by how many drugs are involved in the prosecution, you can even have the police keep an investigation alive longer than they would otherwise to have more drugs involved. Now, I'm not saying that's bad,

there may be good reason for it, but theoretically it's not good.

Certainly at the prosecutorial level it happens all the time. What you charge is what's going to mandate the sentence. And it is just not true to say that you get uniformity in sentencing when you have strict sentencing guidelines. You have simply transferred the power to make those decisions away from the judge, who is accountable in the courtroom, who presumably has more experience than prosecutors who make the decisions behind the scenes in their charge decisions, in plea negotiations, and who are not impartial in the system. Now, that's not to say that you shouldn't have guidelines. The judges, some are too hard, some are too weak. But if you have a system where you have guidelines, appellate courts know which judges are too soft, which ones are too weak, they can also look at a strange case and do something about it, that's the way to solve that problem.

You don't want strict sentencing guidelines. You don't want mandatory minimums, of course you have to have mandatory maximums .Every federal judge is going to tell you that, so we are just like parents. But the fact is that we know that from experience. Something which is not on the agenda, but something else people love to go on about is the death penalty. Well, I'm not going to take any moral stand on the death penalty. In fact, I sometimes wonder if I know the answer myself. Certainly there are cases in which it would seem logical, a heinous crime or a crime of treason, killing prison guards and things of that nature. What are the rational responses? But forget the morality of it, look at the practicality. Anybody involved in the system knows how costly a death prosecution is. It is incredible.

Everything has to be done as perfectly as possible. For one thing, the machine doesn't run as well when you're trying to make it perfect. It runs better when you're trying to make it run well. But if you try to make it run perfectly, the cost in the voir dire system, the cost in just taking time to take care, the cost for our marshals, for example, who in this day of terrorism should have other responsibilities, is just a mis-allocation of resources. That's not to say in an appropriate case it shouldn't be used, but the answer that we are going to solve the problem of crime nationally by having a lot more death penalties doesn't make any sense. And professionally, the attorney general of the United States, ought to know that. He ought to set other priorities. That's not to say you can't have it appropriately, but you

shouldn't waste scarce resources on things which aren't going to solve the problem anyway. But it's not just the people in the suburbs, it's the people in the inner city too. We are talking about inner city crime. Where is the talk there that people are going to take responsibility for what they do? I just had a case the other day, a terrible case (people say federal courts don't see inner city crime, they do see it, they've been seeing it for years. The present U.S. attorney has brought exactly the kinds of cases he should bring. I just recently tried a RICO case involving inner city gangs. I just tried another one involving a terrible shooting on North Avenue and they ended up in pleas.) I had a sentencing in court the other day after a plea bargain was reached, one of the defendants was given 35 years and a victim came in and she started screaming at the defendant about how could you have done this. There was no communication going on at all. But I looked around the courtroom and there was a palpable lack of responsibility for what was going on.

One of my defendants, I heard this, I don't know this for a fact, he's 25 years old, he's a grandfather. What are you going to do when you have kids having kids and nobody is taking responsibility for it? What are you going to do? I see it every day. I saw it when I first went on the bench 16 years ago, I saw 36, 40 year old grandmothers. Now I'm seeing, if it is true, I'm not sure, this is hearsay, but it's certainly biologically possible and certainly it's functionally possible to have 25, 26 year old grandfathers and none of them are staying with their kids. The solutions to some of the problems that we are discussing, they are not just small legislative fixes, they are fixes that require true across-the-board work by everybody. And as a city we better come to understand it. And when I say a city, I mean a metropolitan area.

Peremptory challenges, I think Tim's idea of reducing the number of peremptory challenges is a terrific one. It's the same problem in the civil area in the area of litigation expense. One of the huge costs— what's made civil litigation far too expensive is the number of depositions that are taken. We give lawyers a chance to take depositions, they will take depositions from now until doomsday. They train their young lawyers to do it, they pay their overhead, and they can talk. And great minds have tried to fix this problem by changing the standard that you can only look into reasonable things that might lead to relevant information. I forget what the standard is. Frankly, I don't care what the standard is. It doesn't make any sense. I solve

the problem by saying you've got five hours of depositions, you can spend it any way you want, but you've got five hours. Now, the number of deposition hours depends upon the amount in controversy. But I'm not going to set the standard for you, I'm going to let you set your own standard. If you want to spend your five hours asking irrelevant questions or being a jerk and interjecting when the other side is asking questions , go ahead and do it, but the five hours is going to be spent. Same thing with the two peremptory challenges, use them.

In fact, I'm not so sure Batson has had a bad effect. I think it has had probably a deterrent effect upon the most egregious of strikes for inappropriate reasons. Now, the problem is lawyers can cause all kinds of problems, it's essentially a race problem to begin with, then it became an age problem, then it became a gender problem. The other day I had one of the lawyers say, I struck him because he was young. That's a Batson violation. A suspect classification, you're making an age discrimination. It's just silly. We can do it in a way that you don't have to call the other person a racist. You can call upon them to explain themselves, but we don't have them sit in the box. What we do is we have all the jurors stand up first, identify themselves, we strike for cause, then if you're picking 14 jurors with two alternates, each side gets 16 strikes. What you do is you don't have people come into the box, you draw, you start at the top of the list and the people who are listed, you draw a line after the first 14 jurors, plus the 16 strikes. After the first 30 people, nobody is standing up, the sides finally strike. They don't know who the other side has struck until the end. Then they hand the list to the clerks and the first 14 people are the people selected.

And what I do is before they are handed to the clerk, I say, exchange your lists with one another. If there's a Batson challenge, come on up to the bench and we'll talk about how to solve it. When they are made, people don't say they are racist, you say, I think I really question why that strike was made, and somebody is called upon to explain themselves. I think it has had some deterrent effect upon bad challenges, but I think the idea of limiting the number of peremptories is a very good one. I mentioned before one of the things that causes me problems about the sentencing guidelines is the lack of intellectual honesty. It truly corrupts the system when you have to defend things that are different than they are. Frankly, that's also true about search and seizure laws. Now, I'm not suggesting any grand

constitutional change here, but I get a lot of gun cases and I get a lot of inner city searches and I know what the police officer has done has played a reasonable hunch, which in context probably is a very good hunch, to try to get rid of some of those fire arms on the street. Does it amount to reasonable suspicion? It gets awfully close.

But it is corrupting when you are bending over backwards to help the police too much; on the other hand, you know that the police—by definition, it's been a good search in the sense that they've found something. I'm awfully close to saying that legislation ought to be enacted, in given areas, areas of crime problems, which would reduce the standard to reasonable hunch. I really mean it. The same thing about gun control. When you hear the national debate about gun control, hunters and people who are responsible, people who are hunters and that guns are part of their family, they grew up in Montana, they see a great infringement upon their constitutional rights because they can't teach their children how to use guns responsibly.

They are talking about a whole different issue than what is two miles from us, a whole other issue, and people ought to focus upon it in different ways recognizing the different contexts that present themselves. I mean, you can't give too much power to the police because we all know that we will all abuse power if we have it. But on the other hand, one of the problems in the inner city, talking about lack of responsibility, in these hearings that I've had, in these suppression hearings in these cases, people come up and they bring their kids and they sit in the audience and as soon as the police officers say something which seems a little inconsistent, the defense passes and they start these great gales of laughter as if saying, ha ha, we caught you.

Well, who is making your life miserable, the people in the audience, is it the police officers who are out there trying to defend you and doing the best they can, putting their lives on the line, making difficult judgments, or is it your buddies who are thugs and the thugs are running the street corners? I mean, that is something else that the inner city population has got to come to understand, that the police are not occupying forces who are trying to do them in, they are trying to prevent burning down the houses of people with people inside because they've been on drugs, which has happened in the city within the past six months. It is terrible. It is terrible

that we as citizens in this metropolitan area aren't more outraged about this.

I guess the only other two things I want to say is: Don't think that the solution is to throw all the cases in federal court. I mean, these fellows work terrifically hard and every additional judge that they can get helps them. We have six active district judges in federal court. There are cases we ought to try. We ought to try some of the cases I've been trying. You can use federal resources and you can use federal laws, you can use RICO to get a network. But don't just think that by having six additional judges that you're going to be able to solve the problems of the inner city. For one thing, they look at the stats where you've got such a higher rate of conviction in federal court and that's because the prosecutors are making reasonable cuts on searches and seizures and decisions before the case ever gets into court. We'd been throwing cases out all the time on some of these searches.

We just can't handle every little case that comes along. And if we do, and this frankly again is something the private bar should become involved in, if all we are doing is trying criminal cases from the city, we have other things we are supposed to be doing. We are supposed to be trying antitrust cases. We are supposed to be trying banking cases. We are also supposed to be trying civil rights cases. We are supposed to be trying employment discrimination cases, ERISA cases, which involves the rights of people who are being deprived of benefits by insurance companies, things that really go to the heart of people, we can't do all of that if we simply are turned into another branch of the criminal court of Baltimore City. I haven't seen a letter to the editor or an op ed piece which says: Look, the federal court does have a role, federal prosecutors do have a role, but they too have limited resources and they have other responsibilities, some of which are of tremendous economic importance to the state, intellectual property cases for example, where they have to have the time to be able to do that job and they also have to do other civil cases which count for every citizen in the state, such as employment discrimination, civil rights and pension cases.

The final thing is, we also have to believe in the rule of law. We have to be tough. We have to recognize the risks that are facing us domestically and internationally. But let's not be embarrassed when a generation looks back on us and says: What were those people thinking when they were denying rights to people because of a vague concern about terrorist

activity? That's not to say that there aren't legitimate things and that there are some ways that we have been too soft in the past. But there are some cases going through the courts right now where thought for the rule of law and the importance of the rule of law is being forgotten. Frankly, I think it may have happened not in a terrorist case, but in the Lee Malvo case right now, but that's a whole different question and that's for the Virginia judges to decide. But we can't just say we are frightened and give into mass hysteria and forget the rule of law because then we are in for a lot of trouble.

MODERATOR: The trial de novo issue, as someone said, is not one of enormous practical importance as things are. Last year there were 378 criminal cases that were tried and appealed de novo in Baltimore City, that compares with the number of cases that were removed from the district court for jury trial, which was 12,548. So it's not the right to appeal a district court case after it's been tried in the district court that's of great practical importance, it's the jury trial right itself and the thousands of cases removed when there is really no intention of claiming a jury trial in the circuit court. What renders the trial de novo question of importance is that if these minor offenses were created that called for sentences of less than 90 days, then the trial de novo would become a large issue. In a great many of the foreign systems, and in many many other states, the magistrates are essentially the front line of defense. They try minor crimes and they are the last word on them subject to a record appeal. And the effect of that is that there are twice as many judges trying criminal cases.

In our system, the district court is simply a way station and therefore the entire serious burden is shouldered ultimately at the circuit court level. So that I think the idea of creating more district court non-jury offenses is inextricably intertwined with the issue of trial de novo: it is probably not worth doing unless you curtail the trial de novo. But if you do it without curtailing the trial de novo, you won't get as many jury trial prayers as you get now, but you will get an enormous number of trials de novo. The pressure that's now brought to bear on the circuit court by removal for jury trial will take the form of appeals de novo. I turn now to our panelists who have varied and I suspect contrasting opinions about these two issues, trial de novo, and the idea of new minor offenses.

PAGE CROYDER: The two issues are intertwined, trial de novo and the

sentences for first offenses if 90 days is the magic number for when somebody becomes eligible to pray a jury trial. A lot of the problems here and a lot of the things that we are discussing are driven by the volume in Baltimore City. If we don't see some of these issues in the outlying counties, it's because they don't face the volume that we face in Baltimore City. In reality, a lot of the crimes that we see that come through the system, regardless of what the maximum sentence is, one year, two years, three years, are probation cases or short jail terms that go under 90 days and yet all of these people who face the maximum sentence are eligible for jury trials and in my opinion the role the district court currently plays is as a way to negotiate the best plea possible, not necessarily to get the best forum to have the facts heard, but to get the best plea possible. 'And so if you don't take my plea, state's attorney, if you don't take what I want to plea to, we'll go down to the jury trial.'

There is tension between the district court and circuit court judges. The circuit court judges think that maybe some of these cases shouldn't be coming down to them. District court judges want to give the sentences they think are appropriate, but they get undercut and they get less sentencing at circuit court. I think that we need to move in the direction of making the district court more of a court of finality. Right now I heard a colleague of Judge Doory say that that the district court is merely a postponement and probation court and I agree with that assessment. Postponing cases when the defendant doesn't have an attorney or in cases where the state doesn't have their witnesses, and after that, if they are not offering probation, down to the circuit court it goes.

We have now highly trained, highly paid district court judges, we should be making use of them, and I think we should be taking the burden off of the circuit court by limiting the de novo appeals. Having a trial all over again is without question a waste of court and judicial resources. I also think as a practical matter we need to recognize when cases are not going to be in the category of over 90 day sentences, they should remain at the district court. I have heard my colleague, the district public defender , say that limiting more cases to 90 days deprives people of their constitutional right to a jury trial. I disagree. The right to a jury trial begins after 90 days and if more cases are limited to 90 days or less, there is no constitutional right and nobody is being deprived. If we recognize the reality and if we limit more cases, I think that we could take substantial pressure off of the

circuit court and use the district court for what it was designed for: To resolve in some kind of final fashion the cases, the minor cases, in our system.

ELIZABETH JULIAN: When you just look at one point about taking away the right to a jury trial, if there was a right to a jury trial on the crime and then you take the 90 days away or the 91 days away, then you have effectively legislatively taken away the jury trial right on a classification and I stand by that. I believe in jury trial for many reasons because my focus has always been in my career at the circuit court level. But my experience has been to get the 12 jurors in the box and try out fresh ideas on fresh people, not judges who have heard hundreds of cases and maybe even in district court that number that day. But I think that we are missing something here.

I think the whole reason for why we are looking at the trial de novo aspect of things and the reason why the on-record part is disfavored is because in Baltimore City because of the volume and because of past practices, the discovery rules are not as broadly used. So many times people will be trying to get information to get prepared for the next step, getting up to the circuit court, so they go and try the case with more information than they were given before the trial started.

The rules are less mandatory in the district court than they are in the circuit court. But I agree with something I read in this wonderful packet, I agree with Judge Doory on that, the information was really great. There was a Massachusetts study that was talking about pretrial discovery at the district court that answered the questions I've just raised, so that there is more information gained in the proper way and the cases were held where they should be, at the district court level. Before we go changing the system, we need to look at and fix the system that's already in place. Another aspect of searching for pleas at different levels comes from the processes that the different judges use down at the district court. Some judges will bind themselves to a plea. I think that's called a defense driven plea in the materials, I can't remember, something like that. But the point is—you debate the plea in front of the judge. The judge may choose to engage in it. Many judges will say, well, that's what the state offered, what are you going to do, rather than trying to, in view of the volume, engage themselves and see if they can get something more meaningful. The answer right away, just with the plea on the table without any tweaking of it is, yes,

let's go someplace else and find a better deal, and that's practice. As a defense counsel, I feel it would be unethical for me not to take that route and go where I can do the best for my client. But that's something else that needs to be examined.

The process though in Baltimore is driven by the volume and I think that when we look for efficiency we are losing effectiveness. I believe that things are backwards anyway. I think that preliminary hearings should be held at the circuit court where the case will be tried. If the preliminary hearing in the case is successful for the people bringing it, for the state, it should stay right in that building. It starts in the circuit court and it stays there. I also believe that jury trials should stay down at the district court, and that's not a novel concept. I saw this play out, both of those aspects, in San Diego, it makes more sense, they leave misdemeanor cases where they belong in the district court. To shift the burden down to the circuit court does not really make sense intellectually and definitely economically. But when I say economically, we are not prepared to do that.

We were talking to Judge Doory about the fact that there is a jury courtroom in every one of the districts and that's nice, but they don't use it. If we were to permit jury trials down there, one would not be enough. But the issue I think I missed, was binding of pleas. Some judges will bind themselves and say that, if you get the facts and I'm still in agreement with this plea, then this is a good deal. If I don't agree to this deal because I've heard something that I can't do, I will not honor this, I may change this agreement, then you're free to go down to the circuit court and free to ask for a jury trial, you're free to take it to the circuit court and free to leave my court. Some judges will not do that and so there is uncertainty when you're going to the first level of what the outcome will be, which I don't think it would take that much more time to resolve it where it belongs. And I think that sometimes it's engendered the practice of passing cases along because you have someone in your court room at the district court at the time.

PETER SAAR: I'm here from the Baltimore City Police Department, Legal Affairs, and my perspective in this comes in part mostly from being a former prosecutor myself. However, from the standpoint of how the trial de novo reduction or trial on the record would be, it would certainly be, at least for our purposes, the department's purposes as sort of a cost savings as far as having to pay police officers to go to court for the court overtime

that they normally wouldn't be expected to be receiving for attendance at court if they are off duty.

If we have a trial de novo at the circuit court level or there are increases in that as a result of what we are contemplating here, or if we have trial on the record, we would avoid that additional expense or that expectation of an expense from a budgetary standpoint. Certainly for officers who are on duty, it would be one thing less for them to be removed from the duties of patrol to attend at the circuit court level because the record is sufficient or is expected to be sufficient for the purposes of the appeals. With reference to reducing the number or offense to a number of days, 90 or less as a first penalty, that would be also a very large benefit in my estimation, but it would also have to be done in tandem with the trial de novo changes for the very same reasons that have already been expressed. I won't go over those. But again, it would be beneficial because you get some finality at a much earlier point in the entire process for a category of offenses.

MODERATOR: On this issue, I'd throw out one other question and that is whether the issue in an important way is one that's involved with drug penalties. If what drug possession charges are really about is diversion into drug treatment, doesn't it make sense to eliminate the gamesmanship concerned with removal and trial de novo and just allow the job of diversion to get done in the district court while the cases that do get tried go through a record appeal, perhaps a record appeal that's more intensive than the usual record appeal.

You could in theory have a record appeal like the one in England before the Court of Criminal Appeals which has the right to set aside convictions if they find them to be unsafe, whether or not there was trial error. And they also have the right to some degree to remand for additional evidence if they think that's desirable. I throw this out because one concern seems to be that the system for the processing of violent crime and violent offenders in the circuit court is simply buried under drug cases that don't necessarily involve violent offenders, but heavily burden the system.

JUDGE GLYNN: Well, first of all, you have to persuade the people involved in the process.It's very difficult for people to say, well, we are just going to divert all of those through the district court to some sort of probation and treatment, particularly when no such treatment really exists

at the current levels that would be needed to accomplish anything. You could actually have an entirely different program discussing this, which I think it would probably be better to discuss when no one was here filming it, but discussing the deleterious, secondary and tertiary effects on our society and the criminal justice system of the war on drugs. It's a very complicated subject which at this point we don't have time to go into, nor do I particularly want to. But it's an entirely different subject.

JUDGE DOORY: A couple of thoughts. Yes, diversion for those people for whom it's appropriate into treatment is an important step in this process. But, believe me, in district court we are doing that with every one who can be couched in any way, shape or form as any type of first time offender. And believe me, we don't count very well when we count to one. But remember, we put everyone into diversion who wants to go. Most people don't want to go into diversion with treatment and a little bit of human service thrown in. This is considered by many a rather onerous outcome to being found in possession of drugs.

That being said, you have to understand that district court with its early resolutions court is clearing out as many cases as possible for those people who want nothing or next to nothing. Another thought that is being frequently mentioned, and I really have to present what is definitely a minority view, and that is I do agree with Judge Glynn, that the war on drugs is not exactly a success and that we can't arrest our way out of the problem. But on the other hand, I think people are very wrong to think we can treat our way out of the problem because most of the people who come to court don't want treatment, they just don't want anything, they want to be left alone. Just think if you walked into any bar in town right now, just walk in, pick out your bar and walk in, and say: Okay, for everybody that's in here, we are going to give you alcohol treatment so you will not drink anymore. How successful would that be? We would spend a lot of money doing it, but would we stop people from drinking? Maybe one, maybe two. And if we did it over and over and over again, maybe more than that. But we have to realize most of the people who use drugs in Baltimore City today, are using them certainly as a result of addiction, but because that's what they want.

Now, are you going to decriminalize it? Then you're going to have to think about all the problems that you're going to put on the other side of the

problem. It's not a simple solution.

MODERATOR: I find it interesting in this political day and age that we still have on the panel one Albert Ritchie Democrat. I promised Page Croyder that I would have her address two subjects at once, mandatory minimums and the peremptory challenge issue.

MS. CROYDER: Mandatory minimum sentencing, I agree with Judge Moylan. I think that they are also a reaction to some high publicity event that seems so terrible. That they were let out on probation and how could they have done that and now they went out and killed somebody and now they went out and shot somebody else. It's also in creation of new crimes. The sex offender getting out of jail who commits another sex offense, now we have sex offender registration laws where people have to register. I think a lot of these legislative reactions are ill-conceived and political in nature and are not necessarily helpful to the criminal justice system. I have somewhat mixed feelings about mandatory minimum sentences. It is a prosecutorial tool and a powerful one without question. And in a jurisdiction like Baltimore City where we have sentences driven down down down by our volume, mandatory sentences sort of catch our attention and catch the judiciary's attention. They say, look, judiciary, look prosecutors, we think particularly gun offenses, gun offenses and violent crime offenses, are important to us and we need you to pay attention to them.

However, I also think mandatory minimums are misleading because they don't have to be mandatory minimums, they can be subverted by the prosecutors who choose not to call the count, use it as a plea bargaining tool or choose not to prove the predicated conviction if the mandatory occurs because you were convicted once before of a crime, the prosecutor doesn't prove the prior crime. The prosecutor can get around the mandatory, which is why we have it as a tool. It's not like we have to necessarily proceed. Judges can also subvert it. Judge Glynn pointed out a judge in Baltimore City Circuit Court found somebody not guilty on a guilty plea, that was pretty creative. One has to wonder, however, what was the worst outcome, someone getting five years without parole for shooting a gun into a car where three people were sitting, or getting off altogether. So you can have abuses of discretion either imposing the mandatory or by judicial or prosecutorial attempts to get around the mandatory minimum. Personally

I favor more discretion for judges, just as I as a prosecutor prefer to have discretion.

With respect to peremptory challenges, I agree with Judge Moylan that once you have Batson you end up logically going down the hill to having no peremptory challenges. On the other hand, the idea of getting rid of Batson raises before my mind one of my favorite books and favorite movies, To Kill a Mockingbird, and that scenario frightens me. So I would not like to see necessarily the end of peremptory challenges.

We have to remember, however, in Maryland we have very limited voir dire. We just had a job application from somebody in New York that's applying to our office. She started a trial on Monday. I talked to her last night after two days of what I thought was trial and I said, where are you? And she said, we've gotten eight jurors. That's because they have this lengthy voir dire process up there. I think our court system would shut down altogether if it took two days to pick eight jurors. So in Maryland, or at least in Baltimore City, I can't speak for the rest of the state, the judge says, ask a few questions, and we say, can you be fair? And they say yes or no. And if they say no, they are usually gone; and if they say yes, we keep them. Well, I personally would not like to keep a juror whose son just got convicted of first degree murder without asking a few more questions. So I would like to have my peremptory challenges. Elizabeth wouldn't like the person whose three sons were all police officers in Baltimore City without asking a few more questions, and even then she's going to get rid of them.

So, you know, if we have a choice between Batson and no peremptories, or no Batson and lots of peremptories, I'm not quite sure what I would choose. I think that I agree with Judge Doory who suggested that we limit the number of peremptories. I even liked that creative suggestion, say it right out why you don't like that person, I think that would curb some of that. So I actually liked those suggestions.

MODERATOR: Let's proceed now on the mandatory minimum sentencing.

MS. JULIAN: I enjoyed Judge Motz's analysis that when you take the power away from the judge to impose the maximum, it's already there on the plate, it's been put there by a partial party and that is the prosecutor and

it takes away the discretion of the judge. I had not formed it that way in my head, but that does make a lot of sense. I know in federal court I find it quite odd that defense counsel basically ends up working with the probation agent, that's all they can do, look for departures. It's not a real adversarial kind of situation, things are set in stone to begin with. But with regard to mandatory minimums, my major point is to take the discretion away from the judge I think is not a good thing, and also because if the judge doesn't have discretion, there is no room to argue. I think that what happens is this, that an individual is not treated as an individual. They are treated as someone who is going to fit in a grid and that's it, that's all that's said. But I think that judges should always, as the impartial arbiter at the proceeding, should always look at an individual as an individual in that regard, and that way I'd get to argue on behalf of my defendant who I know better than anybody else in the courtroom.

MR. SAAR: Actually I am in total agreement with the representation that the judiciary has been handcuffed by mandatory sentencing, minimum sentences. I think that it is again a reflection of the reaction of the legislators to the specific horrific fact pattern offenses which in turn then handicap the entire process, the entire system, by restricting the ability to handle matters on an individual basis and, as they say, trying to force everybody into the same type of box because of the facts. I agree wholeheartedly with the representation that it is a disservice to the justice system the way it is currently fashioned both federally as well as in the state system. And I find actually it hard to contemplate how the judges can tolerate that particular ongoing pattern and still remain at least pleasantly bemused by the problems of the system, or at least able to talk in a relaxed way about the problems of the system. I understand very well how frustrating that can be if you are restricted to a particular framework as far as sentencing is concerned.

MODERATOR: Leaving aside the mandatory minimums in connection with the weapons offenses, which would be very difficult to change, with respect to the drug offenses, the so-called Maryland version of the Rockefeller drug laws, do any of you have any comments on what the effect of those is?

JUDGE DOORY: The only one point that should be made is that there is a substantial agreement to facilitate the system in that respect. But aside

from that, just as many people have pointed out, the way around the system, the box that you're put in, is very thin.

MODERATOR: We come now to peremptory challenges.

MS. JULIAN: I'm very eager to talk about this. First of all, I don't think we are on a slippery slope. I think it's a mountain and it's not an easy breezy situation here because we've got a long way to slide before I'm giving up peremptory challenges.The point is this, we have no information to go on before you stand there and try to pick what's to be an impartial jury, it's just a matter of semantics, one that will listen to and consider the rights of my client rather than be hysterical and reactive to the nature of the case being a drug case. This is Baltimore City and the person is arrested, they must have done it.

I am perplexed by the situation that the police campaign has chosen to put on buses. If you serve on juries, you can convict the guilty. There is a big gap there in determining who is guilty. It almost leads me to believe that a juror is faced with sitting there being intimidated by the fact that they must make a guilty finding and that if the police did great work, then the person sitting next to me is obviously guilty. So we have a lot of things to do in between before we can mail those postcards out to possible jurors and make that kind of pronouncement. I think it's more hysteria than anything in Baltimore City.

But what I'm saying is to make it more of a mountain rather than a slope, let's take a step back and talk about the voir dire process. I know that some judges believe that only four questions are necessary and will not let you ask other relevant questions so you can make an intelligent peremptory challenge. You can ask the person perhaps whether they are biased against someone who uses drugs. Would it make them more likely to believe that the person committed a crime. Sometimes there is a drug user and that comes out in a case and the issue is whether there was theft. These issues are important as far as whether the person is going to be biased upon the issue of the underlying crime and we can't just leave that by asking the perfunctory questions and then have a juror that says, I can be fair, and that's the panacea.

I've had jurors stand before the judge and say, my wife was murdered,

but I can be fair, and that's okay, that person will be seated. If I don't have a peremptory challenge, then I don't get to second guess, which I think should be done in a situation like that and take a person like that off the jury panel because they may be, for various psychological reasons that are very clear and very predictable, wanting to sit on the jury to overcome bias that they feel they've come up with, or to get back at the unknown assailant that was never captured in their case. There are studies in the writings that were done that favor what I'm saying, that we need to do more in the questions process so that we have an intelligent jury.

The questions that are on the piece of paper that the judge asks, should be followed up, where you get to ask the person who says, I'll be fair, more questions about the level of fairness or ask what was the outcome in that case, was the prosecution kind to your family, did the defense—were they mean to you, and all of that so you can get underlying biases. We don't know enough about the people that are going to sit in judgment of others when we pick them and I just think that taking away peremptory challenges because of Batson and how far that's gone would be a great misstep. I'm not saying let's have open voir dire like in Kentucky. I'm saying that I have seen curtailed over the years questions about the location of where the perspective juror lives. I think that you can make great decisions about impartiality or whether the person understands the issues if you can see where they live. You can also understand the look on a person's face why they want to get off the jury. If they are in the same zip code, they might live on the same street. You don't get that information unless you are allowed to ask follow-up questions.

MR. SAAR: Perhaps a weakness in the system at this point may be that the gathering of information about jurors and the manner in which the biography, if you will, of the individual panel, jury panel members is accumulated and then displayed on the jury lists that are supplied to counsel and to the courts are insufficiently crafted. And in fact, that is the better alternative, to go for a more expansive biography, if you will, of the individual members. A questionnaire could be completed before they even become members of the panel. The peremptory challenge discussion is really reduced down to the essence, which is that you're acting blindly with people with very minimal information that you have to discern anything from that you find offensive for your client's interests. Again, going down to reducing those numbers of peremptory changes, I think reducing those

actually is a useful benefit in the sense of making it very judicious on the attorney using those challenges when there is only a handful to use as opposed to having a plethora or a dozen or two dozen depending on the nature of the offense.

MS. JULIAN: No matter what happens, if the trial appeared to be fair because they got what they thought was a fair and impartial jury and they got to participate and I got to ask extra questions, then that does a lot for what happens afterwards, whether they are found guilty or not.

JUDGE DOORY: In doing death penalty work in Baltimore City, I've done a fair amount of not the open voir dire that comes about, but individualized voir dire which we have pretty well honed down. It's honed down now to where individually questioned jurors can be picked in about a week even using the 10 and 20 strikes that are available. Now, that is an option that's available and should be used extremely limitedly because of the great cost involved, but it is a solution when problems like this exist. But there has been some suggestion that we model ourselves after the British system, which causes me some skepticism. There has also been a suggestion that we model ourselves after the California system, which really gives me the willies.

MODERATOR: I think the consensus seems to be that reducing the number of challenges may be an acceptable thing if there is a tradeoff in the form of more information, however that information is obtained, whether on a questionnaire or by voir dire.

MS. JULIAN: I'm not asking for anything. I'd like to keep them the same until we deal with the other aspects first. We cannot change the peremptory number until we have more information.

MODERATOR: I understand. I think also on the earlier issue of the trial de novo and high maximum penalty, there was no violent objection to the idea of entry-level drug offenses, whatever might be said about the weapons.

MS. JULIAN: My only comment that I wanted to add was that other people described addictions, that we had to realize that the cases involve addicts and once they are addicted, I believe that's a medical issue, but there

is no real controversy.

MODERATOR: That brings us to the last subject , and that is the police retirement question.

MR. SAAR: I was actually very troubled about having this included until Mr. Liebmann was kind enough to explain his thoughts on this. What it amounts to is that with what we'll call a generous pension plan, the officers have at this point as far as Baltimore City is concerned an ability to retire after 20 years of service and get a pension substantially of I believe it works out to about 60 percent. There is also an additional incentive to hang around for an additional couple of years, a deferred retirement option plan basically as a drop program. In essence what it amounts to is a fiscal incentive to stay around and keep their expertise with the department.

Mr. Liebmann's point was that the effect of a generous pension plan encourages those with experience in the department, investigative experience and practical experience, in terms of the constitutional rights of individuals, of performing the usual stop and frisks in the appropriate legal matter, in the entry and search and seizure warrants, and making those very solid bases for bringing cases to court is lost when you start having people with 20 years of experience leaving the department. In fact, we are in fact as a result of perhaps I would venture to blame, if you will, the former police commissioner Frazier in terms of a rotation policy, which started a chain of events in the department that we are feeling even today.

That is, for your information if you aren't aware, intentionally rotating out experienced detectives from the homicide unit of the Baltimore police department for the beneficial purpose, of giving minority officers and younger officers in the department an opportunity to gain the experience which otherwise you would not necessarily have had, but for retirements out of the homicide division, and that was fairly rare because people stayed in that part of the department for quite some time often because of their proficiency as investigators. And in that particular vein in terms of the proficiency, you don't gain proficiency in that vein of investigation without having worked a substantial amount of hours and days and weeks and years with even more experienced investigators and learning the tricks of the trade. With that rotation policy, the retirement incentives for the officers are that the officers are now being asked to go back to parole from the homicide

division who had been at the epitome of their profession, and the pinnacle of their profession, were now asked to go back and do normal patrol work, which often times would be an insult to their abilities, if you will, and many submitted their retirement papers and took their experience out.

Baltimore County was the beneficiary of six or seven homicide detectives who had to do a stint, of course, in patrol after going through their training, but then immediately moved into homicide investigation in Baltimore County. The whole point of this particular long drawn out explanation is that a generous retirement plan at 20 years of service with the department does in fact take away people who want to only spend 20 years with the police department and then go on to do other things with their lives, the experience that comes from that 20 years of working for the police department, and we see that at this point in time with the Baltimore City police department.

We have patrol officers who on a routine basis have been looking kind of young to prosecutors. They will ask: Well, how long have you been on? Well, two years, three years. We've got sergeants with three or four years. Sergeants who used to have to have from five to seven years of experience before they actually qualified and were considered to have enough experience to be supervisors of line officers. Well, now it's been diluted down in terms of that experience to three and four years and you barely are getting the hang of the job at that stage based on what I personally know from police contacts and also the word from the more veteran police officers that I've spoken with in the department recently.

The same goes for the supervisor levels on up from that. They have lieutenants who used to take approximately seven to ten years to become a lieutenant who are now lieutenants at five years of experience with the department, five and six years. You've got majors who've made major at ten years when that was just a phenomenal rise so-to-speak and it's not because of ability is the point, it's because of the vacancies at the upper echelon. The fact that we've changed police commissioners six times since 1999 has also had a deletrious effect— one interim 57 day commissioner took out five colonels from the department who had collective experience of somewhere in the vicinity of 110 to 120 years of police management and thus made vacancies and moved people up.

Of course the net positive in the social vein is you do have people having opportunities now to take over leadership and management of the police department, but you lose the basic policing institutional ability by taking out people prematurely, especially if there aren't incentives to keep them in place. Part of it is opportunity. If you don't have opportunity in the department, you're going to lose people. Part of it is the expectations that you have an opportunity to move into specialized units to further fulfill yourself as a policing officer, mostly in the area of detective investigations for many officers. Then a handful are selected who have demonstrated by either an examination process or other on-the-street processes of leadership ability that comes—that doesn't come necessarily from a book and studying and examinations, that comes from demonstrating often times the ability. Those are things that you'd like to hope to retain. But we do have a problem in that regard

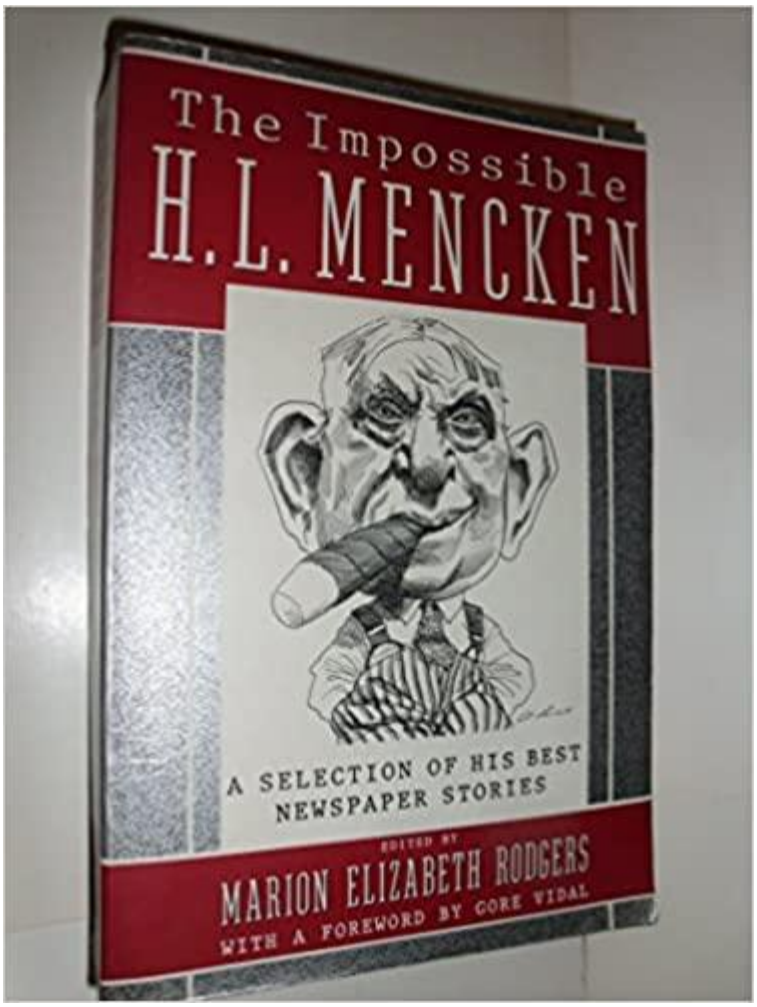
I don't blame it so much on, at this point, the early retirement abilities of officers because you have to also take it into consideration from the police officer's standpoint. I don't know how many of the judges are particularly aware of the workmen's compensation statute, but two items I found pretty curious as I was trying to do research. The workmen's compensation laws provide for high blood pressure as a disability and a presumed disability that stems from their livelihood for police officers and for firefighters and gives you an ability to get out if you've got that condition and attribute it back to your employment. And I find that—actually it was astounding to me when I first ran across it in another context, but it is something that is already recognized as a reason. Would you want people who have high blood pressure with the potential to stroke out also responding with sirens or into a physical confrontation where you as a citizen are expecting a primed officer, a primed and conditioned officer to make an appearance and maybe save the day for you if you're a victim of crime? I think not would be the answer. You'd want somebody who is in their Oriole baseball prime as opposed to someone who potentially was on a ventilator so-to-speak at a hospital.

The inexperience of the officers that do exist is a training issue of huge proportions. I don't know how many times I've actually appeared before Judge Prevas and explained one agonizing Friday evening I can recall where he was trying to rail against the particular pair of detectives I had and the explanation that I reached for was the digenesis of what I call the

problem: The rotational policy and the series of different rotational policies that are variations thereof that have since befallen the police department. The problem that I saw was that it was especially a training issue, especially in the homicide or serious crime investigations where you need the maximum amount of experience to get the best results out of an investigation, and you don't have that level of expertise either at the patrol level or at what we'll call the beginning investigative or detective levels because we've got the same thing that I was just describing as the supervisor problems. Supervisors have insufficient personal experience on the street.

You've got detectives who are now made detectives who were only patrol officers two years ago when they first started and now they are a detective because of the vacancy problem in the department and they need an abundance of training which is not currently offered even with their academy training. Academy training is 16 weeks, plus another 10 weeks of field training with an experienced—a field training officer. In that 16 weeks they learn everything they, theoretically speaking, need to know from an academic sense of how to be a police officer. In that they probably do not spend more than a week or two weeks time frame learning about the laws and certainly not to any degree of sufficiency in terms of constitutional law and/or the basics of what we are concerned with here, which are how to put together cases that stand up to judicial scrutiny that is required, and it is expected of them.

Their in-service training program is also in my mind fairly deficient from that standpoint that it encompasses quite a number of things during the week that they have to requalify for recertification and they barely broach, if it's one day, anything resembling a comprehensive examination of current developments in constitutional law or things to help them improve their abilities to be the police officers that we all expect them to be.



The article that follows by H. L. Mencken is excerpted from *The Impossible H. L. Mencken*, edited by noted Mencken authority Ms. Marion Elizabeth Rodgers. Ms. Rodgers has been a frequent speaker at the Library beginning with her presentation of "Mencken, Ritchie & Prohibition" on February 8, 2011. Her subsequent presentations, like her first, both entertaining and informative, were "Mencken & Lynchings" (March 27, 2012); "Mencken & The Red Scare" (April 30, 2013); "Mencken & The American Presidency" (October 29, 2014); "Henry Louis Mencken & George Samuel Schuyler" (March 10, 2016); and most recently "Mencken & Religion" (May 9, 2018). Upon our hoped for return to normality, we look forward to once again welcoming Ms. Rodgers to the Main Reading Room of the Library for another evening recounting the life of the "Bard of Baltimore."

The Dark American

Negro Spokesman Arises to Voice His Race's Wrongs

Unless I err gravely (in which case I recant and apologize), the ablest document the war has yet produced in the United States is the composition of a colored man, Prof. Kelly Miller, A.M., dean of the college of arts and sciences in Howard University, the Ethiop Sorbonne at Washington.

It is in the form of an open letter to the President of the republic and it bears the date of August 4, but so far as I can make out its text was not made public at that time. Now, however, the learned senior Senator from Washington, the Hon. Wesley Livsey Jones, A.B., has spread it in extenso upon the instructive papyrus of the *Congressional Record,* and there, on pages 7631–34 of the issue of September 12, you will find it.

The epistle of the dark dean is, in form, a solemn protest against the late pogrom at East St. Louis and a demand that the Federal government take measures to prevent such astounding massacres in future. In this protest and demand, of course, there is nothing new, and nothing remarkable; all the Moorish synods, pleasure clubs, sodalities and orders of Elks, Odd Fellows and Galilean Fishermen have been inundating Congress and the White House with similar papers.

But in two important respects Dr. Miller's confection transcends the ordinary.

On the one hand it is written in a style so suave, so persuasive and withal so graceful and colorful that, even forgetting its content, it is a quite unusual work of art in words.

On the other hand it passes beyond a mere prayer for abatement and relief, and proceeds to the formulation of a definite political theory for the American negro—a theory that, for the first time in the history of the race, shows both a penetrating sense of what is wrong and an acute understanding of what may be done about it.

Dr. Miller wastes no time gabbling about Jim Crow cars, the laws against miscegenation and the rule forbidding negro hog-and-hominy parties at the Plaza Hotel. He does not argue that white society, such as it is, should throw open its doors to its negro cooks and chauffeurs. He looses no maudlin bawl about the exclusion of negroes from the Piping Rock Club, the University of Virginia, the Ancient Order of Hibernians and the B'nai B'rith.

His whole argument is confined to the field of political rights—rights specifically and unqualifiedly guaranteed by the organic law of the land.

He shows how those rights are invaded and made a mock of today, he demonstrates that the existing machinery is insufficient to restore them, and he gives dignified and respectful notice, but nevertheless plain and uncompromising notice, that, unless some better machinery is devised in a reasonable time, the negro will hold himself free to disregard the duties that go with them and are an integral part of them.

In brief, what he says is this:

We blacks are getting tired of this endless rowelling and persecution. We are getting tired of mobbing, lynchings, burnings at the stake. We are getting tired of having no representative in the government, and no means of obtaining common justice.

When we complain, we are put off. When we protest we are reviled. The states either cannot or will not help us. We therefore call upon the Federal government, and we ask for attention. Heretofore, we have got only words. Asking for justice, we have been "given a theory of government"; asking for protection, we have been "confronted with a scheme of governmental checks and balances."

It is now time to do something. You ask us to be patriots, to die for our country, to protect it against aggression. Well, first show

us that it is our country. First protect us. First, prove to us that we will get the same return from patriotism that other patriots get.

This in crude outline. The sagacious professor is far more courtly than I have made him appear, and far more convincing. His letter runs to four or five newspaper columns, and I recommend it to your very careful reading.

It bears out, in a striking way, what I have been predicting in various favorite periodicals for a dozen years past: that sooner or later the American negroes would hatch a leader capable of putting their discontents into clear, simple and vivid words, and that the appearance of such a leader would give a new complexion to the race problem, and make it ten times more pressing than ever before.

The first part of the prognostication, it seems to me, is now fulfilled; the Miller manifesto is something quite new under the Afro-American sun. The second part, I venture, will be brought to term during the internal uproars and readjustments that are bound to follow the war.

Down in the South, where the race question is forever on the mat, the difficulties of dealing with it have been steadily mounting up for two decades past, and despite all the alleged thought that has been lavished upon it by corn-fed publicists the southerners are further from a solution than ever before. They wobble eternally between antagonistic theories.

First, they proceed upon the assumption that all their woes would cease if only they could get rid of the darky—and not infrequently they try to bring in that millennium with the shotgun and the torch. Then, when the alarmed raccoons jump freight-trains for the North, they find their fields unplowed and their windows unwashed, and yell for them to come back.

And so in details. First they decide to educate the negroes, and then they decide that education ruins them. First they are in favor of Booker Washington's schemes, and then they are against them.

First they try kindness then they try force. First they pretend that the thing is easy—that any child, if uncontaminated by Yankee blood, can understand it—, and then they throw up their hands.

The trouble down there, at the bottom, is very simple. That section of the American people which has the most difficult and vexatious of all problems on its hands, and not only on its hands,

but directly under its nose, is precisely the section which is least accustomed to clear thought, and hence least capable of it.

The southerner, whatever his graces otherwise, is almost destitute of the faculty of sober reflection. He is a sentimentalist, a romanticist, a weeper and arm-waver, and as full of superstitions as the Zulu at his gates.

There are whole areas in the South—areas quite as large as most European kingdoms—in which not a single intelligent man is to be found.

The politics of the region is vapid and idiotic—a mere whooping of shibboleths. Its literature is that of the finishing school. Its philosophy is the half supernaturalism of the camp-meeting, the wind-music of the chautauqua. It has no more art than Liberia.

Add to this intellectual emptiness, a bellicose and amusing vanity, and you have a picture of incompetence that is almost tragic. The whole machinery of so-called southern chivalry, the invention of the feudal aristocracy of ante-bellum days, now almost wholly extinct, has been taken over by the emancipated poor white trash, and the result is a wholesale preening and posturing that must needs make the judicious grieve.

The southerner who is chiefly heard from is apparently all toes; one can have no commerce with him without stepping on them. Thus he protests hysterically every time northern opinion is intruded into his consideration of his problems, and northern opinion, so often called to book, now prudently keeps out. The result is that he struggles on alone, and that he goes steadily from bad to worse.

He was in difficulties while the negro was yet a mere serf, legally freed but still tied to the soil. He is in ten times worse difficulties now that the negro has begun to find leaders, and is beginning to acquire property and self-respect, and is showing signs of demanding an accounting.

The economic progress of the colored brother, in fact, gives the whites of the black belt their worst disquiet. It was relatively easy to deal with the darky separated from starvation by no more than one week's meagre wages, but what of the darky who owns a farm, and has money in the bank, and is perhaps even one of its stockholders and directors?

Such blacks are no longer rare. In state after state of the South, the negro holdings of property are increasing faster than the white holdings, and the negroes are founding banks, merchandis-

ing companies, cotton gins, insurance companies, and even whole towns.

With property goes self-respect, and with self-respect goes aspiration. That aspiration irritates and outrages the poor whites. They view it as the Russian muzhik views the accumulations of the village Jew. It is, at bottom, one of the chief causes of race antagonism, and in the end, of race conflicts.

So the volcano keeps on smoking, and the more reflective Southerners, in the intervals of fustian, regard the occasional explosions with uneasy eyes. Worse, the disturbance throws out far ripples. As Prof. Miller wisely points out, the state of affairs south of the Potomac makes for trouble north of the Potomac; the Atlanta massacre was the father of the East St. Louis massacre.

The thing, in brief, takes on larger and larger aspects; it becomes, in the true sense, a national problem, for the southerners are quite unable to deal with it, and so long as their inability continues, the northerners will have to bear a part of the burden. Meanwhile, the negroes themselves begin to show signs of restlessness, and the Miller manifesto gives that restlessness definite voice.

"Mr. President," it says, "negroes all over this nation are aroused as they have never been before. It is not the wild hysterics of the hour, but a determined purpose that this country shall be made a safe place for American citizens to live and work and enjoy the pursuits of happiness."

A fair plea—and behind it there is an extremely able argument —perhaps the best argument that any southerner, white or black, has contributed to American governmental theory in half a century. What will be the answer of the national government?

The Force bill was one answer—and it failed to answer. The two houses of Congress now jockey with the East St. Louis matter —a feeble scratching of the surface. One house, if I remember rightly, has appointed an investigating committee that will bring in a report heavy with meaningless words. The other house has delicately put the dynamite behind the clock.

Perhaps it is a southerner, after all, who has seen farthest, and none other than the redoubtable negrophobe, the Hon. James Kimble Vardaman, of Mississippi. In the Senate, some time ago, he raised a warning voice against drilling the blacks. Teach them how to bring the Turk to account for butchering the Armenians,

and they may come home to inquire into the butchering of their own relatives.

This, of course, is an extreme view, and perhaps an alarmist view. But the Miller manifesto shows that we have already come to the stage where we must give thought to it—that the negro has at last acquired a spokesman who can think clearly, disengaging non-essentials from essentials, and who can put his conclusions into clear and forceful English.

Altogether, that manifesto is a document of the utmost significance. Lost amid issues which seem to be greater, it is getting much less attention than it deserves.

(The New York Evening Mail, September 19, 1917)

In His Own Words

As all of you undoubtedly know that the Internet is a most amazing place that contains a great deal of fascinating material that in the past you would have had to go to great lengths to uncover. If you would like to know more about Prof. Kelly Miller, by reading not about him, but as with the Congressional record pages we have set forth, his very words, visit the following.

- Address to the Graduating Class of the College Department, Howard University / by Professor Kelly Miller, June 1, 1898.
- Kelly Miller's Monographic Magazine
- "The Primary Needs of the Negro Race." An Address Delivered before the Alumni Association of the Hampton Normal and Agricultural Institute, by Prof. Kelly Miller ... June 14, 1899.

... The effect of imperialism upon the negro race. Ably set out by a colored man. (Written by Kelly Miller, professor of mathematics in Howard University, Washington, D. C. for the Springfield Republican. Boston, Mass. Published by the N. E. Ant

designation, construction, and maintenance of a system of national highways; to the Committee on Roads.

By Mr. FULLER of Illinois: Petition of P. A. Peterson, of Rockford, Ill., opposing the proposition to compute excess-profits tax on the basis of earnings for the years 1911, 1912, and 1913; to the Committee on Ways and Means.

Also, petition of the International Typographical Union, Indianapolis, Ind., favoring prosecution of those responsible for the greatly increased cost of print paper and protesting against imposing any further burdens of taxation on publishers; to the Committee on Interstate and Foreign Commerce.

By Mr. GALLIVAN: Petition of the Amalgamated Association of Street and Electric Railway Employees of America, Division 589, urging a full investigation into the San Francisco bomb explosion of 1916; to the Committee on Labor.

By Mr. KENNEDY of Rhode Island: Resolutions of Tyler Council, No. 45, Knights of Columbus, of Pawtucket, R. I., protesting against granting of loans to Carranzista government of Mexico until such time as that Government shall have put into effect in Mexico religious liberty and freedom of worship, the same as provided by the Constitution of the United States; to the Committee on Foreign Affairs.

Also, petition of Commodore Perry Council, No. 14, Junior Order United American Mechanics, of Wakefield, R. I., favoring further restriction of immigration; to the Committee on Immigration and Naturalization.

By Mr. LONERGAN: Petition of the Common Council of Danbury, Conn., urging an investigation of the production and distribution of anthracite coal; to the Committee on Interstate and Foreign Commerce.

By Mr. RAKER: Petition of the International Typographical Union, J. W. Hays, secretary, Indianapolis, Ind., protesting against any further increase in the postage rates on second-class matter; to the Committee on Ways and Means.

By Mr. TINKHAM: Petition of Division 57, Ancient Order of Hibernians, urging the independence of Ireland, etc.; to the Committee on Foreign Affairs.

SENATE.

WEDNESDAY, *September 12, 1917.*

Rev. J. J. Muir, D. D., of the city of Washington, offered the following prayer:

Our Father and our God, we recognize Thee in the brightness of the day, and recognize Thee, too, in all the manifold duties and responsibilities which Thou dost call for. We ask Thy blessing upon this representative body. May these, Thy servants, be guided to fulfill the high duties of their sacred trust in Thy fear, and may the Government under which we live be prospered in all its undertakings. Be with us at home and abroad. In the manifold duties we owe to the world at large guide, we beseech of Thee, and guard the person of our President and all who are called into the councils of our Nation at this time; and speed the hour when over the vast field of human conflict the battle flag shall be furled, and we shall find ourselves in happy relations to all the peoples of the earth. We humbly ask, for Christ our Lord's sake. Amen.

The Secretary proceeded to read the Journal of yesterday's proceedings, when, on request of Mr. BRADY and by unanimous consent, the further reading was dispensed with and the Journal was approved.

MESSAGE FROM THE HOUSE.

A message from the House of Representatives, by J. C. South, its Chief Clerk, announced that the House disagrees to the amendments of the Senate to the bill (H. R. 4280) to provide revenue to defray war expenses, and for other purposes, agrees to the conference asked for by the Senate on the disagreeing votes of the two Houses thereon, and had appointed Mr. KITCHIN, Mr. RAINEY, Mr. DIXON, Mr. FORDNEY, and Mr. MOORE of Pennsylvania managers at the conference on the part of the House.

The message also announced that the House had passed a bill (H. R. 5271) authorizing appointment of chaplains at large for the United States Army, in which it requested the concurrence of the Senate.

LETTER BY PROF. KELLY MILLER.

Mr. JONES of Washington. I have an open letter here by Prof. Kelly Miller, of Howard University, pronounced by the New York Evening Post to be the ablest colored man in the United States. This letter is a very temperate presentation of the colored man's view of the riots, and so on, that we have had involving their race. I ask that it may be printed in the RECORD.

The PRESIDENT pro tempore. Is there objection? The Chair hears none, and it is so ordered.

The letter is as follows:

THE DISGRACE OF DEMOCRACY.

[By Kelly Miller.]

AUGUST 4, 1917.

Hon. WOODROW WILSON,
President of the United States,
The White House, Washington, D. C.

MR. PRESIDENT: I am taking the liberty of intruding this letter upon you because I feel that the issues involved are as important as any questions now pressing upon your busy attention. The whole civilized world has been shocked at the recent occurrences in Memphis and East St. Louis. These outbreaks call attention anew to the irritating race problem of which they are but eruptive symptoms which break forth ever and anon with Vesuvian violence. For fully a generation American statesmanship has striven to avoid, ignore, or forget the perplexing race problem. But this persistent issue will not down at our bidding, and can not be shunted from public attention by other questions, however momentous or vital they may seem to be.

I know that I am taking unwarranted liberties with the ceremonial proprieties in writing such a letter to the President of the United States at the present time. It may seem to partake of the spirit of heckling after the manner of the suffragists. Nothing is further from my purpose. No right-minded American would wish to add one featherweight to the burden that now so heavily taxes the mind and body of the President of the United States who labors under as heavy a load as human nature is capable of sustaining. Every citizen should strive to lighten rather than to aggravate that burden. It is, nevertheless, true that any suppressed and aggrieved class must run athwart the established code of procedure in order that their case may receive a just hearing. Ceremonial codes were enacted by those who are the beneficiaries of existing order which they wish to perpetuate and make unchangeable. They would estop all social and moral reform. The ardent suffragists find it necessary to ruthlessly violate the traditional and decorous modes of procedure in order to promote the reform which they have at heart. On one occasion you felt forced to terminate an interview with a committee of suffragists because they persisted in cross-examining the President of the United States.

There are 10,000,000 loyal citizens of African descent in the United States. They are rigorously excluded from a voice in the Government by which they are controlled. They have no regularly constituted organ through which to present their case to the powers that be. They have no seat nor voice in the council of the Nation. The late Dr. Booker T. Washington was the accepted spokesman and mediator of the race, but he has no successor. Under former administrations there was a small appointive official class of negroes. Though derisively designated as the "Black Cabinet," they were on the inside of the circle of governmental control to which they had ready access in presenting the claims of the race. But under the exaction of partisan exigencies even these have been excluded from official position under your administration. Several weeks ago a delegation of colored men from the State of Maryland sought an interview with you concerning the horrible crime of East St. Louis. You were good enough to write Senator FRANCE that you were too busy with other pressing issues to grant the request of an interview. The failure of all other methods is my only excuse for resorting to an open letter as a means of reaching you and, through you, the Nation at large, concerning the just grievances of 10,000,000 loyal American citizens.

The negro feels that he is not regarded as a constituent part of American democracy. This is our fundamental grievance and lies at the basis of all of the outrages inflicted upon this helpless race. It is the fundamental creed of democracy that no people are good enough to govern any other people without their consent and participation. The English are not good enough to govern the Irish. The Russians are not good enough to govern the Finns. The Germans are not good enough to govern the Belgians. The Belgians are not good enough to govern the people of the Congo. Men are not considered good enough to govern women. The white people of this country are not good enough to govern the negro. As long as the black man is excluded from participation in the government of the Nation, just so long will he be the victim of cruelty and outrage on the part of his white fellow citizens who assume lordship over him.

These periodic outbreaks of lawlessness are but the outgrowth of the disfavor and despite in which the race is held by public opinion. The evil is so widespread that the remedy lies in the hands of the National Government.

Resolutions pending before both Houses of Congress look toward investigation of the outrage at East St. Louis. I under-

stand that you are sympathetically disposed toward this investigation by Federal authority. Such investigation is important only to the extent that it implies a tardy recognition of national responsibility for local lawlessness. There is no expectation that any additional comprehensive information will result. You may rest assured that there will be a half dozen similar outbreaks before this investigation is well under way. Indeed, since the East St. Louis atrocity there have already been lynchings in Georgia, Louisiana, Pennsylvania, and Montana. Every intelligent American knows as much about the essential cause of this conflict as he will know after long and tedious investigation. The vital issues involved are apt to be obscured by technical wranglings over majority and minority reports. What the Nation needs is not investigation of obvious fact, but determination and avowed declaration on the part of the President speaking for the people of the United States to put an end to lawlessness wherever it raises its hideous head.

I know that it has been steadily maintained that the Federal Government has no authority over lynchings and local race conflicts. This is not a political contention. This view was maintained under the administrations of Harrison, Cleveland, McKinley, Roosevelt, and Taft. Indeed, President Cleveland, that great American Democrat, came nearer recognizing Federal responsibility in such matters than any President before or since his time. During the administration of President McKinley, an atrocious riot occurred in Wilmington, N. C., the city in which you spent your boyhood as the son of a minister of the Gospel. Scores of innocent negroes were killed and hundreds were driven from their homes. But it was maintained that the President had no authority to interfere. A horrible lynching took place at Alexandria, Va., a few miles from the White House, which the President might possibly have observed through his field glasses. And yet it was looked upon as a purely local affair for which the Federal Government had no responsibility nor concern. You recall the atrocities of the riot in Atlanta, a city in which you spent your young manhood as a practitioner of law. But here again even President Roosevelt could find no ground for interference.

These outbreaks are not limited to the Southern States, although they occur there more frequently than elsewhere because of the relatively larger number of negroes in the total population. There have been lynchings and burnings in Illinois, Kansas, Delaware, Ohio, Indiana, Colorado, and other Northern States. The evil is, indeed, national in its range and scope, and the Nation must provide the remedy. Striking, indeed, is the analogy between the spread of lawlessness to-day and the extension of the institution of slavery two generations ago. Like slavery, lawlessness can not be localized. As the Nation could not exist half slave and half free under Abraham Lincoln, so it can not continue half law-abiding and half lawless under Woodrow Wilson. The evil tendency overcomes the good, just as the darker overlaps the brighter phase in the waning moon. If the negro is allowed to be lynched in the South with impunity, he will soon be lynched in the North, so easy is the communicability of evil suggestion. The lynchings of negroes has become fashionable in some parts of the country. When a black man is accused of wrongdoing, "Lynch the negro!" is the cry that springs spontaneously to the lips of man, woman, and child. The fashion is rapidly spreading throughout the whole Nation. If slavery could have been isolated and segregated in the South, that institution might have existed even down to the present time. And so if lynching could be localized and limited to the Southern States the Nation as a whole would have less pretext for interfering. But this can not be done. Senator Tombs, of Georgia, boasted that he would call the roll of his slaves under the shadow of the Bunker Hill Monument, an ambition which doubtless might have been gratified had not the Nation arisen in its moral might and blotted out the iniquitous institution altogether. Unless the aroused conscience of the American people, efficiently asserting itself through Federal authority, shall stamp out the spirit of lawlessness, it is easy to prophesy that the negro will yet be lynched not only in the shadow of the Bunker Hill Monument but on the campus of your beloved Princeton. Already there have been burnings of human beings in the bleeding State of Old John Brown, and in the city where lie the remains of Abraham Lincoln. During the past 30 years nearly 3,000 negroes have been lynched in various parts of the country. Scores of these have been burned at the stake. Even the bodies of women have been fed to the flames. Thousands of localities in the majority of the States of the Union have experienced these outrages. Our fair land of liberty is blotted over with these foul spots which can not be washed out by all of the waters of the ocean. It is not easy to calculate the number of persons who have been involved in these lynchings, either as participants or as acquiescent lookers-on, all of whom were potential murderers. So general and widespread has become the practice that lynching may well be characterized as a national institution, to the eternal disgrace of American democracy.

Lynching can not be confined to the negro race. Hundreds of white men have been the victims of lawlessness and violence. While these words are flowing from my pen news comes over the wire that a labor agitator has been lynched in the State of Montana. Although the negro is at present the chief victim of lawlessness, like any other evil disease it can not be limited by racial lines.

It is but hollow mockery of the negro when he is beaten and bruised and burned in all parts of the Nation and flees to the National Government for asylum, to be denied relief on the ground of doubtful jurisdiction. The black man asks for justice and is given a theory of government. He asks for protection and is confronted with a scheme of governmental checks and balances.

Mr. President, you are Commander in Chief of the Army and Navy. You express the voice of the American people in the great world conflict which involves practically the entire human race. You are the accepted spokesman of the world democracy. You have sounded forth the trumpet of democratization of the nations, which shall never call retreat. But, Mr. President, a chain is no stronger than its weakest link. A doctrine that breaks down at home is not fit to be propagated abroad. One is reminded of the pious slaveholder who became so deeply impressed with the plea for foreign missions that he sold one of his slaves to contribute liberally to the cause. Why democratize the nations of the earth if it leads them to delight in the burning of human beings after the manner of Springfield, Waco, Memphis, and East St. Louis while the Nation looks helplessly on? You add nothing to the civilization of the world nor to the culture of the human spirit by the technical changes in forms of government. The old adage still remains true:

> For forms of government let fools contest;
> Whate'er is best administer'd is best.

If democracy can not control lawlessness, then democracy must be pronounced a failure. The nations of the world have a right to demand of us the workings of the institutions at home before they are promulgated abroad. The German press will doubtless gloat with ghoulish glee over American atrocities against the negro. The outrages complained of against the Belgians become merciful performances by gruesome comparison. Our frantic wail against the barbarity of Turk against Armenian, German upon Belgian, Russian upon Jew, are made of no effect. It can not be said that these outbreaks are but the spontaneous ebullitions of popular feeling, without governmental sanction or approval. These outrages occur all over the Nation. The Nation must be responsible for what it permits. Sins of permission are as reprehensible as sins of commission. A few years ago a Turkish ambassador was handed his passport by you for calling attention to the inconsistency between our national practice and performance. The Nation was compelled, with a spirit of humiliation, to accept the reproach which he hurled into our teeth: "Thou hypocrite, first cast out the beam out of thine own eye; and then shalt thou see clearly to cast out the mote out of thy brother's eye." Every high-minded American must be touched with a tinge of shame when he contemplates that his rallying cry for the liberation of humanity is made a delusion and a snare by these racial barbarities.

It is needless to attempt to place the blame on the helpless negro. In the early stages of these outbreaks there was an attempt to fix an evil and lecherous reputation on the negro race as lying at the basis of lynching and lawlessness. Statistics most clearly refute this contention. The great majority of the outbreaks can not even allege rapeful assault in extenuation. It is undoubtedly true that there are imbruited and lawless members of the negro race, as there are of the white race, capable of committing any outrageous and hideous offense. The negro possesses the imperfections of his status. His virtues as well as his failures are simply human. It is a fatuous philosophy, however, that would resort to cruel and unusual punishment as a deterrent to crime. Lynching has never made one negro virtuous nor planted the seed of right doing in the mind of a single American citizen. The negro should be encouraged in all right directions to develop his best manly and human qualities. Where he deviates from the accepted standard he should be punished by due process of law. But as long as the negro is held in general despite and suppressed below the level of human privilege, just so long will he produce a disproportionate number of imperfect individuals of evil propensity. To relegate the negro to a status that encourages the baser instincts of humanity and then denounce him because he does not stand forth as a model of human perfection is of the same order of ironical cruelty as shown by the barbarous Teutons in Shakespeare, who cut off the hands and hacked out the tongue

of the lovely Lavinia and then upbraided her for not calling for perfumed water to wash her delicate hands. The negro is neither angelic nor diabolical, but merely human, and should be treated as such.

The vainglorious boast of Anglo-Saxon superiority will no longer avail to justify these outrages. The contact, adjustment, and attrition of various races of mankind constitute a problem which is coterminous with the ends of the earth. The lighter and stronger races are coming into contact with the weaker and darker ones. The stronger breeds of men are relating themselves to the weaker members of the human family in all the ends of the earth. How does it happen that in the United States alone, of all civilized lands, these atrocious outrages are heaped upon the helpless negro? The English nation has the largest colonial experience and success since the days of the Roman Empire, and has come into relationship with the various weaker breeds of men in all parts of the world. But everywhere under English jurisdiction law and order prevail. In the West Indies, where negroes outnumber the whites 20 to 1, rape and lynching have scarcely yet found a place in the local vocabulary. In Brazil, under a Latin dispensation, where a more complex racial situation exists than in the United States, racial peace and good will prevail. Belgium furnishes the only parallel of civilized nations in the atrocious treatment of a helpless people placed in their charge. But even the Belgians were forced to modify the rigors of their outrageous régime in the Congo under the bombardment of moral sentiment of the more enlightened nations of the world. America enjoys the evil distinction among all civilized nations of the earth of taking delight in murder and burning of human beings. Nowhere else do men, women, and children dance with ghoulish glee and fight for ghastly souvenirs of human flesh and mock the dying groans of the helpless victim which sicken the air while the flickering flames of the funereal pyre lighten the midnight sky with their dismal glare.

Mr. President, the American conscience has been touched and quickened by the East St. Louis outbreak as it has never been before. Press and pulpit have tried to forget these outrages. At each fresh outbreak they would lash themselves into a spasm of virtue and exhaust the entire vocabulary of denunciation, but forthwith would lapse into sudden silence and acquiescent guilt. By some fatuous delusion they seem to hope that the atrocities of Springfield, Wilmington, Waco, Atlanta, Memphis, and a thousand other places of evil report would never be repeated nor the memory rise up to condemn the Nation. But silence and neglect merely result in compounding atrocities. The East St. Louis outbreak convinces the Nation, as it has never been before, that the time for action has come. The press is not content with a single editorial ebullition, but by repeated utterances insists that the Nation shall deal with its most malignant domestic evil. Reproach is cast upon your contention for the democratization of the world in face of its lamentable failure at home. Ex-President Roosevelt, who is the greatest living voice now crying aloud for individual and national righteousness, has openly proclaimed, in dramatic declaration, that these outbreaks make our moral propaganda for the liberation of mankind but a delusion and a snare. Mr. President, can this Nation hope to live and grow in favor with God and man on the basis of a lie? A nation with a stultified conscience is a nation with stunted power.

Democracies have frequently shut their eyes to moral inconsistencies. The democracy of Greece conferred privilege upon a mere handful of freemen in the midst of ten times their own number of slaves. The Greek philosophers and statesmen were supremely unconscious of this moral obliquity. The Declaration of Independence, which declared for the equality of all men, was written by a slaveholder. The statesmen of the period, however, hoped that slavery would be of short-lived duration and would effect its own solution in the process of time. But Thomas Jefferson was keenly sensitive of the moral inconsistency of this attitude and declared that he trembled when he considered that God is just and that His justice would not slumber forever. Abraham Lincoln is perhaps the only great statesman of democracy who was absolutely consistent in his logical attitude and moral sincerity. The Nation believed in his moral integrity. He uttered no word of cryptic meaning. The people heard him gladly, because the words that fell from his lips were not the coinage of his intellect but the mintage of his heart. The embattled hosts under his high command marched to victory with the Battle Hymn of the Republic resounding in their souls:

> As He died to make men holy,
> Let us die to make men free.

To them this phrase had no remote and deferred meaning, but was immediately applicable to their black brother in chains. It was not a barren ideality, but a living impulse. You have given the rallying cry for the present world crisis. But this shibboleth will be robbed of instant meaning and power unless it applies to the helpless within our own gates. If the sons and grandsons of the heroes who battered down the walls of slavery a half century ago could be made to feel with unreserved certainty a renewal of the moral energy which urged their fathers to that high resolve, they would with heightened enthusiasm for humanity demolish the Teutonic bulwarks of oppression across the seas.

Doctrine is more than deeds if it be sound doctrine. Deeds are the outgrowth of doctrine. Doctrine lives forever with persistent potentiality. Doctrine rules the world or throws it into confusion. The power of words is far greater than the meaning of the author. It makes no difference what lay in the minds or practice of the statesmen of Greece. They planted the seeds of democracy, and all mankind will become the beneficiary of the sowing. The intendment of the signers of the Declaration of Independence boots but little. That document will stand for all time as the gospel of human liberty. When you speak of the democratization of the world and the liberation of mankind you are setting up a standard to which the whole world must rise in the ages to come, despite its attitude at the present time. It may be far from the purpose of our present-day statesmen to admit the negro into this democracy on terms of equality with the rest. But, in spite of the purpose of this statesmanship, this must be the ultimate goal of human democracy. A democracy of race or class is no democracy at all. It is with projected imagination that the negro will endure until these high-sounding phrases have borne their full fruition. Any other class of the American people, under the strain of distress to which the negro has been subjected, would imitate Job's distracted wife and curse the white God and die. The negro will neither curse nor die, but grin and live—albeit beneath that grin is a groaning of spirit too deep for utterance. The negro says to his country, "Though you slay me, yet will I serve you."

The negro's patriotism is vicarious and altruistic. It seems to be an anomaly of fate that the negro, the man of all men who is held in despite, should stand out in conspicuous relief at every crisis of our national history. His blood offering is not for himself or for his race, but for his country. This blood flows like a stream through our national history, from Boston Commons to Carrizal. Crispus Attucks was the first American to give his blood as an earnest of American independence. The negro was with Washington in the dark days of Valley Forge, when the lamp of national liberty flickered almost to extinguishment. The black troops fought valiantly with Jackson behind the fleecy breastworks at New Orleans. Two hundred thousand black boys in blue responded to the call of the immortal Lincoln for the preservation of the Union. The negro was the positive cause of the Civil War and the negative cause of the united Nation with which we face the world to-day.

The reckless daring of negro troops on San Juan Hill marked the turning point in that struggle which drove the last vestige of Spanish power from the western world. It was but yesterday that we buried with honor at Arlington Cemetery the negro soldiers who fell face forward while carrying the flag to the farthest point in the heart of Mexico in quest of the bandit who dared place impious foot on American soil. In complete harmony with this marvelous patriotic record, it so happened that it was an American negro who proved to be the first victim of ruthless submarine warfare after you had distinctly announced to Germany that such outrage would be considered tantamount to war. In all of these ways has the negro shown, purposely or unconsciously, his undeviating devotion to the glory and honor of the Nation. Greater love hath no man than this, that he lay down his life for his country.

In the midst of the world war for the democratization of mankind the negro will do his full share. I have personally always striven to urge the negro to be patriotic and loyal in every emergency. At the reserve officers' training camp in Fort Des Moines there are over 100 young colored men who have come under my instruction. The deviltry of his fellow men can not devise iniquities horrible enough to drive him from his patriotic devotion. The negro, Mr. President, in this emergency will stand by you and the Nation. Will you and the Nation stand by the negro?

I believe, Mr. President, that to the victor belongs the spoils, especially if these spoils be human liberty. After this war for the liberation of mankind has been won through the negro's patriotic participation, he will repeat the lines of the old familiar hymn somewhat louder than ever:

> Behold a stranger at the door,
> He gently knocks, has knocked before,
> Has waited long, is waiting still,
> You treat no other friend so ill.

As a student of public questions I have carefully watched your attitude on the race problem. You have preserved a lukewarm aloofness from the tangled issues of this problem. In searching your writings one finds little or no reference to this troubled phase of American life. It seems that you regard it as a regrettable social malady to be treated with cautious and calculated neglect. There is observable, however, a passive solicitude. You have kept the race problem in the back part of your mind. Your letter to Bishop Walters during your first campaign for the Presidency, expressing a generous concern for the welfare of the race, though of a general and passive character, caused many negroes to give you their political support. Under the stress and strain of other pressing issues and the partisan demands of your political supporters you have not yet translated this passive purpose into positive performance. There is, however, something of consolation in the fact that while during your entire career you have never done anything constructive for the negro, you have never done anything destructive against him. Your constructive opportunity is now at hand. The time has come to make lawlessness a national issue as a war measure, if not from any higher consideration. As a patriotic and military necessity, I suggest that you ask the Congress of the United States to invest you with the power to prevent lynching and to quell lawlessness and violence in all parts of the country during the continuance of the war. Or at least you might quicken the conscience of the Nation by a stirring message to Congress calling attention to this growing evil which is gnawing at the vitals of the Nation. It is entirely probable that before the war is over you will have to resort to some such measure to control internal disturbances on other accounts. It is inconceivable that this Nation should spend billions of dollars and sacrifice the lives of millions of its citizens without domestic uprising and revulsion. In such a time it becomes necessary for the President to exercise all but dictatorial power. The country is willing to grant you anything you ask which, in your judgment, would promote the welfare of the Nation in this crisis. You asked Congress to grant undiscriminated use of the Panama Canal as a means of securing international good will and friendship, and it was granted. In face of the impending conflict, you demanded that Congress should grant the eight-hour demand of the laboring men, and it was done. The suffragists who guard your going in and coming out of the White House were duly convicted under process of law, but were immediately pardoned by you to avoid embarrassment in this war emergency. You asked for billions of dollars and millions of lives to be placed at your disposal for the purpose of carrying on the great conflict, and it was willingly granted. The people have willingly placed in your hands more power than has ever been exercised by any member of the human race, and are willing to trust you in the use of that power. I am sure that they will grant this additional authority during the continuance of the present war in order to secure the unqualified patriotic devotion of all of the citizens and to safeguard the honor of democracy and the good name of the Republic.

Mr. President, negroes all over this Nation are aroused as they have never been before. It is not the wild hysterics of the hour, but a determined purpose that this country shall be made a safe place for American citizens to live and work and enjoy the pursuits of happiness. Ten thousand speechless men and women marched in silent array down Fifth Avenue in New York City as a spectral demonstration against the wrongs and cruelties heaped upon the race. Negro women all over the Nation have appointed a day of prayer in order that righteousness might be done to this people. The weaker sex of the weaker race are praying that God may use you as the instrument of His will to promote the cause of human freedom at home. I attended one of these 6 o'clock prayer meetings in the city of Washington. Two thousand humble women snatched the early hours of the morning before going to their daily tasks to resort to the house of prayer. They literally performed unto the Lord the burden of their prayer and song, "Steal Away to Jesus." There was not a note of bitterness nor denunciation throughout the season of prayer. They prayed as their mothers prayed in the darker days gone by, that God would deliver the race. Mr. President, you can help God answer their prayer. May it not be that these despised and rejected daughters of a despised and rejected race shall yet lead the world to its knees in acknowledgment of some controlling power outside of the machinations of man? As I sat there and listened in reverent silence to these 2,000 voices as they sang—

On Christ, the Solid Rock, I stand
All other ground is sinking sand—

I could not but think of the godless war which is now convulsing the world—a war in which Christian hands are dyed in Christian blood. It must cause the Prince of Peace to groan as in His dying agony when He gave up the ghost on the cross. The professed followers of the Meek and Lowly One, with heathen heart, are putting their trust in reeking tube and iron shard. God uses the humbler things of life to confound the mighty. It may be that these helpless victims of cruelty and outrage will bring an apostate world back to God.

Mr. President, 10,000,000 of your fellow citizens are looking to you and to the God whom you serve to grant them relief in this hour of their deepest distress. All moral reforms grow out of the people who suffer and stand in need of them. The negro's helpless position may yet bring America to a realizing sense that "righteousness exalteth a nation, but sin is a reproach to any people."

Yours, truly, KELLY MILLER.

WOMAN SUFFRAGE.

Mr. SHIELDS. I have received a copy of resolutions passed by a branch of the National Woman's Party of Tennessee, which they desire to be presented to the Senate. While I am not in sympathy with the movement or the resolutions, I present them and ask that they may be printed in the RECORD without reading.

The PRESIDING OFFICER. Without objection, it will be so ordered.

The matter referred to is as follows:

Whereas the women of Russia and of England have been enfranchised as a war measure; and

Whereas the women of the United States are just as desirous of freedom as are the women of the allied nations; and

Whereas we feel that more fervid response would be made by women who are already giving loved ones and personal service for their country if the United States were made an ideal democracy: Therefore be it

Resolved, That we women, meeting this 24th day of August, 1917, at the Hotel Atkin, Knoxville, Tenn., under the auspices of the National Woman's Party, insist upon the recognition of American women as a war measure and that we urge the President of the United States to make this possible by speaking to the party leaders; and be it further

Resolved, That copies of this resolution be sent to the President, to the party leaders in both Houses of Congress, to Senator JOHN K. SHIELDS and to Hon. RICHARD AUSTIN, with the request to the former that it be read into the record of the Senate and to the latter that it be read into the record of the House.

L. CROZIER FRENCH,
State Chairman Tennessee Branch National Woman's Party.

RED RIVER BRIDGE.

Mr. SHEPPARD. From the Committee on Commerce I report back favorably with an amendment the bill (S. 2816) granting the consent of Congress to the Gainesville Red River Bridge Co. to construct a bridge across Red River, and I submit a report (No. 128) thereon. I ask for the immediate consideration of the bill.

There being no objection, the bill was considered as in Committee of the Whole.

The amendment was, after the word "Oklahoma" and the comma at the end of line 7, to insert "at a point suitable to the interests of navigation," so as to make the bill read:

Be it enacted, etc., That the consent of Congress is hereby granted to the Gainesville Red River Bridge Co., or its successors and assigns, to construct, maintain, and operate a bridge and approaches thereto across the Red River at Sacras Ferry, Cooke County, Tex., and Love County, Okla., at a point suitable to the interests of navigation, in accordance with the provisions of the act entitled "An act to regulate the construction of bridges over navigable waters," approved March 23, 1906.

SEC. 2. That the right to alter, amend, or repeal this act is hereby expressly reserved.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendment was concurred in.

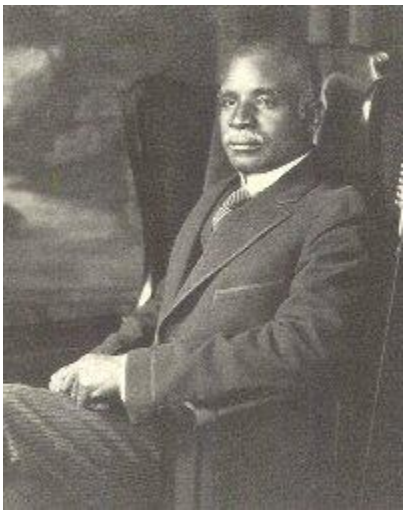
The bill was ordered to be engrossed for a third reading, read the third time, and passed.

MOBILE BAY BRIDGE.

Mr. SHEPPARD. From the Committee on Commerce I report back favorably with an amendment the bill (S. 2813) to authorize the Gulf Ports Terminal Railway Co., a corporation existing under the laws of the State of Florida, to construct a bridge over and across the headwaters of Mobile Bay and such navigable channels as are between the east side of the bay and Blakely Island, in Baldwin and Mobile Counties, Ala., and I submit a report (No. 127) thereon. I ask for the immediate consideration of the bill.

There being no objection, the bill was considered as in Committee of the Whole.

The amendment was, on page 2, line 1, after the word "Alabama" and the comma, to insert "at a point or points suitable to the interests of navigation," so as to make the bill read:



Kelly Miller

Kelly Miller (July 18, 1863 – December 29, 1939) was an American mathematician, sociologist, essayist, newspaper columnist, author, and an important figure in the intellectual life of black America for close to half a century. He was known as "the Bard of the Potomac".[1]

Early life and education

Kelly Miller was the sixth of ten children born to Elizabeth Miller and Kelly Miller Sr. His mother was a former slave and his father was a freed black man who was conscripted into the Winnsboro Regiment of the Confederacy. Miller was born in Winnsboro, South Carolina, where he would attend local primary and grade school.

From 1878–1880, Miller attended the Fairfield Institute where his hard work paid off and he was offered a scholarship to the historically black college, Howard University. Miller finished the preparatory department's three-year curriculum in Latin and Greek, then mathematics, in two years. After finishing one department, he quickly moved on to the next one. Miller attended the College Department at Howard from 1882 to 1886.

In 1886, Miller was given the opportunity to study advanced mathematics with Captain Edgar Frisby. Frisby was an English mathematician working at the U.S Naval Observatory. Frisby's attendant, Simon Newcomb, noticed Miller's intellectual talent and recommended him to attend Johns Hopkins University. Miller spent the following two years at Johns Hopkins University (1887-1889) and became the first African American student to attend the university. Miller spent his time at the university studying mathematics, physics, and astronomy.[2] He was also the first African-American to study graduate mathematics in the United States.[3]

Miller was a member of Alpha Phi Alpha fraternity.[4]

Career

Miller was not able to keep attending Johns Hopkins University due to financial limitations. From 1889 to 1890, taught mathematics at the M Street High School in Washington, D.C. Appointed professor of mathematics at Howard in 1890, Miller introduced sociology the development structure and functioning of human society into the curriculum in 1895, serving as professor of sociology from 1895 to 1934. Miller graduated from Howard University School of Law in 1903.[5] In 1907, Miller was appointed dean of the College of Arts and Sciences.[5]

His deanship lasted twelve years, and in that time, the college changed significantly. The old classical curriculum was modernized and new courses in the natural sciences and the social sciences were added. Miller was an avid supporter of Howard University and actively recruited students to the school. In 1914, he planned a Negro-American Museum and Library. He persuaded Jesse E. Moorland to donate his large private library on blacks in Africa and the United States to Howard University and it became the foundation for his Negro-Americana Museum and Library center.[2]

He was a participant in the March 5, 1897 meeting to celebrate the memory of Frederick Douglass, which founded the American Negro Academy led by Alexander Crummell.[6] Until the organization was discontinued in 1928, Miller remained one of the most active members of this first major African American learned society, refuting racist scholarship, promoting black claims to individual, social, and political equality, and publishing early histories and sociological studies of African American life.[7]

Miller gained his well-known national importance from his involvement in another movement led by W. E. B. Du Bois. He showed intellectual leadership during the conflict between the "accommodations" of Booker T. Washington and the "radicalism" of the growing civil rights. Miller was known in two ways to the public.

On African-American education policy, Miller aligned himself with neither the "radicals" — Du Bois and the Niagara Movement — nor the "conservatives" — the followers of Booker T. Washington.[*citation needed*] Miller sought a middle way, a comprehensive education system that would provide for "symmetrical development" of African-American citizens by offering both vocational and intellectual instruction.[8]

In February 1924, Miller was elected chairman of the Negro Sanhedrin, a civil rights conference held in Chicago that brought together representatives of 61 African-American organizations to forge closer ties and attempt to craft a common program for social and political reform.[9]

He believed that blacks should favor free market rather than government or union power, stating:

The capitalist has but one dominating motive, the production and sale of goods. The race or color of the producer counts but little.... The capitalist stands for an open shop which gives to

every man the unhindered right to work according to his ability and skill. In this proposition the capitalist and the Negro are as one.[10]

Written works

Miller was a prolific writer of articles and essays which were published in major newspapers, magazines, and several books, including *Out of the House of Bondage*. Miller assisted W. E. B. Du Bois in editing *The Crisis*, the official journal of the National Association for the Advancement of Colored People (NAACP).[5] Miller started off publishing his articles anonymously in the *Boston Transcript*. He wrote about both radical and conservative groups. Miller also shared his views in the *Educational Review, Dial, Education*, and the *Journal of Social Science*. His anonymous articles later became subject for his lead essay in his book *Race Adjustment* published in 1908. Miller suggested that African Americans had the right to protest against the unjust circumstances that came with the rise of white supremacy in the South. Miller supported racial harmony, thrift, and institution building.[2]

In 1917, Miller published an open letter to President Woodrow Wilson in the *Baltimore Afro-American* against lynching, which he called "national in its range and scope," and called the government's failure to stop it "the disgrace of democracy."[11] He also stated "It is but hollow mockery of the Negro when he is beaten and bruised in all parts of the nation and flees to the national government for asylum, to be denied relief on the basis of doubtful jurisdiction. The black man asks for protection and is given a theory of government." [2]

It was circulated as a pamphlet in the camp libraries of the US armed forces for about a year until "the department of military censorship" ordered it removed because it "tended to make the soldier who read [it] a less effective fighter against the German."[12] Miller published *Kelly Miller's History of the World War for Human Rights* which included "A wonderful Array of Striking Pictures Made from Recent Official Photographs, Illustrating and Describing the New and Awful Devices Used in the Horrible Methods of Modern Warfare, together with Remarkable Pictures of the Negro in Action in Both Army and Navy" in 1919.

Death and legacy

After the First World War, Miller's life became difficult. He was demoted in 1919 to dean of a new junior college after J. Stanley Durkee was appointed as president of Howard in 1918 and built a new central administration. Miller continued to publish articles and weekly columns in black presses. His views were published in more than 100 newspapers.[*citation needed*]

Miller died in 1939, on Howard's campus. He was survived by his wife Annie May Butler, four of his five children: Kelly the III, May, Irene, and Paul. His son, Isaac Newton, preceded him in death.

A 160-unit housing development in LeDroit Park, constructed in 1941, was named in his honor, as was Kelly Miller Middle School in Washington, DC.[13]

Footnotes

1. *Gary, Lawrence E., ed. (1973). "Social Research and the Black Community - Selected Issues and Prioities". Howard University: 23.*
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3. *Shakil, M (2010). "African-Americans in mathematical sciences - a chronological introduction" (PDF). Polygon. **4** (Spring): 27–42. Retrieved April 8, 2017.*
4. *"Notable Alpha Men". Alpha Phi Alpha fraternity, Mu Lambda chapter. Archived from the original on October 23, 2007. Retrieved November 13, 2007.*
5. *"Kelly Miller Biography (1863–1939)". biography.com. Archived from the original on April 10, 2017. Retrieved April 9, 2017.*
6. Seraile, William. Bruce Grit: The Black Nationalist Writings of John Edward Bruce. Univ. of Tennessee Press, 2003. p110-111
7. Alfred A. Moss. The American Negro Academy: Voice of the Talented Tenth. Louisiana State University Press, 1981.
8. *"Library of Congress: "Kelly Miller (1863-1939)"". Archived from the original on February 11, 2013. Retrieved December 23, 2012.*
9. Glenda Elizabeth Gilmore, *Defying Dixie: The Radical Roots of Civil Rights, 1919-1950.* New York: W.W. Norton & Co., 2008; pg. 41.
10. Olasky, Marvin, "History turned right side up", *WORLD magazine*. 13 February 2010. p. 22.
11. *Miller, Kelly (August 25, 1917). "The Disgrace of Democracy". Baltimore Afro-American. p. 4.*
12. *"Bar Miller's book from camp libraries". Chicago Defender. October 19, 1918. p. 1.*
13. *"2101 4th Street NW 20001". dchousing.org. March 14, 2016. Archived from the original on March 14, 2016. Retrieved March 14, 2016.*

Bar Library Lecture Series

We are living at a time where more than anything else, we need something to look forward to. With that in mind, please circle the date of Thursday, November 19, 2020, when Prof. Christopher R. Riano is scheduled to appear in the Main Reading Room of the Bar Library to speak on his book *Marriage Equality: From Outlaws to In-Laws*. As always, the lecture will be followed by a wine and cheese reception. I cannot begin to tell you how much I hope to see you there.

Hon. Joseph H. H. Kaplan
(Also Pictured Hon. Julie R. Rubin & James B. Astrachan, Esq.)

The Best Judge You Never Heard Of – Joseph H. H. Kaplan

by Paul W. Grimm

"In 1984, a series of state-chartered savings and loan associations failed as a result of embezzlement and poor management, leaving the quasi-public non-profit organization chartered by the State of Maryland to protect the interests of consumers without sufficient funds to guarantee all the deposits. A run on the S & L's followed, and the state government had a genuine crisis on its hands. Ten years later, thanks to the steady supervision of a single Maryland Circuit Court Judge–the Honorable Joseph H. H. Kaplan—the crisis came to a successful end. Under Judge Kaplan's supervision, the receivership that had been created to marshal and liquidate the assets of the defunct S & L's in order to raise the funds needed to guarantee the deposits of the account holders completed its work with a degree of success that was unimaginable at the start of the crisis. Under Judge Kaplan's careful scrutiny, the runs on the S & L's stopped, and he presided over the development of a plan to maximize the value of the assets of the S & L's to insure their disposal netted sufficient funds to pay depositor claims. In the end, the State of Maryland was left with a vastly reduced financial obligation to make good on the deposits, and a stronger regulatory authority had been put in place to insure the safety of the S&L's in the future. It is no exaggeration to say that the work of Judge Kaplan in managing the Maryland S&L crisis benefitted every citizen in the state, the vast majority of whom never even knew his name.

Also in 1984, a Maryland domiciled insurance company selling fidelity and surety bonds throughout the United States was placed into receivership by the Maryland Insurance Commissioner. The state legislature passed a law requiring that all state initiated insurance receiverships would have venue in the Circuit Court for Baltimore City, where Judge Kaplan sat. For more than a dozen years, he presided over a series of insurance company receiverships involving surety and construction insurance, medical malpractice insurance, and title insurance. Again, under his stewardship, receivership expenses were kept to the minimum, the assets of the insolvent companies were marshaled and liquidated, and claimants paid as near to the full value of their claims as was possible. Remarkably, in the receivership of medical malpractice carrier, policyholder claims adjudged to be valid were paid 100 cents on the dollar, an almost unheard of outcome for a receivership.

My first involvement with Judge Kaplan was as retained counsel to the court appointed receiver for the longest running of the insurance company receiverships. My relationship with him in that capacity lasted more than ten years, and I appeared before him countless times in hearings and trials. Part of my job was to obtain advance permission to initiate litigation against third parties that our investigation revealed had been responsible for the mismanagement or defalcations that led to the failure of the company, and later, to submit settlement proposals in those lawsuits for his approval. In this process, I learned just how accurately he could evaluate the merits and value of cases, and to forecast whether the suit was likely to result in a recovery that would add enough to the receivership assets to warrant the expenses of bringing it. As with the S&L crisis, Judge Kaplan's management of the insurance company insolvencies inured to the benefit of countless Maryland residents, and claimants outside of Maryland. And, as with the resolution of the S & L failures, most of those who received the benefits of the work that he did never knew the name of the judge who made it possible for them to obtain a fair recovery.

I watched Judge Kaplan carefully during the years I appeared before him. The first thing I noted was that no matter how complex the matter, or how quickly it had been set in, he always was prepared. He had read the filings, and studied the law. Not once did I hear him announce, at the start of a well briefed motions hearing, the words that signal that the judge has not read the papers: "Well now, counsel, what's this matter all about?". Usually, he knew the issues and the law better than the lawyers did. The second thing I noticed was how he treated everyone who came before him. He was courteous to every lawyer, party and witnesses who appeared before him. I never saw him lose his temper or display anger. And, I noticed that the dignity that he displayed influenced how the other lawyers, myself included, behaved towards each other and the court.

Judge Kaplan also displayed enormous common sense. Many judges are brilliant on the law, but seem out of touch with the real world. Judge Kaplan was a scholar of the law, but also pragmatic and end-result oriented. I recall filing a motion requesting permission to file a claim against a third party responsible for contributing to the failure of one of the insurance companies. I thought the evidence of liability was overwhelming, as did Judge Kaplan, but the question that pinned me to the wall was "Paul, if you get a judgment, how much will you be able to collect?" After hearing my dispirited response, he said "settle the claim for what you can get." And looking back, he was right. The receiver could not pay a claimant with a worthless judgment.

In court, Judge Kaplan never appeared to be rushed or out of time. I knew he had an unimaginably large case load, in addition to his duties as Circuit Administrative Judge, and later Chief Circuit Court Judge. No matter what else was on his plate, he made sure he finished what he was doing at the time before moving on. Judge Kaplan also displayed the courage of his convictions. When he had heard the facts and studied the law, he was unafraid to rule, even when doing so involved tough issues. He never dodged the hard cases, or shirked difficult questions, and he fearlessly tackled impossibly complex matters like the redoing of the dysfunctional Baltimore City School System, the revamping of Baltimore City juvenile justice system, and eliminating the hundreds of backlogged criminal cases in the adult criminal justice system.

On top of all this, Judge Kaplan was kind, sincere, and always able to diffuse a volatile situation with his sense of humor. The lessons in judging he taught me I benefit from every day of my own career as a judge, now in its seventeenth year. On the wall outside of my office there is a framed quote that I look at each day as I start work. It is a quotation from a speech given by the great Supreme Court advocate John W. Davis, in a speech to the Virginia State Bar Association in 1926, titled "Thomas Jefferson, Attorney at Law". Davis said, of Jefferson: "In the heart of every lawyer, worthy of the name, there burns a deep ambition so to bear himself that the profession may be stronger by reason of his passage through its ranks, and that he may leave the law itself a better instrument of human justice than he found it." Those words capture the essence of Judge Joseph H. H. Kaplan. Through his intellect, dedication, hard work, practicality, common sense, and devotion to his court, his city, his state and his country, he manifestly made the law a better instrument of human justice than he found it when he entered the practice of law in 1960. He taught me much of what I think a judge should be, and I hope that when my days as a judge are at an end, I will be regarded as having been half as worthy."

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