# Riverside Lawyer

March 2016 • Volume 66 Number 3 MAGAZINE

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Surviving an Active Shooter

California Penal Code Section 422 Criminal/Terrorist Threats and the Mentally Ill (or When a Threat is Not Really a Threat)


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# Mission Statement

## Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

## RCBA Mission Statement

The mission of the Riverside County Bar Association is:
To serve our members, our communities, and our legal system.

## Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of *Riverside Lawyer* published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

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*The* Riverside Lawyer *is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $25.00 and single copies are $3.50.*

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# Calendar

## March

**9 Criminal Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Souley Diallo, Esq.
Topic: "The Basics of Trying a Gang Case"
MCLE
Lunch sponsored by Trey Roberts of Breathe Easy Insurance Solutions

**14 Civil Litigation Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speakers: Judge Craig Riemer & Judge Sharon Waters
Topic: "Complex Civil Litigation in Riverside Superior Court"
MCLE

**15 Family Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Leslie Summers
Topic: "Alcohol Abuse and Alcohol Monitoring"
MCLE

**16 Estate Planning, Probate & Elder Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Judge Thomas Cahraman and Managing Attorney Tom Johnson
Topic: "Probate Court: Changes in Statutes, Rules, Forms and Procedures"
MCLE
Lunch will be provided to those who respond by March 14.

**18 General Membership Meeting**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Topic: "Mediating in Riverside ADR Programs: Successes & Struggles"
Speakers: A panel discussion with mediators and arbitrators from DRS, Community Action Program, Chapman University & Court's mediation/arbitration programs.
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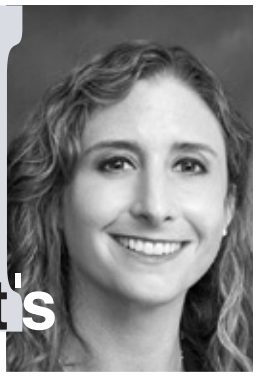
***Cover photo:***
The San Bernardino memorial
*photo by Christa Shewbridge*

# President's Message



*by Kira L. Klatchko*

Every few months, I come across an article about the substance abuse and mental health problems plaguing our profession. Most recently, I read a study entitled "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," which was conducted jointly by the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation. The study (available in full at http://journals.lww.com) involved a sample of nearly 13,000 licensed attorneys from 19 different states. Over 20% of study respondents had a drinking problem, 28% had significant levels of depression, 19% had anxiety, and 23% were significantly stressed. Sixty-one percent of respondents had "concerns with anxiety at some point in their career" and 46% "reported concerns with depression." Surprising absolutely no one, the study concluded: "Our research reveals a concerning amount of behavioral health problems among attorneys in the United States. Our most significant findings are the rates of hazardous, harmful, and potentially alcohol dependent drinking and high rates of depression and anxiety symptoms." It also concluded that attorneys in their first 10 years of practice experienced the highest rates of problematic drinking, and that lawyers, comparatively, had higher levels of problem drinking than doctors and other highly educated workers.

As a profession we are apparently more tired, stressed, depressed, and drunk than other professionals. I can think of innumerable possible causes, and surely you can too. We work in an adversary system that is too often a high conflict system. There are significant risks for the people we represent. Client expectations are high, court expectations are high, and our own expectations are high. We have little ability to control outcomes. We work long hours. There are fewer jobs and fewer opportunities to advance.

I am not writing to offer a magic solution. Highly risk-averse individuals are likely going to be stressed by high conflict and high consequence situations over which they have little control. We cannot eliminate all of the stressors inherent in our profession. But, with conscious effort we can make things easier on ourselves. We could set realistic expectations, be more honest in our conversations about work-life balance, and be more honest with ourselves about our limitations.

We could start by dispelling some of the myths that have outsized influence on our decision-making and serious consequences for our mental and emotional health. For example, one popular myth is that a "superstar" attorney is one who has no personal life and bills 3,000 hours in a year. Many attorneys, particularly the young attorneys that, according to the ABA/Hazelden report, are on their way to becoming problem drinkers, are under the impression that the only path to success is to be a "superstar." But, I have yet to see any empirical or anecdotal evidence suggesting that a burned-out and demoralized attorney at the breaking point is a better long-term employee, more stellar attorney, or more successful rainmaker than an attorney who takes the occasional weekend off, spends time with friends and family, goes on vacation, or has a non-work-related hobby. Most of us recognize, on some level, that work-life balance is required, but beyond lip service we avoid having important and meaningful conversations about the is-ought gap between the normative good of "balance" and the actual expectation that we work like "superstars." When I hear my colleagues tell me that they have not been on vacation for years, or that they routinely wake up in the middle of night to go into the office, they seem shocked when I suggest that they are in need of a break. Someone recently told me that the idea of going on a vacation was stressful because a vacation would mean extra work prior to leaving, work while away, and extra work upon coming home. When vacation becomes a major stressor that is probably a sign that we are under too much pressure. As a group, we could do better. We could actually readjust expectations, and talk openly about the different pathways to success. We could recognize that some of our professional myths are contributing to the disturbing trends outlined in the ABA/Hazelden report.

We could also try to be nicer to one another, and eliminate toxic people from our firms and our profession. This is not a Pollyannaish prescription, but a recognition of the fact that some of our greatest stressors are people we work with. Emotions are contagious, and nothing is more stressful than having a boss, colleague, or judge who is demeaning, abusive, or unreasonably demanding.

I have heard many stories from attorneys who were called by a boss on a Sunday evening, or in the middle of the night, or on vacation, to work on "emergencies" that existed for weeks prior to the call. We have all heard these kinds of stories, and worse. Sometimes toxic behavior is forgiven in legal settings, where it may be construed as evidence of "bull-dog" litigator, or may be overlooked when the perpetrator is a rainmaker. But in most cases, the bull dog in your office is terrorizing all of the other dogs, increasing their stress levels, and lowering their

productivity. For empirical proof, I refer you to the "The No A**hole Rule: Building a Civilized Workplace and Surviving One That Isn't," by Stanford professor Robert I. Sutton. As a group, we could do more than just talk about the number of toxic attorneys in our midst. We could re-train them, remove them, or at least do a better job of protecting other people from them.

Judges too could help. I have seen judges berate attorneys, and publicly humiliate them, for small infractions, or for no infraction at all. A few weeks ago I read an article about a federal judge issuing an "order on ineptitude" castigating counsel for, among other things, ineptly ordering a reporter's transcript. The same article described the judge as "bollocking" an attorney who failed to wear a tie. Being on the receiving end of an "order on ineptitude" or a dressing-down about your attire would be stressful and demoralizing. I point this out because judges, whether they realize it or not, are stressors. Ordering an attorney file a written response within 24 hours pretty well guarantees that attorney, or that attorney's colleagues, are going to have a long night. Refusing to continue or advance a randomly set hearing date to accommodate an attorney's prepaid vacation sends a message that next time the attorney should not bother to schedule a vacation. We have very good judges in our county, and I am not suggesting they are driving attorneys to drink, but am suggesting they are part of our legal community and part of any solution to the problems addressed in the ABA/Hazelden report.

I hope, as a profession, we will figure out a way to address these serious problems. If you want to continue this discussion, or suggest a way that the RCBA can help, please post on the RCBA's discussion forum.

*Kira Klatchko is a certified appellate law specialist and co-contributing editor of* Matthew Bender Practice Guide: California Civil Appeals and Writs. *She is also a vice chair of the appellate practice at Lewis Brisbois Bisgaard & Smith, where she is a partner.*

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# Barristers President's Message

*by Christopher Marin*

*Higitus Figitus migitus mum, pres-ti-dig-i-ton-i-um!*

-Merlin from Disney's
*The Sword in the Stone* (1963)

Say what you will about Antonin Scalia, the man had a keen intellect and sharp wit that came through in his legal opinions. Hopefully, we will remember him for his use of such colorful phrases as "jiggery-pokery" and "legalistic argle-bargle" (which always bring me back to that song from *The Sword in the Stone*) as much as for his originalist (-ish) philosophy of jurisprudence. From a writer's standpoint, he will be missed.

This January your Barristers board and I had the honor of lunching with the newly admitted attorneys attending the RCBA's annual Bridging the Gap program. I remarked how much Barristers is not just a way to network with other attorneys professionally, but also to celebrate major life milestones and – in a sense – become like another family. Between weddings, births, adoptions, and making partner (Yay, Scott!), we have had a lot to celebrate over the last few years. We also find comfort in our grief as we mourn together those who die way too soon (RIP, Luis).

Lately, though, I have noticed a decline in attendance at our monthly events. This is troubling because these meetings are our time to connect with our colleagues and form that bond that makes Riverside a truly unique place to practice law – a place where lawyers and judges strive to foster an atmosphere of collegiality and mutual respect.

Barristers does not exist to pad the officers' resumes or promote the glamour of the life of the young attorney. (Hah!) Rather, we exist because of you, because we value this wonderful legal community and want to pass on these traditions to you, our peers and colleagues. To that end, I urge you – be you a young attorney, someone who knows young attorneys, or even someone who wants to network with young attorneys – to come to our events and experience this connection for yourself. If there is anything I or the board can do to make these events easier or more interesting for you to attend, do not hesitate to contact me.

Speaking of interesting events, we have a great one lined up for March. We are pairing with the Richard T. Fields Bar Association to present a voir dire workshop. Voir dire is a crucial skill in litigation because as we develop the story of our case, voir dire provides us the first chance to deliver it and connect with our target audience. Darryl Exum from Exum Law Offices and A.C. Jones from the Law Offices of the Public Defender of Riverside County are sure to deliver a program that is engaging, informative, and very interactive.

The voir dire workshop will be on Saturday, March 19th in the Gabbert Gallery on the 3rd floor of the RCBA building. The event starts with a networking breakfast at 9:30 a.m., followed by the main event from 10 a.m. to 1 p.m. The event offers 3 hours of general MCLE credit. We are also charging a nominal fee to raise money for future events. The cost is $10 for RCBA and RTFBA members and $30 for non-members, payable at the door. Breakfast will be provided. I hope to see you there; I have seen Mr. Jones in action and Mr. Exum's reputation speaks for itself, and I assure you this program will be worth both your money and your time.

*Christopher Marin, a member of the Bar Publications Committee, is a sole practitioner based in Riverside. He can be reached at christopher@riversidecafamilylaw.com.*

## *In Memoriam*

**JUDGE ELWOOD M. RICH**

(1920 – 2015)

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# Freedom of the Press, Free Speech, and the Espionage Act of 1917

*by Dwight Kealy*

Q&A with David Gehring, Global Media Advisor, former VP of Partnerships at Guardian News & Media (UK) and head of Global Media Alliances & Strategies at Google. Mr. Gehring spoke to the Riverside County Bar Association about Freedom of the Press on January 8, 2016.

Q: When talking to the RCBA about freedom of the press, you mentioned the Foreign Intelligence Act, Patriot Act, and Espionage Act. How do you think these three acts are related?

Gehring: The 1978 Foreign Intelligence Surveillance Act [FISA] significantly expanded the surveillance apparatus which, over time, was not limited to foreign surveillance. This was evidenced by the FISA Court's warrant ordering Verizon to hand over to the government all metadata for communications, including telephone calls within the United States. The Patriot Act made it easier to investigate and seize assets and to arrest by broadening the definition of terrorism. The 1917 Espionage Act gave the federal government the ability to prosecute and makes it largely impossible for non-spy U.S. citizens to defend themselves when accused of terrorism. Although developed in the interest of domestic security, these three acts work in concert to give the executive branch the legal framework necessary to establish a more authoritarian role for the federal government.

Q: Your professional focus is on the freedom of the press. How do these acts relate to the press?

Gehring: Historically, the federal government prosecuted using the Espionage Act very, very rarely. The frequency of Espionage Act prosecutions has increased significantly. In fact, Obama has used the Espionage Act to prosecute more than all other U.S. presidents combined. The aggressive use of the Espionage Act has a chilling effect on a potential leaker's willingness to leak information that may be in the public's interest. This also has a chilling effect on reporters because of the reporter's risk of being prosecuted for coming into contact with information that may be somehow remotely related to national security.

The Patriot Act expanded the definition of terrorism to include any act "dangerous to human life" that violates a criminal law of the U.S. or any state if the act appears to be intended to intimidate or coerce a civilian population or influence the policy of a government by intimidation or coercion [Section 802]. Think of how broad this definition could be. If the government says an act was intended to intimidate or coerce, they can prosecute it as terrorism.

Then the Espionage Act states that whoever communicates information relating to national defense to a foreign government or citizen shall be punished by death or by imprisonment for any term of years or for life. The death penalty is even available when the communication is, among other things, concerning communications intelligence. Wouldn't communications intelligence include something like the metadata from all phone calls in the U.S.? In light of the FISA court's warrant for Verizon to hand over all metadata for all calls—including completely domestic calls—you can see that the legal framework is in place for broad prosecutorial powers against someone who might report on this important issue.

Q: We're obviously talking in the shadow of last month's attack on a government building in our neighbor San Bernardino. We have security concerns. How do you suggest that we balance national security concerns with freedom of the press?

Gehring: Clearly we live in challenging times as we try to find a balance between domestic security and civil liberties. A free press is supposed to facilitate a societal conversation about this balance. If we go too far in favor of protecting civil liberties at all costs, we expose ourselves to significant security risks. On the other hand, if we go too far in favor of domestic security as the highest goal, we expose ourselves to political risks.

Q: What are the political risks?

Gehring: The political risks are that we allow for the establishment and use of laws that give power to our Executive Branch to protect us at all costs. Those same powers can be used to establish an authoritarian government that can perpetuate a level of human

misery that is much greater than the original domestic security risk.

Q: What do you suggest is the solution?

Gehring: Three things. We need to elect politicians who are trustworthy and don't ridicule the press for political expediency. This willingness to attack the press for political expediency betrays the individual's inclination to control the press if ever elected into power. In 1917, when the Espionage Act was passed, Woodrow Wilson made a significant attempt to have the Executive Branch control the media as a provision of the Espionage Act. He lost that provision by one vote. If he had the opportunity to control the press, do you think he would have? That is the first thing. We need elected politicians who are worthy of our trust.

Second, we need a free and economically sustainable news media industry employing journalists who take their role seriously. At its core, the purpose of journalism is to provide us with the information we need to be free and self-governing. We need journalists that embrace that function in society and are able to financially support themselves doing this. Ruben Vives is a great example. He won the Pulitzer Prize reporting on the corruption in the City of Bell where city officials were using city accounts as pretty much their own ATM. At the time, Ruben was 32 and the youngest person ever to win the Pulitzer Prize. He spent two years investigating and writing about the City of Bell. He was only able to do this because the *Los Angeles Times* paid him to do it. Do we think the same corruption is not happening in other small cities across the U.S? We just don't know about it because we do not have as many newspapers employing as many journalists like Ruben out there doing the job of holding power accountable.

The third thing we need is a legal community committed to the rule of law and committed to making hard choices for the sake of that responsibility.

*Dwight Kealy studied archaeology in the Middle East, served as an Arabic/Spanish Linguist and Intelligence Officer in the United States Marine Corps, and spent a decade in the commercial insurance business. He is co-chair of the Solo/Small Firm Section of the RCBA and a member of the RCBA Publications Committee. He can be reached at info@dwightkealy.com.*

# Walter Laqueur and Everything You Wanted to Know About Terrorism, But Were Afraid to Ask

*by Abram S. Feuerstein*

Shortly before the 2004 presidential election, former President George W. Bush observed that the war on terror was not winnable. "I don't think you can win it," Bush told an NBC "Today" show interviewer while campaigning in New Hampshire. "I think you can create conditions so that . . . those who use terror as a tool are less acceptable in parts of the world," Bush said.[1]

At the time Bush's comments were viewed as a campaign "gaffe," and his aides and spokesman quickly engaged in damage control efforts. After all, throughout his re-election bid, the president persistently claimed that he, and not his opponent Senator John F. Kerry, had the ability to win the war on terror. Bush's comments seemed to undermine a key theme of his campaign.

Scott McClellan, the White House Press Secretary, scrambled and noted that Bush simply had been referring to the idea that the war on terror was a "different kind of war," one that would not end with a "formal surrender or a treaty signed like we have in wars past."[2] And after Democratic vice presidential candidate John Edwards derided Bush's comments by asserting that "(t)his is not time to declare defeat," and that "(t)he war on terrorism is absolutely winnable,"[3] Bush told an American Legion audience: "(M)ake no mistake about it, we are winning and we will win."[4]

A dozen years later, the question that needs asking is not the politically driven one from 2004 of whether the United States is winning a war on terror, but what our perspective and strategy should be in dealing with the numerous issues that terrorism, in all of its shapes and sizes, presents.

In a series of books written and/or updated more than a decade ago, historian Walter Laqueur (now age 94) attempted to provide a solid foundation upon which policymakers could begin to answer that question: *A History of Terrorism*, initially published in 1977 and re-issued with new material in 2001; the 1999 *The New Terrorism: Fanaticism and the Arms of Mass Destruction*; and *No End to War: Terrorism in the Twenty-First Century*, published in 2003.[5]

The starting point for Laqueur – whose resume includes a lengthy list of prestigious domestic and international university posts and think-tanks – is his observation that terrorism is as "old as the hills,"[6] a "very old phenomenon,"[7] which "has been with us for centuries."[8] Laqueur does not believe in wasting intellectual energy on crafting a generally acceptable definition of the term "terrorism." He notes that efforts through the years to define terrorism are unavailing not only because of misconceptions about terrorism, but simply because terrorism has "changed its character and meaning over time and from country to country."[9] An attempt to define democracy in ancient Greece, he observes, is of limited value to an attempt to define democracy today.[10] Similarly, it likely makes little sense to try to define terrorism by reference to the Sicarii, Jewish extremists active in Roman occupied Palestine in the year 70; the Eleventh Century Order of the Assassins; revolutionaries in mid-to-late Nineteenth Century Czarist Russia; or, in the 1960s and 1970s, the Tupamaros of Uruguay, the Baader-Meinhof Gang of Germany, or Italy's Red Brigades.[11]

1 *See* Rich Klein, "In interview, president suggests war on terror can't be won," *The Boston Globe*, August 31, 2004, available at: *http://www.boston.com/news/politics/president/articles/2004/08/31/in_interview_president_suggests_war_on_terror_cant_be_won/*.

2 *Id.*

3 *See* August 31, 2004, NBC, MSNBC.COM and news services report at: *http://www.nbcnews.com/id/5865710/ns/politics/t/bush-clarifies-view-war-against-terrorism/*.

4 *Id.*

5 The three books are widely available in large format paperback used editions through Amazon for essentially the price of shipping and handling charges.

6 Walter Laqueur, "The Terrorism to Come," Policy Review, August/September 2004 (Hoover Institution), available at *http://www.hoover.org/research/terrorism-come*.

7 Laqueur, *No End to War*, p. 232 (Continuum 2004).

8 Laqueur, *The New Terrorism*, p. 3 (Oxford University Press 2000).

9 *No End to War*, pp.232-233.

10 *Id.*

11 In earlier writings, Laqueur states that he limited his own definition of terrorism to: "[T]he systematic use of murder, injury, and destruction, or the threat of such acts, aimed at achieving political ends." (*No End to War*, p. 238.) He also wrote approvingly of a 1990 definition provided by the U.S. Department of Defense which described terrorism as "the unlawful use of, or threatened use, of force or violence against individuals or property to coerce and intimidate governments or societies, often to achieve political, religious, or ideological objectives." (*The New Terrorism*, p. 5.)

More fruitful than attempting to overcome definitional challenges, Laqueur's approach to the subject of terrorism is to provide a comprehensive history of terrorist movements. By doing so, Laqueur desires to show, first, that there is such a history and, second, that the study of terrorism is not a worthless endeavor but one which he hopes will shed light on the conditions in which terrorism tends to occur. Unfortunately, as Laqueur himself realizes, this history "does not offer clear-cut lessons" and is not a "magic wand, a key to all the mysteries of contemporary terrorism."[12] He writes: "Predicting future trends in terrorism has always been next to impossible. The actors involved have been few, their actions often erratic, and the behavior of small groups in a society is no more predictable than that of very small particles in the physical world."[13]

Yet Laqueur's work does lead him to make several useful insights.

First, from a historical perspective, he notes that terrorism generally has been ineffective in achieving its ends and, although tragic to its direct victims and their families, terrorism "seldom has been more than a nuisance."[14] The bloodiest terrorist incidents in the past have affected only a relatively few people. With a few exceptions, instead of altering public opinion about their causes or grievances, Laqueur observes that the terrorists generated counterforces that resulted in their ultimate defeat.[15] Moreover, the invocation by some that there has been a "steady growth of terrorism," is not factually supportable.[16] This track record means that in the past the danger of terrorism has been overstated, and one might conclude that the resources and attention allocated to the subject were out of proportion, and possibly grossly so, to the impact of terrorism.

Second, the correlation between poverty and terrorism is weak at best, and likely non-existent. Quoting former U.N. Secretary General Kofi Annan, Laqueur writes that "[t]he poor of this world suffer enough; one should not in addition brand them as potential terrorists."[17] Although some on the left may take issue with this conclusion and continue to insist that poverty is the cause of terrorism, Laqueur's historical analysis easily dispels this shibboleth as well as its deeply flawed related assumption that prosperity will cure terrorism. In light of this conclusion, fighting poverty in the world's poorest countries might be desirable, but it will have little or no effect on the activities of terrorists.

Instead, nationalistic, ethnic, religious and tribal conflict – combined with an unhealthy dosage of fanaticism and extreme religious and political doctrine – are more likely to be at the root of terrorism. At present and for the past three decades, the main manifestation of this has been jihadist terrorism. Writing in 2003, Laqueur did not see any end in sight of jihadist, Islamist groups who viewed armed struggle against the perceived enemies of Islam as their religious duty.[18] To Laqueur,

12 Laqueur, *A History of Terrorism*, pp. vii-viii (Transaction Publishers 2002).
13 *No End to War*, p. 209.
14 *The New Terrorism*, p. 3.
15 *No End to War*, p. 209.
16 *A History of Terrorism*, p. 226. With respect to domestic terrorism, a recent 2016 book by CNN's well-regarded national security analyst Peter Bergen, *United States of Jihad: Investigating America's Homegrown Terrorists*, makes a similar point that there have been relatively few terrorist attacks since 9/11. Bergen asserts that "the new normal" is that Jihadist terrorism will remain a low-level albeit persistent threat that will continue over a number of years; that most attacks in the United States will be disrupted by law enforcement although by the law of averages some will "get through"; and that larger scale attacks similar to last's November's Paris one will continue to take place mostly in Europe. (*See generally*, Peter Bergen Interview, CSPAN2, Original air date Feb. 20, 2016.)
17 *Id.*, at p. 18.
18 *No End to War*, p. 210.

that most Muslims or even the vast majority of Muslims, do not embrace jihad is as true as it is irrelevant. He notes that believers in jihad "can count on a substantial periphery of sympathizers, more than sufficient to sustain long campaigns of terrorism," while those preaching jihad have "fertile ground to find converts," especially among younger generations in the Middle East and Muslim immigrants in the West.[19]

Given the link between terrorism and nationalist, ethnic and religious conflict, Laqueur gloomily concludes that with varying intensity and diverse geographic locations "terrorism will be with us as far as one can look ahead."[20]

Third, weapons of mass destruction (WMD) are "game-changers" in the way we view or should view terrorism. "In brief, there has been a radical transformation, if not a revolution, in the character of terrorism, a fact we are still reluctant to accept," Laqueur notes.[21] The destructive power of WMD, including nuclear, biological, and chemical weapons and the existence of cyberterrorism, will enable small groups – possibly even one person – to kill thousands if not hundreds of thousands. Although Laqueur even conjures up the science fiction image of the mad scientist in the lab coat attempting to invent a doomsday device such as an "earthquake machine" or a "death ray,"[22] Laqueur's knowledge base is broad enough to enable him to assess realistically the likelihood that any of the categories of WMD might be used. The news is not good. The technology skills needed to obtain and use WMD do not appear complex, and the resources to do so appear widely available or can be furnished by rogue nations. When these factors are combined with the upsurge in religious or other fanaticism, in short, "mega-terrorist" acts seem a near certainty.

Worse, as weapons have become more destructive and available more widely, terrorist groups can work in very small groups. And "[t]he smaller the group, the more radical it is likely to be, the more divorced from rational thought, and the more difficult to detect."[23] Laqueur observes that large terrorism movements can be infiltrated by informers; smaller groups located in less populated towns draw attention, too. But a handful of actors cloaked in the anonymity of a large urbanized setting are likely beyond scrutiny. Unfortunately, thinking that we will be able to stop any and all future mega-terrorist acts may border on the delusional.

A final Laqueur insight worth noting here is that democratic institutions and the norms of international law are inadequate and ill-suited to deal with the new terrorism. Certainly, terrorists have never been bound by international law and conventions, and accepting "humanist rules would condemn them to impotence."[24] But Laqueur observes that democratic governments are bound by laws and rules, so much so that if their leaders and soldiers adopted the techniques of terrorists, they would be considered war criminals. Dictatorial or totalitarian regimes have an easier time.[25] As Western leaders ponder whether they have sufficient evidence to detain suspected terrorists, or engage in litigation with Apple Inc. to gain access to information stored on telephones used by terrorists, we can well wonder whether we are capable of the type of commitment needed to deal effectively with terrorism.

The recent terrorist attacks in Paris unfolded before Americans in television real time. The Riverside County Bar Association building is a short car-ride from the Inland Regional Center in San Bernardino, the site of the December 2, 2015, terrorist killings. The immediacy of these events induced anxiety, and for some panic. But both of these situations – and for that matter the 9/11 attacks – relied upon conventional weapons, and with the passage of time likely will have little impact on the way individuals go about their day-to-day affairs, or the manner in which we govern ourselves.

In the end, Laqueur's thorough survey of the history of terrorism is a valuable platform to help in understanding the reality of a future with potential terrorist acts involving weapons of tremendous destructive capability. The United States and the rest of the world will need to engage in the soul-searching that must take place in dealing with that terrifying inevitability.

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19 *Id.*

20 *A History of Terrorism*, at 231. Of note, consistent with his historical approach and analysis of the subject, Laqueur did not believe that Islamist terrorism would last forever. Pointing to a phenomenon known as "Salafi burnout," Laqueur observed that "religious-nationalist fervor does not constantly burn with the same intensity," and that the messianic and fanatical impulses held by radicalized young people are subject to mellowing or even a sudden decline. ("The Terrorism to Come," *supra*, August/September 2004.)

21 *The New Terrorism*, p. 4.

22 *Id.*, at p. 263.

23 *Id.*, at p. 5.

24 *Id.*, at p. 280.

25 Laqueur recounts that Mussolini, in his early days before marching on Rome, was asked what his approach to the Socialists would be, and Mussolini responded that his "program was to break the heads of the Socialists." (Id., at p. 199.)

# A Dark Day in San Bernardino

*by Jacqueline Carey-Wilson*

There are certain events in life that stand out as benchmarks, after which one's world is never the same. December 2, 2015, was such a day for many of us in the Inland Empire, in particular for employees with the County of San Bernardino. As I pause to remember that fateful day and offer some personal reflections, I am reminded that it is in the wake of the darkest adversity that sometimes the human spirit shines most brightly.

On December 2, 2015, around 11:45 a.m., my husband Doug called me urgently to ask if I was safe. I had just arrived at my office in the San Bernardino County Government Center from court and was surprised by his concern. He said that the news had just reported a shooting at a government building in San Bernardino. I told him that the shooting had not taken place at my building, but I would work on finding out where.

The next update came from the office of Greg Devereaux, the County's Chief Executive Officer. Mr. Devereaux reported that some County employees had been shot. Doug called again to say that a shooting had occurred at the Inland Regional Center (IRC), only about three miles from my office, and that the shooters had left IRC before law enforcement arrived. Mr. Devereaux's office then issued another email advising all County employees in San Bernardino to stay in their buildings for safety.

About 1:50 p.m., the County employees who worked in San Bernardino and who were not responding to the incident were released from work for the reminder of the day. When I left the building, security personnel were not allowing anyone into the building without proper identification. While driving on Fifth Avenue toward the 215 freeway, I noticed the local Post Office was closed, along with numerous other businesses. When I arrived home, the incident was all over the television. The shooters had been killed in a shootout with law enforcement. Questions raced through my mind: What had happened? How could this occur?

In the days following this tragic event, the story unfolded. Employees from the Division of Environmental Health Services (EHS) of the San Bernardino County Department of Public Health had rented a conference room at IRC to hold their annual training session, along with a holiday luncheon. Syed Rizwan Farook, a public health inspector with the department, arrived in the morning at approximately 8:40 a.m. He carried with him a bag containing three galvanized steel pipes with smokeless powder that was attached to a remote-control toy car. According to the Federal Bureau of Investigations, the bomb was "armed and ready to detonate." Farook abruptly left the gathering at approximately 10:40 a.m., leaving the bag with the bomb under the table and his jacket on the chair where he had been sitting. At about 11:00 a.m., Farook returned with his wife, Tashfeen Malik and possibly a third individual. All were armed with semi-automatic pistols and rifles. They shot 65 to 75 rounds at Farook's co-workers. All were dressed in black tactical gear and wore masks. Farook and Malik had left their six-month old baby girl with Farook's mother, who lived with them in their Redlands home. Immediately before they attacked, Malik in an online posting pledged allegiance to an Islamic leader. Thirteen County employees and one IRC employee were killed. Twenty-two others were physically injured; most were County employees. Law enforcement, including officers from the San Bernardino Police Department and the San Bernardino County Sheriff, and medical staff from Arrowhead Regional Medical Center and other local hospitals, by all accounts did an exemplary job in responding to the incident. But the fact that the worst terrorist attack on American soil since September 11, 2001, had occurred so close to home was starting to sink in.

The County Board of Supervisors closed all non-essential County offices on December 3 and 4. County employees returned to work on Monday, December 7, except those who were employed with EHS. Grief counselors were available if needed for County employees. On December 7, Supervisor James Ramos, Chair of the Board of Supervisors, came through the County Counsel offices and let staff know we would get through this difficult time. EHS is located directly below the County Counsel offices in the Government Center. Many in my office had personal connections with the victims.

My office was faced with a mundane but appropriate question given the circumstances. The Office of County Counsel had a holiday party scheduled on Friday, December 12. We all agreed with County Counsel Jean-Rene Basle's decision to cancel the party and donate the funds collected for it to the victims of this tragedy.

Members of the community outside the County family showed their spirit of generosity in a variety of ways.


Arrowhead Country Club, where our holiday party was to be held, waived the mandatory deposit so those funds could be donated to the victims. Costco and Stater Bros allowed the gifts purchased for the holiday party to be returned for a full refund, which was given to the victims. The office received messages of support from colleagues in and out of the County.

To remember the victims, County Counsel staff decorated two trees and placed the names of the fourteen people who had died on ornaments. On one tree, the ornaments were placed on the tree and on the other; the ornaments were displayed on a wall next to the tree.

The County distributed two different pins to employees to commemorate the victims and demonstrate unity. One pin has a diagonal black band over an outline of the County arrowhead logo. The other has the words "SB STRONG" inside the County arrowhead logo, with a heart replacing the "O" and the date "12.2.15" underneath. These small pins worn by County staff have been a unifying force for the employees, remind us of the victims and the loss suffered by survivors and family, and represent a resolve to stand together at a time of sorrow.

IRC offices reopened on January 4, except the building where the shootings occurred and many of the EHS employees also returned to work. On this same day at 2:00 p.m., the County held a memorial service for the victims at Citizens Bank Arena in Ontario. County employees were invited to attend the service.

At the beginning of the memorial service, Chairman James Ramos welcomed those in attendance. Supervisor Josie Gonzalez read a poem entitled "We Remember Them" from Rabbi Sylvan Kaman, while the names of the victims scrolled on monitors in the front of the arena. Many other elected representatives attended, including Governor Jerry Brown and Attorney General Kamala Harris.

The first speaker was author and pastor Rick Warren. Pastor Warren talked of having the strength to go on after such a terrible loss. He counseled that trauma is a dividing line, "We are never the same after a trauma occurs—we are permanently different." Pastor Warren said that there is no expiration date on grief—one just gets through; the goal is to survive. He encouraged the survivors and others in attendance to release their grief. If we leave grief bottled up, it is like a can of soda placed in a freezer—you just explode. Pastor Warren shared that his son, who struggled with mental illness, took his own life. For Pastor Warren, it was important that people who cared about his son just showed up to offer empathy to those who loved him. This is what he advised us to do for others who are grieving. For Pastor Warren, grief is both

## We Remember Them

*Robert Adams*
*Isaac Amanios*
*Bennetta Betbadal*
*Harry Bowman*
*Sierra Clayborn*
*Juan Espinoza*
*Aurora Godoy*
*Shannon Johnson*
*Larry Daniel Kaufman*
*Damian Meins*
*Tin Nguyen*
*Nicholas Thalasinos*
*Yvette Velasco*
*Michael Raymond Wetzel*

*The San Bernardino United Relief Fund has been created to aid the victims and families affected by the terrorist attack. The Arrowhead United Way is overseeing the fund with the San Bernardino County Board of Supervisors. Donations may be made on the United Way website, arrowheadunitedway.org, or by mobile phone by texting SBUNITED to 71777.*



a good thing and the only appropriate response to a great loss. He also gave the following recommendations:

- Do not isolate yourself — God never meant you to handle grief on your own;
- To someone going through a difficult time, never ask "How are you handling the situation" or say "I know how you feel" or "At least you still have your other child"; What you can say is, "I am truly sorry for your loss";
- Reject vengeance and bitterness, as they will not change what happened; let law enforcement administer justice.

In closing, Pastor Warren read Psalm 23, "The Lord is my shepherd; I shall not want . . ." and shared with those assembled that "Even though I walk in the valley of death I fear no evil. The violence that happened on December 2 was evil, but do not stay there. Keep walking. As a child I feared shadows. Where evil is, a shadow is there. However, where there is a shadow, there is light and how you get out of the valley of death is that you walk toward the light."

The second speaker at the service was former Mayor of New York Rudy Giuliani. Mayor Giuliani shared personal stories of courage, kindness, and resolve of New Yorkers following the attacks on 9/11. Mayor Giuliani encouraged those in attendance to remain strong and fight this evil.

Three months have passed since the December 2 shootings. This tragedy could have happened to any of us. Our hearts are forever broken for the family, friends, and colleagues whose lives were taken much too soon. There are many unanswered questions surrounding the attack, but we do know that the Inland Empire community will never be the same after December 2. We also know that many of us came together to support one another in the wake of this tragedy, and for that we are grateful and stronger.

Special thanks to the following who contributed to the article: Patricia Cisneros, Kenneth Hardy, Mitchell Norton, and Ramona Verduzco.

*To see photos and biographies of the victims, please go to the following: http://www.latimes.com/local/lanow/la-me-ln-san-bernardino-shooting-victims-htmlstory.html*

*Jacqueline Carey-Wilson is a deputy county counsel with San Bernardino County, past president of the Riverside County Bar Association, and past president of the Inland Empire Chapter of the Federal Bar Association.*

*Photos by Jacqueline Carey-Wilson and Christa Shewbridge.*



# Can the No-Fly List Double as a No-Gun List?

*by Mohammad Tehrani*

## I. Introduction

On a crisp, sunny, Wednesday morning, ISIL-inspired shooters carrying modified AR-15 assault rifles targeted the San Bernardino County Department of Public Health's holiday party, killing 14 people and seriously injuring 22 others. Following the attacks, President Obama criticized the regulation of firearm sales:

> "[F]or those who are concerned about terrorism, some may be aware of the fact that we have a no-fly list where people can't get on planes, but those same people who we don't allow to fly could go into a store right now in the United States and buy a firearm and there's nothing that we can do to stop them. That's a law that needs to be changed." [1]

The question arises: Would federal legislation prohibiting the purchase of firearms by all individuals on the No-Fly List survive a Second Amendment challenge?

## II. The Second Amendment

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[2]

In 2008, the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment ensured "an individual right to keep and bear arms,"[3] ending speculation that the right was tied only to militia use. [4]The Court also determined that the right is not unlimited: "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possessions of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[5] While suggesting limits, the Court did not address how lower courts should evaluate regulations, instead determining that the legislation challenged in *Heller* would "fail constitutional muster" under "any of the standards of scrutiny."[6] Nonetheless, the Court indicated that rational basis review would be inappropriate.[7]

Following *Heller*, the Ninth Circuit, along with the majority of circuit courts, adopted a two-step analysis mimicking the analysis performed in *Heller*.[8] Under this method, courts will first conduct a historical analysis to determine whether the regulation limits conduct protected by the Second Amendment, and specifically how closely the regulation limits the core right of "law-abiding, responsible citizens to use arms in defense of hearth and home."[9] If the regulation infringes on historically recognized rights, courts then apply intermediate scrutiny, the strictness of which intensifies depending on how closely the regulation attacks the core right of the Second Amendment.[10]

## III. Application to the No-Fly List

The first question that must be answered, then, is whether a categorical bar on individuals placed on the No-Fly List is historically protected by the Second Amendment.

The No-Fly List is a subset of the Terrorist Screening Database, which is a consolidated watch list developed and maintained by the Federal Bureau of Investigation.[11] A person will be included in the database if there is a showing of "articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual is known or suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of or related to, terrorism or terrorist activities."[12]

There is at least an argument that people on the No-Fly List do not have a historical right to bear arms. There is a longstanding history of the government's ability to categorically bar gun ownership from people it deemed dangerous. Under the 1689 English Declaration of Rights, the predecessor to the Second Amendment, the right to bear arms was limited to Protestants.[13] Further, under the 1662 Militia Act, even persons *suspected* to be dangerous were routinely disarmed.[14] These sorts of categorical bars based on perceived threats continued in early America as well, whether it applied to those who refused to swear an oath of loyalty, Native Americans, slaves, free blacks, and Catholics.[15]

In applying part one of the *Chovan* analysis, then, a court may conclude that the right of people on the No-Fly

1 Stephanie Condon, *Obama Responds to San Bernardino Shooting*, CBS NEWS (December 2, 2015, 4:50 PM) *available at* http://www.cbsnews.com/news/obama-responds-to-san-bernardino-shooting/.
2 U.S. CONST. amend II.
3 *District of Columbia v. Heller* (2008) 554 U.S. 570, 595 (*Heller*).
4 *See United States v. Miller* (1939) 307 U.S. 174, 178 [upholding regulation on sawed-off shot gun because its "possession or use failed to show some reasonable relationship to the preservation or efficiency of a well-regulated militia]".)
5 *Heller*, 554 U.S. at p. 626-27.
6 *Id.*, at p. 628-629.
7 *Id.*, at p. 628 fn. 27.
8 *U.S. v. Chovan* (9th Cir. 2013) 735 F.3d 1127, 1136 (*Chovan*).
9 *Id.*, at p. 1138 (quoting *Heller, supra*, 554 U.S. at p. 635).
10 *Ibid.*
11 *Latif v. Holder* (D. Or. 2014)28 F.Supp.3d 1134, 1141.
12 *Ibid.*, citation and internal quotation marks omitted.
13 *Heller, supra*, 554 U.S. at p. 593.
14 Patrick J. Charles, *Arms for Their Defence – An Historical, Legal and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago*, 57 Clev. State L. Rev. 366-67 (2009).
15 Allen Rostron, *The Continuing Battle Over the Second Amendment*, 78 Alb. L. Rev. 819, 826 (2015).

List, determined to be engaged in terrorist activities and therefore dangerous people, do not have a historical right to bear arms. The regulation would then stand.

This argument, of course, excludes all historical evidence that many of those same groups, Catholics, Native Americans, etc., freely carried guns throughout early America. Similarly, due to competing evidence in other contexts, it has been difficult for courts to find clear historical exceptions to the right to bear arms.[16] Even the evaluation of the historical right of felons to bear arms has been deemed unclear.[17] In all likelihood, then, courts would be unable to establish a historical carve-out for people on the No-Fly List. In the absence of an exception, a court would need to evaluate the regulation under intermediate scrutiny.

A regulation survives intermediate scrutiny if it is substantially related to an important government interest.[18] Regulation barring individuals on the No-Fly List of the right to bear arms would probably fail intermediate scrutiny. The government would probably argue that the law takes guns out of the hands of terrorists, serving the governmental interest of preventing terrorist acts. But the No-Fly List adjudicates persons to be potential terrorists, and thus dangerous, under rational basis review. To deprive the rights of a group who has been adjudicated terrorists under a low standard of review would be a back-door to the entire framework. Courts would probably not allow that to happen.

Then again, intermediate scrutiny is also very flexible, and in light of the importance of the government interest, it's possible some courts would justify the regulation.

## V. Conclusion

While I find the question interesting, the passing of this regulation would not solve the problem. The perpetrators of the San Bernardino shooting were not on the No-Fly List. While perhaps it sounds ridiculous that people who are deemed too dangerous to fly on a plane are allowed to purchase firearms, such a regulation would not have prevented the murder of 14 people on December 2, 2015. However we proceed to try to make our community safer, we will always remember those in our community who lost their lives in a senseless attack during a small holiday office party on a Wednesday morning in San Bernardino.

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16 *Id.*, at p. 825.
17 *See, e.g., United States v. Skoien* (7th Cir. 2010) 614 F.3d 638, 641.
18 *Chovan, supra*, 735 F.3d at p. 1141.

# Refugee Screening Process: Who is Really Coming to Dinner?

*by Rebecca Caporale*

In light of recent brutal attacks on concert goers, journalists, students, commuters and others worldwide we are forced to reexamine our guest list for dinner at home. In stark contrast, the overwhelming refugee crisis calls us to pull up more chairs at the dinner table. With this call to help, we have to ask ourselves, who is really coming to dinner?

First, we have to consider how our new dinner guests are added to the guest list. Refugee applicants are referred to the United States for vetting primarily through the United Nations High Commission for Refugees (UNHCR).[1] Applicants are first vetted by UNHCR for eligibility for refugee status. It is not simply that the applicant is seeking to leave his/her country of origin because of civil war, drought, famine, etc. An applicant referred to the United States must come within the definition of "refugee" as someone outside the country of his/her nationality that is unable or unwilling to avail him/herself of the protection of that country owing to a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group or political opinion.[2] In other words, general complaints about the menu at home are insufficient for refugee status.

Applicants may also be referred to the United States under "refugee" status through a U.S. Embassy abroad, trained non-governmental organization, or direct application through the International Organization for Migration (IOM) to US Refugee Admissions Program (USRAP) for certain categories with U.S. affiliations (often our former employees abroad).[3]

Once added to the guest list, UNHCR gathers biographic information and processes this information. All this before the United States begins its own vetting process. An applicant's biographic information is checked under the National Counterterrorism Center, FBI, Department of Homeland Security and Department of State.[4] Within the Department of State alone, the applicant's biographic information is cross-checked under the Standard CLASS (Consular Lookout and Support System) and enhanced screening procedures mandated in 2010.[5] The Standard CLASS name-check database alone contains information from the National Counterterrorism Center, U.S. Customs and Border Protection TECS (amazingly not an acronym!) system, Interpol, Drug Enforcement Administration, Health and Human Services and then extracts from the FBI Most Wanted, Foreign Fugitive, and Violent Gang and Terrorist Organization files.[6]

Following biographic information checks, an applicant undergoes a biological check by iris scan. Unless of course the applicant is coming from Syria in which case he/she will undergo enhanced review by the Department of Homeland Security Fraud and Detection and National Security Directorate.

Following additional review, if needed, Department of Homeland Security Citizenship and Immigrant Services will conduct an in-person interview of each applicant and take fingerprints for biometric screening. The biometric screening scans the FBI Next Generation Identification system (pertaining to criminal history and immigration data), Department of Homeland Security Automated Biometric Identification System (pertaining to travel and immigration data), and Department of Defense Automated Biometric Identification System (pertaining to classified and various unclassified U.S. government databases).[7]

At this juncture, the dinner guest has undergone two interviews, document collection and biographic background checks, an iris scan and fingerprinting. The completed process for refugee admission and resettlement in the United States is approximately 18 to 24 months.

Once the applicant is through the initial screening, the applicant undergoes a medical examination for communicable diseases, vaccinations and general physical health. All the while, recurrent vetting of the application continues to ensure that new information does not come to light. If there is doubt about whether an applicant poses a security risk, he/she will not be admitted.

After the applicant passes the medical examination, he/she will take a cultural orientation class (to avoid

1 https://www.whitehouse.gov/
2 http://www.unhcr.org/
3 http://www.state.gov/
4 https://www.uscis.gov/
5 http://www.rcusa.org/
6 https://www.uscis.gov/
7 https://www.uscis.gov/refugeescreening#RefugeeProcessing

faux pas at dinner!) and finally be assigned a place card at the dinner table. All this before plane tickets are booked.

Once the applicant steps off the plane, he/she is inspected by two separate Department of Homeland Security agencies – Customs and Border Protection and Transportation Security Administration. The applicant enters the United States as a "parolee" (in other words, for dinner only) and must apply for a green card within one year. The application for a green card requires both biographical and biometric screening through the Department of Homeland Security.

Now, the question is who is really coming to dinner? A dinner guest that has been excluded from his/her country based on a well-founded fear of persecution because of his/her race, religion, nationality, political opinion, and/or membership in a particular social group and subsequently undergone biographical, biological, biometric and physical as well as two sets of trained officials in-person.

Ultimately even with the most information available in some of the most expansive information databases available and two separate in-person interviews, nobody can guarantee that a dinner guest will not get drunk and destroy your antique gravy boat. But, as a late night comedian has joked, "There was only one time in American history when the fear of refugees wiping everyone out did actually come true, and we'll all be sitting around a table celebrating it on [third] Thursday [of November]."[8]

*Rebecca Caporale is an Associate Attorney with Wilner & O'Reilly, APLC in the Sacramento office. Ms. Caporale's immigration practice involves family-based immigration, non-immigrant visas, removal defense, litigation, and asylum law.*

8 Last Week Tonight with John Oliver, November 22, 2015.

# Krieger Award Nominations Sought

*by Judge John Vineyard*

The Riverside County Bar Association has two awards that can be considered "Lifetime Achievement" awards. In 1974, the RCBA established a Meritorious Service Award to recognize those lawyers or judges who have, over their lifetimes, accumulated outstanding records of community service beyond the bar association and the legal profession. The E. Aurora Hughes Award was established in 2011 to recognize a lifetime of service to the RCBA and the legal profession.

The Meritorious Service Award was named for James H. Krieger after his death in 1975, and has been awarded to a select few RCBA members that have demonstrated a lifetime of service to the community beyond the RCBA. The award is not presented every year. Instead, it is given only when the extraordinary accomplishments of particularly deserving individuals come to the attention of the award committee.

The award is intended to honor the memory of Jim Krieger, and his exceptional record of service to his community. He was, of course, a respected lawyer and member of the Riverside bar. He was a nationally recognized water law expert. But, beyond that, he was a giant in the Riverside community. He was known and respected in too many community circles to name (see the great article by Terry Bridges in the November 2014 issue of this magazine). The past recipients of this award are all known and respected by the community at large – Judge Victor Miceli, Jane Carney, Jack Clarke, Jr. and Virginia Blumenthal, for example.

The award committee is now soliciting nominations for the award. Those eligible to be considered for the award must be (1) lawyers, inactive lawyers, judicial officers, or former judicial officers (2) who either are currently practicing or sitting in Riverside County, or have in the past practiced or sat in Riverside County, and (3) who, over their lifetime, have accumulated an outstanding record of community service or community achievement. That service may be limited to the legal community, but must not be limited to the RCBA.

Current members of the RCBA Board of Directors are not eligible, nor are the current members of the award committee.

**If you would like to nominate a candidate for this prestigious award, please submit a nomination to the RCBA office not later than April 22, 2016.** The nomination should be in writing and should contain, at a minimum, the name of the nominee and a description of his or her record of community service and other accomplishments. The identities of both the nominees and their nominators shall remain strictly confidential.

*Judge John Vineyard is the chair of the Krieger Meritorious Service Award Committee and a past president of the RCBA.*

# Surviving An Active Shooter

*by Patrick Lewis*

The unfortunate state of affairs in 2016 is that incidents involving active shooters have become increasingly common. This article provides basic advice to help people develop the proper mindset, take the right actions and communication with the authorities effectively in the midst of an active shooter crisis.

A common acronym that is used to teach active shooter defense tactics is ACT, which stands for "Action", "Communication" and "Treat." However, before an individual can effectively implement ACT tactics, the individual must develop the proper mindset. The first step in developing a proper mindset is understanding that any individual could find him or herself in the midst of an encounter with an active shooter. The second step in developing the proper mindset is to refuse to resign to being a victim of the situation. Dependent upon the circumstances, individuals must be prepared to take action if they want the best chance at avoiding dire outcomes.

## Action

The first part of the ACT acronym stands for action. What type of action should a person take if they are in the midst of an attack by an active shooter? The answer to that question will be heavily dependent on the specific circumstances, including, but not limited to, where an individual is in relation to the shooter. Generally, there are three different types of action that individuals can take in these circumstances that will help increase the odds of surviving an attack by an active shooter.

- **Run:** The first type of action a person can take if you encounter an active shooter is to run. If it is possible to flee the scene without being harmed, escaping is always the best option. However, there are many circumstances where running is not the best defense. People should get away if they can, but should avoid running if the shooter may have the opportunity to shoot as they flee.

- **Hide:** In the event that running away is not a feasible defense, hiding is another form of action that people can take in these dire circumstances. If you are in an office or a classroom, close the door, lock it, turn off all of the lights and push as many heavy things in front of the door as you can in an effort to barricade yourself. Active shooters are often seeking the easiest targets, because their goal is typically to harm or kill as many people as possible. If you make yourself a difficult target, an active shooter may bypass you.

- **Fight:** The third form of action is to fight. Oftentimes there is not an opportunity to run or to hide from an active shooter. If that is the case, people should fight the active shooter, because if enough people engage, there is a better chance of the attacker being subdued. If you are in close proximity of the shooter, hit the shooter in the head with a heavy object. If you are not in close proximity, you can throw heavy objects at the shooter's head. Even if the objects do not ultimately incapacitate the shooter, they could throw the shooter off balance enough that someone has the opportunity to charge the shooter and subdue him or her.

## Communication

Communication is key. If it is safe for you to call 911 to inform them that there is an active shooter situation, do so at your soonest opportunity. Notably, when you call 911 and inform them that there is an active shooter situation, you will immediately be transferred to a local department. Once you are in touch with the local department, be sure to be as specific about the situation as possible. First and foremost it is important to be clear and specific about where the active shooter is. While 911 does have the ability to track a phone call to a location, the tracking takes up valuable time could be the difference between life and death for many people. The following information is also incredibly helpful to the local department, so if you have any of this information, share that as well: How many active shooters are there? What types of weapons do they have? How many people are injured? Do you know who the shooter is?

If you are hiding from the shooter, you can also text 911. If you are texting, send a first text message stating that there is an active shooter, and providing a precise location. Send that text message before you send additional messages with more details so that you can give notice to the local authorities as soon as possible.

## Treatment

Treatment should be provided to the wounded if at all possible. In crisis circumstances where an individual is suffering from a major bleed, the bleeding should always be addressed first. If the victim is bleeding, it is important to put direct pressure on the bleed. There are four major remedies that a lay person is capable of providing that can save lives.

- **Tourniquets:** All employers should have tourniquets available in the workplace. If someone is suffering from a major bleed on their limb, a tourniquet should be wrapped as quickly and as tightly around that limb as possible. Notably, even if the victim is in severe pain, the tourniquet needs to be wrapped tightly until the bleeding stops.
- **Pressure Dressing:** All employers should also have pressure dressing available in the workplace as well. Pressure dressing can be applied to a minor bleed.
- **Lay Victim on Side:** After addressing the bleeding, the victim should be laid on his/her side. In the event that the victim passes out, his/her tongue muscles relax and fall back into the throat. Laying the victim on their side will mitigate the risk that the victim will die from asphyxiation.
- **Chest Seal:** In the event that a victim has an open wound between his/her belly button and clavicle, a chest seal should be placed over his/her clavicle. If the employer doesn't have a chest seal available, a non-porous plastic material, taped on three sides can be placed over the open wound. Taping three sides should allow for pressure to be relieved without allowing air to re-enter through the hole. This will help prevent the victim's lungs from collapsing.

A great resource for employers is First Care Provider. We encourage all employers to get active shooter training for their employees, because a lay person with correct training can save many lives.

*Patrick Lewis has served as Captain Paramedic for the City of Rancho Cucamonga since 2003. Prior to commencing his service as Captain Paramedic, Mr. Lewis served as a Navy SEAL and medic for eleven years.*

# California Penal Code Section 422 Criminal/ Terrorist Threats and the Mentally Ill (or When a Threat is Not Really a Threat)

*by Juanita E. Mantz*

Almost every Deputy Public Defender and District Attorney in Riverside has read a police report involving a mentally ill defendant charged with California Penal Code section 422.[1]

Section 422 is known as criminal or terrorist threats. The common scenario goes like this: a mentally ill person is walking down the street in the throes of a delusion and yells at a person walking by, "I am going to kill you demon!" The passerby is understandably unnerved and calls the police and the individual (now the defendant) is arrested and charged with a felony under section 422. The charge under section 422 carries a maximum of three years in prison and is also a strike when charged as a felony. Fortunately, the charge is also what is called a "wobbler" and can also be charged as a misdemeanor.

Section 422 states as follows:

> "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, **with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat**, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is **so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety**, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (Emphasis added.)

My question in this essay is, should this statute be used to charge someone under the throes of mental delusion? Is that the right result for someone with a mental illness that causes them a delusion? The specific intent requirement seems to say that it is not appropriate to do so as someone under the throes of a mental delusion is not likely to have a specific intent to kill a random passerby. They are more likely to have the specific intent to escape the monster or demon they believe is coming at them. Further, and even more importantly, in the example above, is that threat unequivocal? Finally, is a sustained fear reasonable in the above scenario? I suppose fear is relative and depends on a host of issues. If you, like me, grew up on the wrong side of the tracks in Ontario you may have a higher tolerance for this kind of conduct than someone raised in Beverly Hills. Yet, the fact that the statute specifies that the threat be specific and the fear be reasonable, directs that the fear be seen from an objective standard. The case law bears this out. (*See In re Ricky T.* (2001) 87 Cal.App.4th 1132 [requiring the threat to convey gravity of purpose and immediate prospect of execution to victim and cause a **reasonable** person to be in sustained fear for his personal safety for a period of time that extends beyond what is momentary, fleeting, or transitory].)

As you may have already guessed by the fact that I am writing this article, the mentally ill are often charged under this statute. Unfortunately, I see these kind of cases often in my current assignment representing incompetent clients in Department 42 in Mental Health Court. Unfortunately, many of my clients are charged under this statute. But the question remains, should they be? I would argue that the prosecutor should take the mental illness and delusion into account when deciding whether to charge these clients. It is imperative that they use their discretion and their judgment in deciding whether they can meet the elements of this crime and also in whether it should be "wobbled" down to misdemeanor land.

Ultimately, I would argue for leniency rather than harshness when dealing with these kind of cases that involve the mentally ill. Just talk to anyone who has a family member with mental illness and you will see the need for such leniency. And, I would further argue that misdemeanors are more appropriate in the above situation. To subject someone to a strike on their record, for a crime of words only, seems more than harsh for someone with a mental illness (dare I use the term draconian?).

In the end, what I am arguing for most is that justice should be just that: just.

*Juanita E. Mantz ("JEM") is a Riverside County Deputy Public Defender in Mental Health Court where she handles incompetency proceedings under Penal Code section 1368. She is also the magazine's copy editor and a member of the RCBA Publications Committee. In her free time, she loves to write nonfiction. You can read her Life of JEM blog at http://www.wwwlifeofjemcom-jemmantz.blogspot.com.*

1 All statutory future references are to the Penal Code unless otherwise stated.

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# DRS Mediator Profile: Charles Schoemaker, Jr.

*by Krista Goodman*

***Editor's Note:*** *RCBA Dispute Resolution Service (DRS) is pleased to introduce you to the members of our experienced panel of neutrals who dedicate their time and legal expertise to our Riverside County public benefit alternative dispute resolution (ADR) programs. Please enjoy learning more about DRS panelist Charles Schoemaker, Jr., Esq., whom the organization is honored and privileged to have involved in its private and court ADR programs.*

*Charles Schoemaker, Jr.*

"Mediation provides an opportunity to resolve a dispute in a matter of hours, rather than languishing in the court system for months, or even years," remarked Attorney Charles Schoemaker, Jr. on mediation and other methods of alternative dispute resolution (ADR).

With over 30 years of litigation experience representing both plaintiffs and defendants in matters involving business and contract disputes, government tort liability, real estate, construction, personal injury and general civil litigation, Mr. Schoemaker brings a wealth of experience to a sole private practice now focused exclusively on ADR.

Mr. Schoemaker grew up in New Jersey, spending his summers in high school and early college years working for his father's roofing business. He completed his undergraduate degree in English at Rutgers University in 1973.

"In either junior high or high school, I became aware of how important the law was through the various situations that happened to my family members, friends and neighbors. It seemed like access to someone who was knowledgeable about the law—or even better, a lawyer—was vital," Mr. Schoemaker reflected on his decision to pursue a legal career.

He would relocate to the west coast to attend law school at the University of West Los Angeles, completing his Juris Doctorate and passing the California State Bar Exam in 1978.

Mr. Schoemaker spent the first 14 years of his legal career with the Los Angeles-based firm Kegel, Tobin & Hamrick, handling the defense in major injury and complex litigation matters for insured and self-insured clients. He primarily worked on the defense of public entities, in addition to unique cases that did not fall in to one of the firm's primary practice areas. This experience broadened his exposure to many different areas of law.

In 1992, he established a new firm with two business partners, Altman, Minkoff & Schoemaker, in Encino, California. It was later renamed Altman, Schoemaker & Hambleton. For the next decade, he represented individuals, small businesses and public entities as plaintiffs in tort and commercial litigation.

"One of the major differences that I quickly learned in doing plaintiff work is that there is a much different interest and perspective on the outcome," Mr. Schoemaker said. "If you go to trial for a major injury case wherein you represent the defendant, and the verdict does not go in your favor, your client is obligated to pay the amount of the jury verdict. If you're representing the plaintiff in the case, and it is a very severe or life-altering injury, the difference between winning and losing can be having appropriate medical or lifestyle care for this individual. It is not just monetary anymore – it can be an effect on the life of a person."

"Having represented both sides, I developed an understanding of the emotional cost of litigation and how it affects individuals. When you are representing an institution, there is not normally an emotional impact. . . If you have someone with catastrophic injuries, or an egregious violation claim, there is an emotional component to the lawsuit as well as the financial component," Mr. Schoemaker explained. "Understanding both and how they factor into the reason for going forward or settling is an important part of the knowledge base for an attorney."

Mr. Schoemaker's experience with ADR began early in his career as a litigator. Many of his early cases were court ordered to arbitration.

"When I first started practicing in Los Angeles, it took five years to get to trial. In the meantime, I got to do a lot of arbitration. With the arbitrations I observed that the process presented a sense of reality for some clients. . . If the client actually testified and underwent cross-examination in the court contest, they would better understand what was happening in the litigation," said Mr. Schoemaker.

"The cases were assigned to an arbitrator, who was essentially doing a court trial or mini-trial and giving a verdict. Of course, one side would not like the verdict," he explained. "In many nonbinding arbitrations, there was an appeal, and so that did not settle the case."

"Eventually that moved to the settlement conferences and the mediations, which started to resolve more cases," Mr. Schoemaker reflected. "I've seen how the perception has changed as to how we get cases out of the system."

At the point in his career when he began to transition out of full-time litigation, Mr. Schoemaker opened his sole private practice, The Law Office of Charles Schoemaker, Jr. in 2002.

He started mediating cases through the Los Angeles County Superior Court's ADR program. He also joined the panel for the Volunteer Settlement Officers Program, a program in which an experienced attorney in representing plaintiffs and an experienced attorney in representing defendants together would handle three to five settlement conferences in a day.

"It was very focused and intense. There were very senior attorneys from both the plaintiff and defense sides. They would ask very probing questions to the various parties. These neutrals knew what questions to ask and would challenge the parties on their positions," Mr. Schoemaker remarked. "They could get to the point very quickly."

"What was surprising to me was how many cases were in the advanced stages of litigation, or were about to go to trial, and information was not available on issues that were certainly pertinent to the case," He said. "There were a lot of unprepared cases."

The experience he obtained through these programs ultimately led to the expansion of Mr. Schoemaker's ADR practice to the counties of Riverside and San Bernardino.

He completed conflict resolution training at Loyola Law School in 2004. He also completed a 42-hour training program through the Straus Institute of Dispute Resolution at Pepperdine University School of Law entitled "Mediating the Litigated Case;" "Essentials on Elder Adult Mediation" through Adult Resolution and Mediation Service; and continues to participate in continuing legal education seminars on ADR topics.

"Part of the role of the mediator is to figure out why the case has not gotten settled and determine which approach to take in order to help resolve it."

"The facilitative approach is more for a business or commercial case – that is finding common interests and showing the parties what they have in common. If it is a business relationship that is to be repaired and they want it to work in the future, assuming the facilitative role as a neutral is very beneficial for that situation," Mr. Schoemaker explained. "The evaluative approach is more effective on cases where the dollar amount is in dispute and at least one side is either miscalculating or misjudging the valuation of the case."

"There are all kinds of mechanisms for dispute resolution. All of the techniques have a place in various cases and an understanding of when to use which particular approach or model is what makes a good mediator."

Today, Mr. Schoemaker is a member of the Civil Mediation Panel for the Riverside County Superior Court, and the ADR panel for the Court of Appeal, Second District. He is also a member of the private ADR panels for DRS and California Mediation and Arbitration Services, Inc. (CAMS).

Mr. Schoemaker serves on the panel for the Trial Assignment Mediation (TAM) program at Riverside, which is administered by DRS and the Riverside County Superior Court, and funded by the Dispute Resolution Programs Act through the County of Riverside. The program commences every Friday at the Riverside Historic Courthouse, where matters on the civil trial calendar are referred to mediators to receive one last opportunity to settle before going to trial the following week. The Court provides facilities for confidential use by the parties at the courthouse. Mr. Schoemaker is also on the panel for TAM at Southwest, which commences on Fridays at the Southwest Justice Center in Murrieta.

"In theory, this is the first day of trial and the parties are answering ready," he said. Recently, he successfully mediated a case where an expert deposition and a private mediation had already been completed earlier that same week. One side had seven experts lined up, and the other had five. The witnesses and documents had been subpoenaed, and all of the motions had been submitted. "One of the arguments you make at a mediation that commences early in a case is that the parties are going to save a lot of money on litigation because they do not have to do all of this."

"Surprisingly, the statistic is about one-third of the referrals to the TAM program are settled," Mr. Schoemaker said. "These are cases that have already been through at least one settlement conference, the experts have been deposed, the money has been spent to prepare the case for trial, and they are still settled."

Mr. Schoemaker is an AV-rated attorney on Martindale-Hubbell, which is the highest ranking in its peer review system. He is a member of the Riverside County Bar Association and the Southern California Mediation Association, and a past member of the American Board of Trial Advocates (ABOTA).

He resides in La Quinta, California, and enjoys traveling, golf, reading and deep sea fishing in his spare time.

For more information about RCBA Dispute Resolution Service, Inc., visit rcbadrs.org or call (951) 682-2132.

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*Krista Goodman is the Scheduling Coordinator for RCBA Dispute Resolution Service, Inc. She completed her Master of Arts in Strategic Public Relations from the University of Southern California and her Bachelor of Arts in Journalism & Media from California Baptist University.*

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The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective March 30, 2016.

**Camille M. Aceituno** – Fiore Racobs & Powers, Riverside

**Gary S. Austin** – Law Office of Gary S. Austin, Riverside

**Marjorie Barrios** – Law Office of Marjorie Barrios, San Bernardino

**Nickolaus E. Buchholz** – Lester & Cantrell LLP, Riverside

**Patricia Cabrera** – Office of the Public Defender, Riverside

**Megan G. Demshki** – Aitken Aitken Cohn, Santa Ana

**Luke A. Fiedler** – U.S. District Court, Riverside

**Priscilla George** – Disenhouse Law APC, Riverside

**Christina L. Godbey** – Law Offices of Catherine A. Schwartz, Riverside

**Janet K. Hasegawa** – Office of the District Attorney, Riverside

**Braden J. Holly** (S) – Law Student, La Crescenta

**Pajman Jassim** – Jassim & Associates, San Diego

**Chip Lyman** (A) – Chip Lyman Insurance Services Inc, Palm Desert

**Michael Anthony Ortiz** (S) – The Turoci Firm, Riverside

**Ethan K. Pham** – Law Offices of Ethan K. Pham, Corona

**Sylvia Quistorf** (A) – Inland Empire Latino Lawyers Assn, Riverside

**Trey Roberts** (A) – Breathe Easy Insurance Solutions, Laguna Hills

**Peter K. Rundle** – Rundle Law Corporation, Irvine

**Michael D. Sargent** – Graves & King LLP, Riverside

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