

Aging Disgracefully

By R. Konrad Moore

Despite an estimated \$16 billion budget deficit, California is making substantial progress toward ensuring lifetime health care coverage for substantial numbers of the poor and elderly. Indeed, on April 11, Gov. Arnold Schwarzenegger announced a plan to spend \$7 billion.

How has the state managed to take the lead in such challenging economic times, and simultaneously avoided criticisms of trending toward socialized medicine? The unconventionally clever answer involves coupling a debatable proposition, state-funded health care, with one that enjoys widespread popular support, punishing criminals.

The engine towing the money train is fueled by the state's criminal justice policy, which is increasingly witnessing a return to indeterminate and "life tail" sentences. According to the Office of the Inspector General, between 1990 and 2004, the number of lifer inmates in the state prison more than tripled from 8,153 to 27,375.

Intended or not, the mission of the prison system is changing from rehabilitation and reintegration to permanent incarceration and incapacitation. Truth in advertising is bringing us the Department of Corrections and Geriatric Care.

The value of public safety is, of course, priceless. And, society has a duty to discourage crime and punish those who break the law. The problem, however, arises when we codify our emotional outrage with the result that offenders remain locked up well into their proverbial golden years, when health care costs rise dramatically.

In the mid-1990s, the horror of Polly Klaas' victimization overwhelmed us. The fury was inarticulate, and commanded an emphatic rebuke. Bitterness may not

always provoke resort to that which we know, but on this occasion the collective reply drew on the national pastime.

Baseball, we decided, offered a convincing metaphor for the punishment of criminals.

What if their third strike involved petty theft with a prior, or simple possession of drugs? It didn't (and under the law still doesn't) matter. They had their chance. Well, what if neither of their first two strikes involved physical injury to another? Again, don't argue with the umpire. Have a seat in state prison, for life. Three Strikes and you're out.

Reminiscent of the scene in "There's Something About Mary" in which Ben Stiller questions whether the bombshell idea of "Seven Minute Abs" might be undercut by the prospect of "Six Minutes Abs," if "Three Strikes" is good, "One Strike" is even better. A One Strike law was later enacted.

Three Strikes probably didn't spawn the practice of legislation by aphorism, but it certainly acted as a catalyst. Three years later, in 1997, the "10-20-Life" law was passed, which targeted gun use.

The slogan was simple, and effectively communicated our collective distaste and unwillingness to abide those who victimize others with guns.

Another legislative win with accompanying lengthier sentences that took no account of the capacity for redemption. Fast-forward a few years and we viscerally recognized that while guns may be bad, gangs are perhaps equally if not more frightening and dangerous.

What might be done? Put gangsters in prison for life. That will show them, except that a policy of "No Criminal Let Out, Ever," ignores the reality that gangsters age into their 50s and beyond. The prospect that vi-



olent and testosterone-filled 20-somethings will mature out of their misbegotten ways? It's forgotten, and it's just as easy to forget about those in prison, until their health bills start coming due.

Of course, to lifers in prison, mention of one's golden years must sound absurd. Certainly, it's an oxymoron, except to taxpayers who front the cost.

Currently, there is a pending petition that would place before voters an initiative to expand the list of crimes committed in furtherance of a gang that warrant increased punishment, and life terms. With

past as prologue, gangsters beware.

Kin of gangsters and friends of gangsters beware as well. If you're caught riding in a car with a gangster, it's a circumstance supporting your membership. Jurors, like the rest of us, don't like gangsters.

If the police conclude, or offer an opinion

you're in a gang, that's often enough. Odds are the Gang Initiative will pass, and more life sentences will be handed down. More people will grow old and die in prison.

Will it keep us safer? Probably not. But at least we might take a measure of consolation in the fact we're providing lifetime health insurance to an increasing portion of the poor, minorities, mentally ill and undereducated.

R. Konrad Moore is a supervising deputy public defender for Kern County. He can be reached at moorek@co.kern.ca.us.

When Talks Reach An Impasse, Mediators Work Their Magic

By Victoria Pynchon

How many times have you heard yourself say to a mediator — "go work your magic"?

If the dark arts were available to us, you can be sure we'd use them. Still, there are days ...

Not that long ago, I was driving downtown for day two of a mediation over a highly emotional landslide dispute between neighbors of decades' standing. This case has legs. The first landslide had taken place 30 years before, when one of the property owners was only 7 years old. He vividly recalled helping his uncle shore up the wide yard sloping into a canyon on the valley side of the hill, as well as the acrimony that simmered for years over the neighbor's failure to do the same.

The previous day, there'd been shouting and table-banging by the neighbors and "under no circumstances will we settle this for more (or less) than" directions from the claims adjusters and their legal representatives.

Driving downtown for day two, I switched off the radio to think, looking for a way the parties could restore the priority of their financial interests over their powerful emotional reactions. The claims adjusters had been reasonable and the parties' attorneys knowledgeable and shrewd. These professional dispute-resolvers needed help with the parties — the people.

As the light turned red, my gaze drifted over to the pennies that had been sliding back and forth across the dashboard for several days.

"Magic pennies," I thought. That's all. Not, "Hey, I'm going to

use these pennies in the mediation." Not, "I wonder if I could get the parties into a more playful state of mind." Just "magic pennies."

As I swung the car to the left, I reached out to capture the copper coins and slipped them into my pocket.

For an Angeleno whose fellow residents seem geographically inclined to crystal-gazing, psychic-consulting or horoscope-reading, I'm pretty hard-headed. More left-brained than right, more rational than emotional and more scientific than magical. Give me the scientific method and a little Western medicine any day of the week in lieu of whatever quasi-spiritual revelation is knocking the celebrities out of their heavens.

Still, I was walking into a commercial mediation carrying magic pennies in my pocket.

You don't even want to know the four-dimensional chess game of this litigation. Suffice it to say that the lawyers and claims representatives have to pretend that R is Q and A is W to create enough insurance coverage to accomplish the desired and most economical resolution. The mental strain is nothing, however, compared to the depth of the parties' rancor and their willingness — indeed eager anticipation — to cut off one another's noses to spite their faces.

By mid-morning, I'd called a joint session that quickly threatened to wheel out of control. When I put my hand in my pocket, I felt the pennies cool against my fingers. I didn't stop to think. I just started talking.

"I've got these magic pennies," I said, holding them up for everyone to see. The room went silent. I mean, completely silent. No one was yet looking at me as if I were nuts, although I was beginning to wonder myself because I still had no clue as to what I was about to say. They call this "intuition" and it works with judges and juries. Sometimes to give the parties a chance, you need to stick your own neck out.

I pulled an empty Styrofoam cup toward me and dropped the penny in. Then I pushed the cup back to the center of the conference table.

"Remember how we talked yesterday about separating the people from the problem?" I asked. "The cup is the problem." I continued, offering a handful of pennies to the parties, indicating that they should each take one.

"If you put your magic penny into

the cup, it will help you focus on the problem rather than your feelings about the problem."

Everyone was looking bemused. My suggestion was unexpected but not, it seemed, unwelcome.

No one leaned over to put his penny in. Still, and somewhat uncharacteristically, I had the patience to simply wait.

Finally, one of the neighbor parties, Bob, said, "I won't put my penny in until I see Jones put his in first."

This was a good sign. Bob was beginning to make meaning with the penny; he was constructing the penny's relationship to the dispute.

"How will it help?" Jones asked, skeptically eyeing me.

"Whenever your focus shifts back to your feelings," I said, "I'll just jingle the cup a little. I'm not suggesting you shouldn't say how you feel or why you're feeling that way. I'm just proposing that it would help all of us if we were aware of the moments when we're acting in response to fear or anger and when we're thinking about a business solution to an economic problem."

Jones tossed his penny into the cup. I liked that. He was all in.

When Bob followed, they both had to suppress smiles, while glancing at each other sheepishly. It was the first time I'd seen them exchange any gaze that wasn't filled with anger, rancor, suspicion or fear.

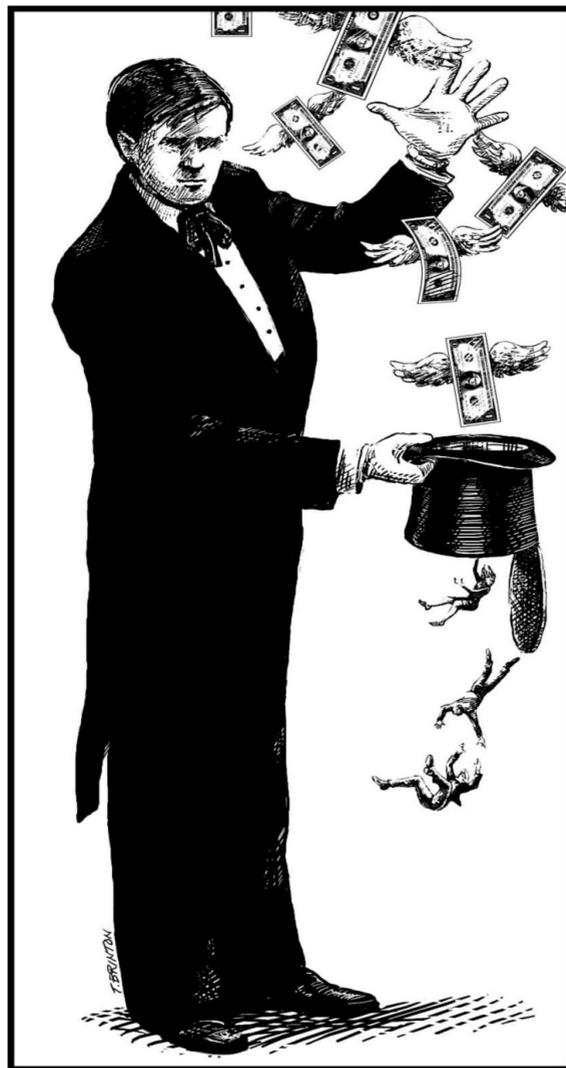
I'm no magician, but the pennies helped us reach a settlement that day.

My friend and fellow mediator Jerry Lazar actually is a magician — miraculously settling cases by day and unsettling audiences with close-up miracles at the Magic Castle by night. I wondered what "magical" solutions he conjured up at the mediation table.

"My only trick," he told me, "is to incentivize the parties by slapping a deck of cards on the table at the start of the session. Then I purposefully start shuffling and cutting them. The parties think you're a mad genius or a crackpot, but either way it gets their attention. Then you authoritatively announce: 'If we reach resolution today, I'll reward you with a card trick ... but if we fail to reach resolution, I'll punish you with two card tricks.'"

"Whenever the parties are at impasse, I casually toy with the deck. You'd be amazed at how quickly that motivates them to keep pushing forward."

On a more somber note, Lazar added: "When we begin our media-



tion training and practice, we often hear (and speak) of the magic of mediation. When it works, it truly is wondrous. It's easy to see why a mediator feels like a wizard with supernatural powers, enabling lambs to lie down with lions. Based on my experience in the realms of magic and mediation, here is my hope.

Once upon a time, if you could take a cup of water, put it in a box, push a button, and make that water boil — without raising the temperature inside the box — you'd have a miracle on your hands. Ditto for talking to someone, or even seeing him or her in real time, on the other side of the planet — or even in outer space! How magical is that! And yet, thanks to technology, even

the youngest child is jaded by these daily experiences.

My fondest wish is that our social evolution keeps pace with our technological progress, so that the peaceful resolution of disputes will similarly become as commonplace as microwaves and mobile devices. Then it will no longer seem that mystical forces — or card tricks, or magic pennies — are needed to bring together the bitterest of enemies for a common purpose."

After 25 years of commercial litigation practice, Victoria Pynchon joined the Southern California ADR firm Judicate West, where she mediates and arbitrates commercial disputes full time.

Daily Journal

<p>Charles T. Munger Chairman of the Board J. P. Guerin Vice Chairman of the Board</p>	<p>Gerald L. Salzman Publisher / Editor-in-Chief Robert E. Work Publisher (1950-1986)</p>
<p>Martin Berg Editor</p>	
<p>David Houston San Francisco Editor</p>	<p>Sara Libby Legal Editor</p>
<p>Jim Adamek, Susan McRae, Zack Van Eyck Associate Editors, Los Angeles</p>	
<p>Alexia Garamfalvi Associate Editor, San Francisco</p>	<p>Hannah Naughton Projects Manager, San Francisco</p>
<p>Aris Davoudian, Heidi Fikstad, Designers</p>	
<p>Los Angeles Staff Writers Pat Alston, Rebecca U. Cho, Courtney Fielding, Gabe Friedman, Evan George, Sandra Hernandez, Robert Iafolla, Greg Katz, Peter B. Matuszak, Maya Meinert, Ryan Oliver, Anat Rubin, Nicolas Taborek</p>	
<p>San Francisco Staff Writers Rebecca Beyer, Laura Ernde, Adam Gorlick, Amelia Hansen, Devan McClaine, Jill Redhage, John Roemer, Fiona Smith, Jonathan Vanian, Amy Yarbrough</p>	
<p>Robert Levins, S. Todd Rogers, Photographers Jacqueline Waldman, Editorial Assistant</p>	
<p>Bureau Staff Writers Craig Anderson, San Jose, Jason W. Armstrong, Riverside, Pat Broderick, San Diego, Don J. DeBenedictis, Santa Ana, Lawrence Hurley, Brent Kendall, Washington D.C., Linda Rapattoni, Sacramento,</p>	
<p>Rulings Service Lesley Sacayanan, Rulings Editor Anjali Arora Dow, Sandy Li, Serena Siew, Legal Writers Mia Kim, Verdicts and Settlements Editor</p>	
<p>Advertising Audrey L. Miller, Corporate Display Advertising Director Sheila Sadaghiani, Monica Smith, Los Angeles Account Managers Joel Hale, Michelle Kenyon, Vanessa Ouellette, San Francisco Account Managers Jesse Rios, Display Advertising Coordinator Alexandra Brown, San Francisco Administrative Coordinator</p>	
<p>Art Department Kathy Cullen Art Director Mel M. Reyes Graphic Artist</p>	
<p><small>The Daily Journal is a member of the Newspaper Association of America, California Newspaper Publishers Association, National Newspaper Association and Associated Press</small></p>	