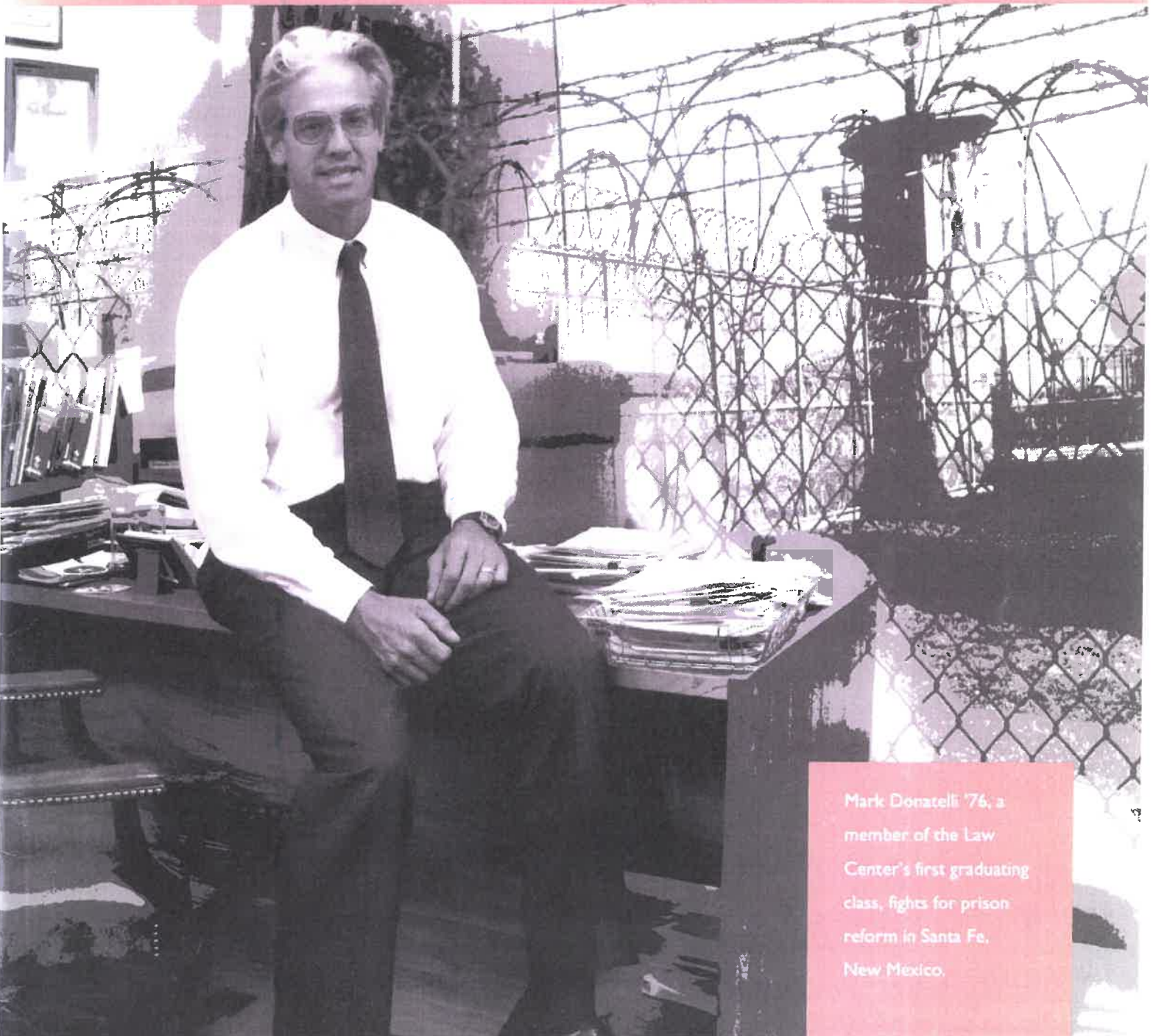


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# THE ADVOCATE

A Magazine for Alumni and Friends of Franklin Pierce Law Center



Mark Donatelli '76, a member of the Law Center's first graduating class, fights for prison reform in Santa Fe, New Mexico.

# MAKING A DIFFERENCE ON DEATH ROW



Franklin Pierce Alumnus Mark Donatelli '76

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ark Donatelli, a member of the Law Center's first class, practices with the firm of Rothstein, Donatelli, Hughes, Dahlstrom, Cron and Schoenburg in Santa Fe, New Mexico. Widely respected as one of the leading criminal defense lawyers in that state, in June 1997 he received the Charles Driscoll Memorial Award from the New Mexico Criminal Defense Lawyers Association. The Award was given to Donatelli for "all of his years involved in prison reform, death penalty work and criminal defense," according to Billy Blackburn, current president of the Association.

Donatelli's campaign against the death penalty began in 1979. As head of the Public Defender Office in Santa Fe, New Mexico's capital, he testified as to the fiscal impact of a bill to reintroduce capital punishment, passed into law that year. The next year saw the New Mexico penitentiary riots in which 33 prisoners were killed, setting a national record. The state established a well-funded special prosecutor's office. It also authorized a separate defender office with a \$3 million budget. Donatelli was selected to head it. The state set out to prosecute 125 inmates for capital murder. In the trials that followed, no inmates were sentenced to death. One was sentenced to life, and he was killed by another prisoner before his appeal was considered. No death sentences were ever rendered.

After his office shut down, Donatelli went into private practice. He was immediately retained by the family of a man charged with capital murder; later he contracted with the state Public Defender program to provide post-conviction services in capital cases. During the mid-'80s, when he was president of the New Mexico Defense Attorneys Association, he again lobbied against capital punishment.

Donatelli has often been qualified as an expert witness on ineffective assistance of counsel in capital cases in both state and federal courts. His work in death penalty cases has not been limited to New Mexico. It has also taken him to Oklahoma and other states where he has testified as an expert witness on ineffective assistance of counsel. He has been an advisor in the aftermath of the Deer Lodge, Montana, and Lucasville, Ohio, prison riots. He continues to be active in state and national criminal justice reform groups.

—by Robert M. Viles, President



## AN INTERVIEW WITH MARK DONATELLI

**Q** Have you always opposed capital punishment?

**A** No, as I'm ashamed to admit. When I was in law school I was mildly in favor of it.

**Q** What made you change your mind?

**A** After graduating from Franklin Pierce in 1976 with excellent instruction from Jim Duggan in criminal practice, I went to work for the New Mexico Public Defender program. Right from the beginning the case load was huge, and my mentor soon left for private practice. I learned a lot on my own.

**Q** What did you learn that changed your mind about capital punishment?

**A** I learned that the system is so damned arbitrary.

**Q** What do you mean — "so damned arbitrary?"

**A** It's arbitrary in lots of ways. Let's start with results. If you kill a black person, you likely won't face the death penalty. If you kill a white person, however, you're more likely to be sentenced to death.

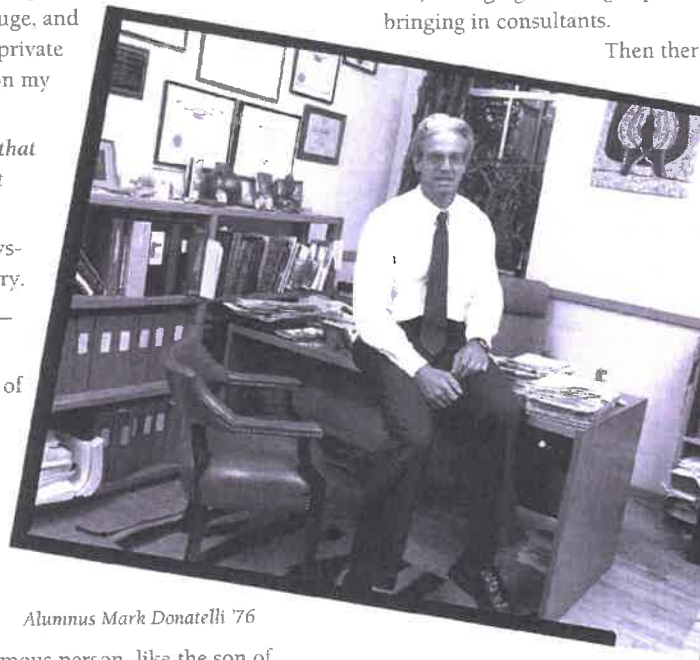
Of course, if you kill a famous person, like the son of Bill Cosby, you're more likely to face the death penalty, whatever the color of the victim.

Most of the time racial prejudice is insidiously present. Real good people don't think they're affected by racial attitudes, but the statistics tell a different story. They're collected in the McClesky opinion. Every law student should read it.

Then look at the process. Start with jury selection. Anyone who is opposed to the death penalty will conscientiously say so when the prosecutor asks whether he or she could sentence the defendant to death if the defendant was found guilty of committing a capital crime. A "no" answer means the prospective juror is disqualified for cause. Favoring the death penalty is not a reason to disqualify, however. In addition, people in favor of the death penalty are more likely to convict than people opposed. Opposing the death penalty typically means you're more skeptical and more likely to require greater proof to convict. So the jury rules are skewed in favor of conviction and in favor of capital punishment. Good defense jurors are sent home before the first witness is called.

In addition, the prosecution has more resources to apply to securing a conviction. Fees for appointed counsel in state prosecutions are so limited that taking a capital case will kill a conscientious private lawyer's practice. So the job will usually go to an inexperienced lawyer or one on the margin of practice. Even if, as in the federal system, the attorney compensation is reasonable, the government has much greater resources at its disposal for investigating the case, managing it, hiring expert witnesses and analysts, and bringing in consultants.

Then there's the rise of the role of the victim or the victim's family. "Victims' rights" turns the process into a contest of who can get the most relatives on the stand to cry the loudest. This is a big change from criminal practice 20 years ago, when victims weren't considered parties to a criminal action and their interests weren't



Alumnus Mark Donatelli '76

involved at all.

**Q** If the criminal justice system is so damned arbitrary in imposing the death penalty, then why do so many people favor the death penalty?

**A** Basically, they're outraged at what they see on TV. Although the violent crime rate is going down, the media coverage of violent crime is going up. Seeing all those homicides tells people it's a dangerous world. And they believe that criminals have been treated too politely too long. The "law and order" political theme of the '70s still seems to work. The average voter still craves simple solutions to incredibly complex problems.

**Q** How has this public attitude carried over into legal change?

**A** The biggest changes have been the federalization of crime and the increase in the number of capital crimes. For example, what used to mean nine years if convicted under state law for a homicide in the course of robbing a 7-11 convenience store is now a capital case in federal court because the 7-11 is in interstate commerce and federal

law now includes 50 capital offenses. At the same time state prosecutors are increasingly seeking the death penalty under state law.

**RV:** *Because many readers of this account are in the Northeast where capital punishment is rarely invoked, will you give us a picture of capital punishment in the Southwest, where you practice?*

**MD:** First, the pace of executions should be a national concern. There are over 3,000 people currently on death row and we have killed over 400 people since 1976. Yes, we have seen more capital prosecutions in the Southwest than in some other regions, but the pattern is spreading. Texas and Arizona have 439 and 125 on their row, respectively. Texas alone killed 30 people in 1997. In New Mexico, we have had well over 100 capital prosecutions since 1980, even though we have barely 1.5 million people in this state, about the size of New Hampshire.

Today's use of capital punishment explains the numbers. Last year, for example, the New Mexico U.S. attorney, following Mafiosi prosecutions as a model, put together a RICO case against street dealers. This would not have happened a few years ago. They would have been prosecuted under state law.

**RV:** *Were you involved in this case?*

**MD:** Yes. We represented one of seven defendants who were death-eligible. We ended pleading our defendant to 13 years—similar to the result if the case had gone under state law. In many respects this was a typical case; the vast majority of death-eligible defendants plead to life, often on the eve of trial. The federal process is a lot different from the state process, however.

**RV:** *What are the differences?*

**MD:** There's a lot more money available to try the case, even if the result is similar. To begin with, the compensation for the defendant's attorney is more realistic than in the state system. There are also more resources for investigation and other assistance. In this case we were able to persuade the government to fund a computerized system for retrieving data that applied to all the defendants, not solely the death-eligible. We were almost on a par with the feds although still outgunned considerably by ATF, FBI, DEA and numerous state and local law enforcement agencies.

In the federal system, thanks to Attorney General Janet Reno's ambivalence toward the death penalty, there is some control over death penalty prosecutions. To ask for death, a federal prosecutor must apply to a central committee in Washington. There is a meeting to review the evidence in which the defendant's counsel participates. If during the case the evidence changes, there is another meeting and review. So there is some protection against a local prosecutor going in an extreme direction in response to political pressure.

**RV:** *Do you think there's any rational justification for increased resort to the death penalty? For example, is prosecution more reliable thanks to technological advances such as DNA typing?*

**MD:** No, I don't think anything has changed in case prosecution that justifies the death penalty. Most of the cases do not hinge on technology. The questions are more likely to turn on eye-witness reliability, the testimony of snitches, and other elements that haven't changed much over the years.

If anything, capital punishment lowers the quality of prosecution overall because it robs prosecutors of resources. They must put a disproportionate amount into death cases because they can't afford to lose them in the glare of media attention. So the rest of their docket suffers.

**RV:** *Do you foresee a decline in public infatuation with the death penalty, similar to the decline in the past before the recent rise?*

**MD:** No. The trend is continuing. I don't see turning the corner in the foreseeable future. I hope we don't see execution rates similar to those in the 1920s, when we killed over 200 people per year, before policymakers came to their senses. I'm convinced the current death penalty process will eventually be seen as a tragic experiment and that proponents will be judged harshly by legal scholars and moralists.