

## A Reflection on Carol Donovan's Career at the Committee for Public Counsel Services

Throughout her public defender career, Carol Donovan was an eloquent and far-sighted champion of justice for the deprived and the despised. During more than two decades of appellate litigation on behalf of the poor, Carol became well-known and widely admired for the crisp perfection of her written briefs, for her dignified and tightly focused oral arguments, and for her keen sense, bordering on clairvoyance, as to which arguments would persuade our appellate judges and which would not.

As a peerless appellate litigator, Carol was successful in the full run of criminal cases. She achieved the reversal of murder convictions in no fewer than four separate appeals – *Batchelder*, *Biancardi*, *Noble*, and *Ward*. In the *Mendonza* case, she presented a powerful challenge to the state law which authorized pretrial detention on grounds of dangerousness. In the *Doe* grand jury lineup case, she won a ruling under Article 14 of the State Constitution requiring a showing of reasonable suspicion in order to require a suspect to appear for an identification procedure. In the *Rodriguez* case, her amicus brief persuaded the Supreme Judicial Court to outlaw drug interdiction roadblocks under Article 14. In the *Hrycenko* case, she helped the trial attorney win a stay pending appeal, then achieved a reversal of the client's convictions based on the improper distribution of excluded photographs to deliberating jurors. And just two years ago in the *Talbot* case, she established that there is a right to have counsel present during a presentence interview with a probation officer. But three specific areas of the law attracted Carol's most frequent and concentrated attention as a litigator.

First, Carol championed the cause of children trapped in a legal system they could not control. In 1990, she successfully challenged a judge's commitment of a school truant to the Department of Youth Services, thereby putting a halt to this abuse of judicial power. In 1995, she advocated a child's right while in the custody of the Department of Social Services to secure appropriate treatment in a particular facility by obtaining a judge's order. In 1998, she wrote a compelling petition for certiorari to the United States Supreme Court, seeking to establish a presumption that sibling children who are removed by the state from the custody of their parents be allowed to live in the same home. In these cases and many others, Carol enthusiastically supported the efforts of the CPCS Children and Family Law staff to provide the best possible outcomes for their child and parent clients.

Second, Carol was the state's undisputed expert on the controversial and vital issue of a criminal defendant's access to relevant, exculpatory information contained within records made privileged by statute. Carol fought this battle for fundamental fairness with every ounce of her strength: in her direct representation of clients, in her authoring of brilliant *amicus curiae* briefs to educate the courts, in law review articles, at legislative hearings, in lawyer training programs, newspaper interviews and media debates. In 2004 in its *Pelosi* case, in which Carol had submitted an *amicus* brief, the Supreme Judicial Court

established a special committee to examine the issue. Carol represented CPCS on that committee. Finally, on December 29, 2006, in its *Dwyer* decision, the SJC created a new protocol for defendants' access to privileged records, hewing closely to the positions Carol had espoused as a member of the Court's committee, and had argued in yet another elegant *amicus* brief. Six weeks before her death, Carol derived great personal satisfaction from this unanimous judicial vindication of her twenty years of education and advocacy.

Third, for over ten years Carol has been the Commonwealth's leading expert on the constitutional issues arising from the state's sex offender registration law, which authorizes the local and worldwide dissemination of personal information concerning certain former sex offenders. When the law was first passed, in 1996, it was the broadest such law in the nation, and accompanied by virtually no due process protections. In her role as CPCS Special Litigation Coordinator, Carol brilliantly brainstormed the many challenging issues presented by this law with her public defender and private counsel colleagues. As importantly, she listened carefully and compassionately to the personal stories of the former offenders and their families whose lives and livelihoods had been ruined by public disclosure of an act or acts they had committed at some previous point in their lives. Carol's sense of justice was offended by these disclosures, as it was by the unsubstantiated claim that humiliating public dissemination of past personal wrongs provided any meaningful protection to the public today. In a series of challenges to the law, Carol persuaded the SJC that basic due process protections were required. As a result of her efforts, the Legislature rewrote the law in 1999. Individual hearings would be required, the government would bear a burden, albeit a limited one, of proving a current risk of reoffending, and judicial review would be available. To the extent that these hearings have, in practice, produced a range of results rather than a constant stream of level 3 findings, as many had feared, is no doubt due to Carol's successful litigation and public advocacy. In 2002, Carol submitted a particularly luminous *amicus curiae* brief on behalf of CPCS to the United States Supreme Court which was considering challenges to the Alaska and Connecticut sex offender registry laws. Her brief, which cited a number of authoritative academic studies and multiple reports issued by the Bureau of Justice Statistics of the United States Department of Justice, "challenge[d] the validity of certain empirical claims by [Alaska and Connecticut] and its *amici* United States and Attorneys General of Forty-One States, including claims regarding the rate of recidivism of sex offenders and the usefulness of public notification in preventing sex offender recidivism." Carol's brief attacked the two centerpieces of the laws in question by marshalling the Government's own statistics, as well as generally accepted scholarship on the subject of sex offender recidivism. Hers was a true Brandeis brief, crafted in the highest and most creative tradition of American legal advocacy. It is a shame that the Court chose not to heed its wisdom.

In addition to her litigation, Carol was a very significant contributor to the improvement of our judicial and criminal justice systems through a variety of collegial efforts. As mentioned above, she was a key participant in the SJC Committee which studied changes to the unsatisfactory *Bishop-Fuller* protocol. Likewise, she was a pronounced contributor to the SJC Committee which issued Model Jury Instructions for homicide cases. Finally,

she played an important part in the Special Committee which issued a series of recommendations designed to address the chronic problem of transcript delays.

It is often assumed that extremely accomplished performers in very demanding fields are one-dimensional persons. That assumption finds no application in the life of Carol Donovan. When her friend and colleague Larni Levy was inspired several months ago to purchase a memory book in which Carol's friends could write something to her when she could no longer work and was confined to her home, it was no accident that Larni bought a book with a bright red cover, and provided to contributors an array of brightly colored markers. Larni had in mind both Carol's brightly colored and plant-filled office, and also Carol's intense interest in the wide world beyond the law. Her colleagues' entries attest repeatedly to Carol's love of opera, children, picnics, flowers, books, people, politics – the entire unrestricted range of human accomplishment and human frailty. Person after person recalled that Carol always took the time to sit down on a bench for a sandwich, or deliver a pithy observation about a recent movie, or observe the activity of a hummingbird, even when she was in the midst of meeting an imminent deadline for the filing of an appellate brief. As a parent, Carol found amusement in pre-adolescent and adolescent antics, thereby affording much-needed perspective to less assured parents who feared disaster and failure in every wayward act. As someone has written, Carol Donovan was “the real deal.”

Those of us who have done it for years know that public defense can be a demanding and sometimes frustrating career choice. Carol's ability to encourage and inspire her colleagues to achieve greatness and derive satisfaction from their work may be her most important legacy of all. By her example, she taught that creative and passionate lawyering will lead to successful results, and that long-term satisfaction requires a balance between work and other interests. Consider just some of the lawyers whose careers she has nurtured: Susan Oker, Director of our Essex County District Court public defender office; Wendy Wayne, CPCS Immigration Specialist; Carol Beck, Director of our private counsel Criminal Trial Support Unit; our criminal defense and children and family law Training Directors, Cathy Bennett and Amy Karp, and assistant training directors Paul Rudof and Katharine Klubock; Ben Keehn, Assistant Deputy Chief Counsel, Public Defender Division; Larni Levy, who carries on Carol's work as Director of our new Alternative Commitment and Registration Support Unit; Beth Eisenberg, Acting Director of Special Litigation; Beverly Cannone, Attorney in Charge of our Norfolk Superior Court office; Susan Dillard, former CAFL Co-Director, now with the Massachusetts Department of Social Services; Alison Bloomquist, Salem public defender office; Page Kelley and Cathy Byrne, Assistant Federal Defenders in Boston; Eve Hanan, District of Columbia Public Defender Service; Colette Tvedt, Seattle public defender; and so many more. Carol's spirit will endure and thrive through their careers, and the careers of many others who have found inspiration in her example. Carol has passed on, but she has also passed the baton.

Many observers have remarked upon the grace and poise and unflinching advocacy which Carol demonstrated amidst critical questioning by the justices in the high-profile case involving internet dissemination of sex offender information at the oral argument in

*Coe v. Sex Offender Registry Board* on June 30, 2004. Perhaps her finest moment came when one of the judges suggested that the legal position Carol was espousing might endanger innocent children: Carol replied, with perfect aplomb and only the most barely noticeable hint of disdain, that the premise of the question was flawed, and that as the mother of two daughters, she would never espouse any position that would endanger them. As I recall, she took the opportunity, as well, to deliver a brief reminder about the importance of parental responsibility.

Brownlow Speer has always singled out Carol's performance at the *Coe* argument as a perfect exhibition of what it means to be a public defender, and what is required to fully realize that role. I close this reflection, therefore, with *her* mentor's words about Carol's performance that day:

"I thought as I watched this that this is what I always wanted the Public Defender office to provide – a system in which attorneys of outstanding ability would dedicate their skills, for no monetary reward at all, to indigents who are at the bottom of the social totem pole, and would fight the good fight with dignity and passion against overwhelming odds. I felt vicariously ennobled; it was the kind of event that provides warmth against many cold days to come."

As Brownny's words suggest, Carol's death is as staggering to we who survive her as her career is inspiring to us. In the long run, once we have shed our tears and mourned her loss, we will rededicate ourselves to carrying on her legacy; approximating, as closely as possible given our individual abilities and limitations, her fierce commitment to the cause of equal justice, and the impeccable quality of her lawyering.

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