National Association of Attorneys General

criminal justice report

OCTOBER 1981

Inside. . .

THE INSANITY DEFENSE

The following was excerpted from an article by Carol Gallo, a Washington, D.C. freelance writer, who is currently working on a book about the insanity defense.

Even before John W. Hinckley II had been indicted for the attempted assassination of President Ronald Reagan his defense attorneys were lining up psychiatrists, and the controversy over Hinckley's "sanity" had started. The Hinckley affair, as well as a number of other notorious criminal cases, has focused national attention on the extent to which psychiatry has undermined justice in the United States by justifying criminality. As a result, a growing number of lawmakers, jurists, and even psychiatrists themselves are suggesting sweeping changes in insanity pleadings at both the state and federal levels.

"Not guilty by reason of insanity" is a special verdict of acquittal in a criminal trial. The verdict grants that although the accused committed the act in question, he cannot be held legally responsible because he was not sane at the time of the crime. Defendants thus acquitted are then usually committed to a mental institution for an indeterminate period and released upon the recommendation of institution psychiatrists when the psychiatrists consider the person "sane."

Since the insanity defense originated almost 200 years ago, definitions used to describe insanity have broadened, and new variations of the defense have been developed, giving criminals ever-increased chances of escaping the legal consequences of their acts. A more insidious variant of the insanity plea is the "diminished capacity" defense, where psychiatric testimony is used to argue that the accused, although clearly sane, still should not be held responsible for his acts because a "mental condition" diminished his capacity to harbor the criminal intent required for conviction.

This was the basis for the so-called "Twinkie Defense" of Dan White, whose controversial trial for the murder of two San Francisco city officials drew national outrage and has resulted in current attempts at major legislative overhaul of allowable criminal defenses. Dr. Martin Blinder, one of the psychiatrists who testified for White, told the jury that White had been depressed before the crime and had been eating junk food, which led to further depression and more junk food, and the sugar made White violent.

Let us trace the historical development of the insanity defense:

In the Anglo-American legal tradition, before a person can be convicted of a crime, two questions must be answered. The first is, did the accused perform the act in question? The second is, did he have criminal intent? An example will illustrate the point the law is trying to make.

A man is driving a car when a small child darts out in front of him. He tries to avoid

hitting the child but cannot do so, and the child is killed. Hypothetically, if this man were tried for murder, he would be found not guilty, because he did not intend to kill. Thus he would be distinguished from a man who saw his enemy on the street and deliberately ran him down.

Criminal intent *(mens rea)* is also important in distinguishing the severity of the crime. For example, two men have a sudden, heated brawl and during its course one is knocked down and killed. If brought to trial, and the survivor showed he did not kill with malice aforethought, he would be found guilty of manslaughter.

"Prior to 1800, 'legal' insanity, as a special verdict of acquittal, did not exist," writes Dr. Halpern in the April 1980 *Journal of Legal Medicine*. "An individual was acquitted because of the failure of the prosecution to prove its case or because the jury chose out of sympathy to find the defendant 'not guilty.' In any event, he was immediately set free. If guilty, and extenuating circumstances existed (which could include lunacy), a special recommendation of a pardon was included in the verdict."

A special point that should be observed here is one that is glossed over by some legal scholars: Care for the language was observed. A lunatic who committed a crime — a sub-human "wild beast," or someone who could not tell the difference between right and wrong — might be pardoned, but he very clearly was found "guilty" first.

This respect for language, absolutely essential to justice, received a severe blow in 1800, according to Dr. Halpern. "In that year, James Hadfield, a war-injured British ex-soldier, believing he had been called by God to undergo self-sacrifce, took a shot at King George III. As Hadfield did intend to shoot at the king, and did know the difference between right and wrong, he would have been found guilty. So his lawyer had to invent a new defense."

Hadfield's attorney had numerous witnesses testify on Hadfield's deranged, delusional mind. Physicians were called to establish that his derangement had been caused by the head injuries he had received in the war. The argument then put forward was that Hadfield's delusional state, not his intention to commit the crime, should be the deciding factor for the jury.

The jury found Hadfield "not guilty" and added to that verdict, "the prisoner appearing to have been under the influence of insanity at the time the act was committed." Hadfield was commited to a lunatic asylum "until": His Majesty's pleasure be known." Although officially "not guilty," Hadfield was not freed, and died in incarceration, now being called a "patient," instead of a prisoner.

"This decision was important for many reasons," says Dr. Halpern. "In effect from that time 'not guilty by reason of insanity' became a separate verdict of acquittal. Secondly, from that time forward, the jury's attention was increasingly focused on the definition of insanity, rather than on the question of whether the accused commited the act and had criminal intent. Lastly, the concept of insanity in the law became intertwined with 'science,' and effectively taken out of the purview of the laymen jurors."

Criminals were not individuals who had simply violated the rules of the culture, but people who suffered from some form of sickness called "mental illness." Once ethics were redefined in terms of medicine, it was continuously to widen the definitions so that any kind of criminality could be excused.

What is at stake here, of course, is our viewpoint on the nature of man. Is he a sentient, essentially spirtual being who makes choices in life? Or is he a material object, acted upon by genes and past experiences, whose choices are predetermined--an object that can neither be praised nor blamed? The evolution of the definitions of insanity reflect the latter, determinist approach.

The *M'Naughten* rule, adopted in England some 43 years after the *Hadfield* case, used a "cognitive" test for insanity. In order for the accused to be found insane under *M'Naughten*, ". . . it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such defect of reason, from disease of the mind, as not to

know the nature and quality of the act he was doing, or, if he did know it, he did not know he was doing what was wrong."

America's first major contribution came in 1834 with the "irresistible impulse" test. As the label would suggest, this is the "just couldn't help it" approach, which assumes free-will does not exist, that impulses to act in certain ways sometimes can be resisted, and sometimes can't be. Thus a person under the influence of an irresistible impulse cannot be held responsible for his actions, even though he knows what he is doing, intends to do it and knows it is wrong.

There were no major redefinitions until the 1954 *Durham* decision was made by Judge David L. Bazelon in the U.S. Court of Appeals for the District of Columbia: ". . . An accused is not criminally responsible if his unlawful act was the product of mental disease or defect," and, in 1966, the U.S. Court of Appeals for the Second Circuit held, ". . . A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

Yet these wildly deterministic definitions of insanity still placed too many restrictions on the psychiatricization of justice. A second inroad was consequently developed, "diminished capacity," the basis of the Dan White "Twinkie defense." It was designed for the use of those criminals who clearly were not insane by even the above definitions. Here the accused pleads "not guilty" as distinguished from "not guilty by reason of insanity" and uses psychiatric testimony to show that, because of a mental condition (depression after having eaten too many Twinkies, for example), the required criminal intent did not exist.

"Diminished capacity" was largely developed and popularized by psychiatrist and law Professor Bernard Diamond, who outlined his case in the *Stanford Law Review*, December 1961:

"Central to the difficulties with any definition of legal insanity is the all-or-none conceptualization of the law. A defendant is either sane and totally responsible, or insane and not at all responsible. Such all-or-nothing concepts are peculiarly foreign to modern psychiatric thinking."

The trouble with the above restrictive definitions, says Diamond, is that it forces the psychiatrist to be either the "tool of vengeance" (i.e., to testify a defendant is sane, thus opening the door to possible punishment for murder, etc.) or to perjure himself and convince the jury the accused is insane when he really isn't (in order to help the defendant avoid punishment).

Piggybacking his idea on a 1867 Scottish decision, his solution was for psychiatrists to testify that this or that mental condition caused the defendant "diminished capacity" to harbor criminal intent, which, of course, only the psychiatrist could "diagnose." This approach undercut the traditional question whether the defendant had criminal intent, and focuses attention on how able the defendant was to formulate intent.

"Thus we arrive at a legal specturm of an infinitely graduated scale of responsibility which corresponds, or could be made to correspond closely, to the psychological reality of human beings as understood by 20th Centruy medical psychology," wrote Diamond.

But Diamond does not believe in free-will anyway, and all this is academic. "I concede that this whole business of lack of mental capacity to premeditate, to have malice or to entertain intent, is a kind of sophistry which must not be allowed to remain an end in itself. Right now we must utilize these legal technicalities to permit the psychiatrist to gain entrance into the trial court . . . .

"The next step . . . is to expand the principle of limited or diminished responsibility of the mentally ill offender to include all definitions of crime. It was easier to introduce this principle in the crimes of homicide because there already existed the legal structure of graduated responsibility for homicide."

In a decision made in June 1980, the Wisconsin Supreme Court struck down the diminished capacity defense:

". . . diminished capacity inevitably opens the door to variable or sliding scales of criminal responsibility. We should not lightly undertake such a revolutionary change in our criminal justice system." It went on to question whether psychiatry can determine a defendant's intent at the time the crime was committed, and concluded it could not .

"Whether or not there should be criminal responsibility is essentially a moral issue. It is just, in light of the ethics and standards of our society, to hold a person who is insane accountable for what he has done."

The Court quoted University of Wisconsin Professor of Criminal Law Frank A. Remington:

> In general, it is not at all apparent that psychiatrists know any more than does the layman about whether the defendant had an intent to kill when the act casuing death was committed.

Even the hopes that psychiatry would help law enforcement officials spot habitual murderers have been dashed. Targeted by numerous malpractice lawsuits, the American Psychiatric Association has been forced to argue the case for psychiatric incompetence in the courts, and has done so most convincingly. In *Tarassoff v. the Regents of the University of California*, via an *amicus curiae* brief, the APA, citing massive professional literature, disclaimed any special psychiatric ability to protect society from potentially harmful citizens. In an even more compelling brief argued before the Supreme Court *(Estelle v. Smith)*, the APA said: "The professional literature uniformly establishes that [predictions of future violence] are fundamentally of very low reliability and that psychiatric testimony and expertise are irrelevant to such predictions. . . . On the issue of future criminal behavior, it only distorts the fact-finding process. The fundamental disadvantage of utilizing such testimony is that it gives the appearance of being based on expert medical judgment, when in fact no such expertise exists."

But old myths die hard, and sadly the two bills designed to handle the insanity defense and its variants on the federal level, S.818, introduced by Sen. Hatch (R-Utah) and S. 1108, introduced by Sen. Edward Zorinsky (D-Neb.) — while obviously well-intentioned — assumed many of the premises that first got us into trouble. The bills unfortunately swim in a sea of sliding definitions and psychiatric bogeymen, and fail to meet three simple tests that need to be met if the situation is to be corrected. These tests are:

- First, the insanity defense *per se* should be entirely abolished. This is an argument for judicial conservatism, an argument to go back to the system that prevailed in jurisprudence before the modernities of 1800.

- Second, psychiatrists should not be permitted to testify on criminal intent. They have no business speculating on how "mental illness," or even yesterday's breakfast, could explain the defendant's crime. The jury can draw more sensible conclusions about intent by first-hand inference, weighing the evidence placed before it. This would effectively end the psychiatric invasion of *mens rea*, abolish the "diminished capacity" excuse and return the examination of criminal intent to the jury rather than the "experts."

- Third, psychiatrists should be stripped of their "expert status" entirely. Should a psychiatirst be called by the defense to testify on any grounds not excluded by the above, the jury should know he has about as much understanding of the human mind (probably a good deal less) as the butcher, the baker, the candlestickmaker, and his legal status should reflect that fact.

The problem is that 'insanity' is not, nor ever could be, a medical term. It is always an ethical term. Insane acts are those which are counter-survival to a person himself, his family, his country, or to the many unknown individuals we commonly called "mankind."

Phonying up scientific names to describe morally and ethically aberrant behavior is anathema to justice. Questions of right and wrong are not irrelevant, they are paramount. They are not unknowable and complex; they can be reasoned and based on common sense. Our laws should reflect these simple truths.

CASES

Prison Litigation: Attorney's Fees

Bonner v. Coughlin, 80-2186, 80-2187 (7th Cir. August 20, 1981)

Defendants, guards at the Stateville Prison in Illinois, successfully appealed a federal district court decision that increased the amount of attorney's fees originally awarded to the plaintiff, a state inmate, pursuant to § 1988. On November 28, 1972, inmate Bonner, after completing a work assignment, returned to his cell to discover it in disarray and his state court trial transcript missing. Defendants admitted that prior to Bonner's return to his cell, two prison guards had conducted a "shakedown" pursuant to a prison regulation authorizing periodic surprise searches. Prison guards are prohibited from damaging or confiscating an inmate's personal property. At the time of the surprise search, Bonner was appealing his state court conviction for murder. Soon after his conviction was affirmed by the Illinois Appellate Court, plaintiff filed a civil rights action seeking declaratory and injunctive relief and monetary damages for the loss of his transcript. On March 22, 1974, a federal district court granted defendant's motion for summary judgment. On appeal, the Seventh Circuit vacated the judgment and remanded the case, holding that Bonner had stated a claim regarding the seizure of his transcript (1) as an unreasonable search under the Fourth Amendment, and (2) as an interference with plaintiff's right of access to Illinois courts under the Fourteenth Amendment. In *Bonner I*, the Seventh Circuit declined to decide whether Bonner's negligence claim was cognizable under § 1983, suggesting that an adequate state court remedy was available. In *Bonner II*, the Seventh Circuit rejected plaintiff's contention that the alleged negligence was actionable under § 1983.

Bonner's trial on remand resulted in the award of $100 in compensatory damages for the loss of his transcript. In June 1979, a trial judge entered an order granting defendant Robinson a Judgment NOV and awarded Bonner costs and $6000 in attorney's fees, although he had requested over $40,000. The judge refused to apply a multiplier and determined that the issue before the court had been resolved. A year later, on motion by Bonner, the district court reversed itself and granted plaintiff's motion to amend the fee award and apply a multiplier. The original award of $6000 was increased to $24,985.

According to the Seventh Circuit decision,

> In determining a fee award under § 1988, a trial court should of course consider the hours spent on the case and the billing rate requested. Various factors in setting fees have been recognized by different courts. This court has recognized as appropriate the factors set forth in the Code of Professional Responsibility adopted by the American Bar Association:
>
> - The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
> - The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
> - The fee customarily charged in the locality for similar legal services.
> - The amount involved and the results obtained.
> - The time limitations imposed by the client or by the circumstances.

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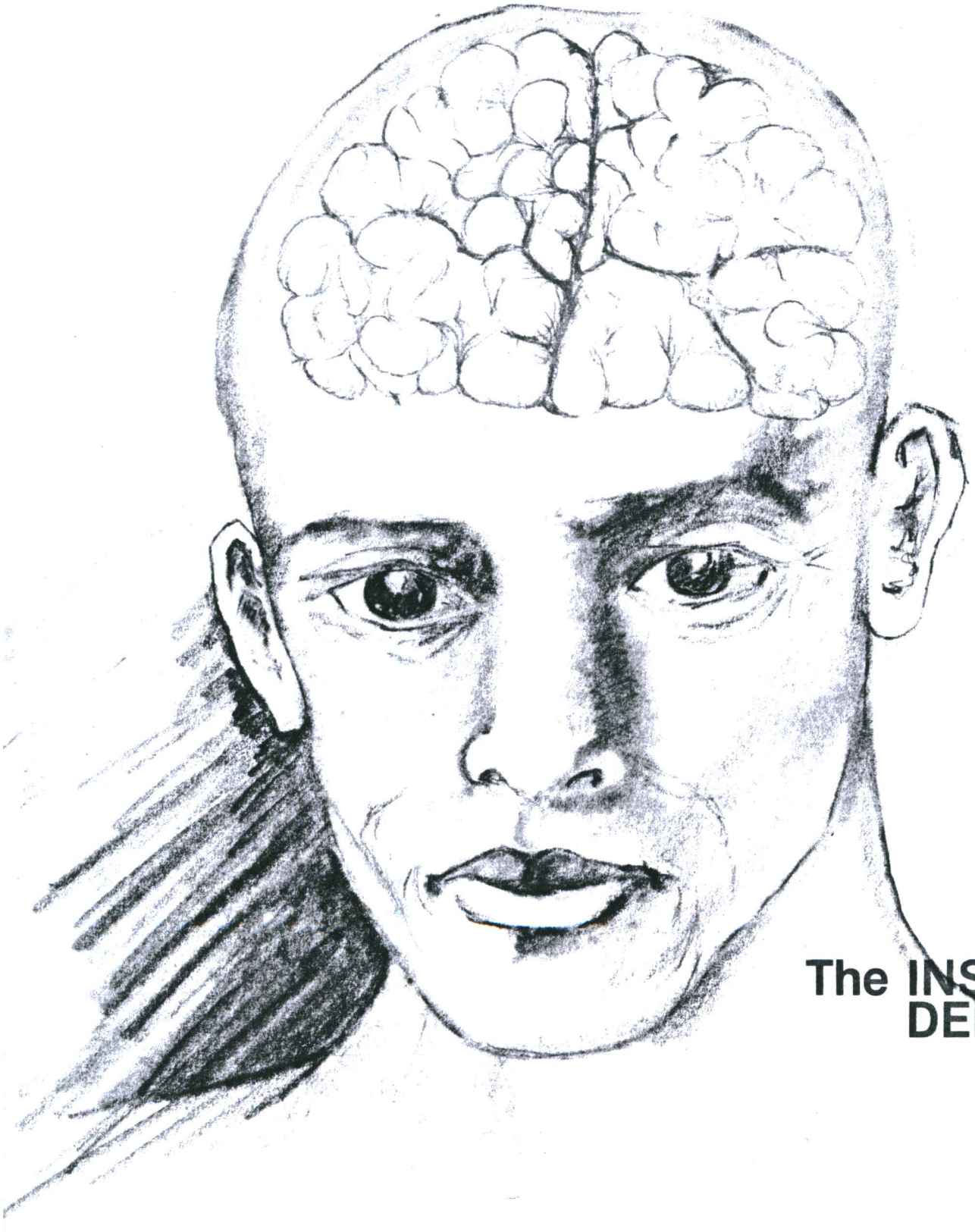

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Features

Departments

Notice

The Summer '82 issue of *The Prosecutor* will be devoted to the subject of *Missing and Exploited Children.* We encourage manuscripts and articles on this subject to be sent to the editor for consideration. The deadline for submission of articles is July 1, 1982. For further information, contact NDAA at 703-549-9222.

Artwork: The artwork which appears on pages 15 and 42 were reproduced from original oil paintings by R.H. Jackson, Sr. Frank Harris contributed a watercolor which appears on page 16. James Mack contributed a watercolor which appears on page 44. All three gentlemen are currently patients at the John Howard Pavillion in St. Elizabeth's Hospital in Washington, D.C.

Letters to the Editors

Beginning with this issue of *The Prosecutor,* Letters to the Editor will be published. *The Prosecutor* encourages its readers to submit letters and comments for publication on these articles and other items of interest to members of the criminal justice system. Letters should be addressed to: Editor, *The Prosecutor,* NDAA, 708 Pendleton Street, Alexandria, Virginia 22314.

On the Cover:

An original sketch produced by Jim McGinnis, Art Director, Weadon Printing Services, for *The Prosecutor.*

THE INSANITY OF THE INSANITY DEFENSE

How psychiatry has undermined the criminal justice system in America by justifying crime and propagandizing through the redefinition of words.

by Carol A. Gallo

Even before John W. Hinckley III had been indicted for the attempted assassination of President Ronald Reagan his defense attorneys were alreading lining up psychiatrists and the controversy over Hinckley's "sanity" had started.

The Hinckley affair, as well as a number of other notorious criminal cases, has focused national attention on the insanity defense, and the extent to which psychiatry has undermined justice in the United States by justifying criminality. As a result, a growing number of lawmakers, jurists, and even psychiatrists themselves are suggesting sweeping changes in insanity pleadings, at both the state and federal levels.

"Not guilty by reason of insanity" is a special verdict of acquittal in a criminal trial. The verdict grants that although the accused committed the act in question, he cannot be held legally responsible because he was not sane at the time of the crime. Defendants thus acquitted are then usually committed to a mental institution for a indeterminate period and released upon the recommendation of institution psychiatrists at such time the psychiatrists consider the person "sane."

Since the insanity defense originated almost 200 years ago, definitions used to describe insanity have broadened, and new variations of the defense have been developed, giving criminals ever-increasing chances of escaping the legal consequences of their acts.

Thus the insanity defense is a major concern to law enforcers, and was given special attention by Presidential Counselor Edwin Meese III when he addressed the California State Sherrifs' Association last year:

"If we are really sincere about the protection of the public, the mental condition of the individual at the time he committed the crime is immaterial. A good portion of criminal trials is taken up with hot and cold psychiatrists running in and out for both sides telling what is wrong with the accused. The way psychiatrists are now pushed and tugged...in order to provide testimony for one side or the other is a disgrace to their profession."

"It's the defense of last resort. The only time it's used is when there is no question the accused committed the act, and the defense can think of nothing else to exonerate his client."

Jeffery Harris, executive director of the Attorney General's Task Force on Violent Crime, makes a similar criticism. Says Harris, "What amazes me is that in any trial I've ever heard of, the defense psychiatrist always says the accused is insane, and the prosecution psychiatrist always says he's sane. This happend invariably, in 100 per cent of the cases, thus far exceeding the laws of chance. You have to ask yourself, 'What is going on here?' The insanity defense is being used as a football...and, quite frankly, you'd be better off calling Central Casting to get 'expert psychiatric testimony' in a criminal trial."

That the insanity defense is used consciously to escape the penalities of the law is common knowledge.

Sen. Orrin Hatch (R-Utah), who recently introduced insanity reform legislation (S 818), pointed to a telling case in Chicago in which Thomas Vanda, then 18 years old, was convicted of stabbing a neighbor, a teen-age girl, as she lay asleep in her bed. While he was on probation from that conviction and receiving psychiatric care, he killed a 15-year-old girl with a hunting knife, and was found not guilty of that crime by reason of insanity. He was committed to a mental institution but released 15 months later by psychiatrists as cured.

In 1978 Vanda was again charged with stabbing another young woman to death, and again pleaded "not guilty by reason of insanity." During these escapades, and while an inmate in Cook County jail, Vanda took time out to advise a fellow inmate on "how to beat a murder rap" by pleading insanity. He advised "acting crazy" in front of doctors, such as claiming to hear voices or openly performing indecent acts.

"It's the defense of last resort," says Assistant U.S. Attorney for the District of Columbia Percy Russell. "The only time it's used is when there is no question the accused committed the act, and-

the defense can think of nothing else to exonerate his client."

Even more insidious is a variant of the insanity plea, the "diminished capacity" defense, where psychiatric testimony is used to argue that the accused, although clearly sane, still should not be held responsible for his acts because a "mental condition" diminished his capacity to harbor the criminal intent required for conviction.

This was the basis for the so-called "Twinkie Defense" of Dan White, whose controversial trial for the murder of two San Francisco city officials drew national outrage and has resulted in current attempts at major legislative overhaul of allowable criminal defenses in California.

White was employed as a San Francisco city supervisor in 1978. Under financial pressure, he resigned his job, then changed his mind a few days later. He started to negotiate for reinstatement, but Mayor George Moscone decided against rehiring him.

White was convinced that a political enemy, City Supervisor Harvey Milk, influenced Moscone in his decision and on Nov. 27, 1978, White concealed a gun, took along extra ammunition, and went to City Hall. Avoiding the metal detectors by climbing through a basement window, White sought out Moscone, revealed his gun, and shot the mayor four times.

As Moscone lay sprawled on the floor, White pointed the gun at the mayor's head and fired two more shots. He then reloaded the gun with the extra bullets he had brought along, sought out Harvey Milk and killed him in the same fashion—several bullets to the body, then, bending over, two more to the head.

When the case came to trial, White's defense argued he was not guilty of murder because he suffered from "diminished mental capacity," and thus was unable to formulate the required criminal intent. Dr. Martin Blinder, one of the psychiatrists who testified for White, told the jury White had been depressed before the crime and had been eating junk food, which led to further depression and more junk food, and the sugar made White violent.

John W. Hinckley III is being tried in the U.S. District Court of the District of Columbia, which uses the American Law Institute's definition of insanity and recognizes "diminished capacity" as an allowable defense. The average length of stay at the District's St. Elizabeth's psychiatric hospital of those acquitted by reason of insanity is five and a half years.

"Whenever he [White] thought that things were not going right, he would abandon his usual program of exercise and good nutrition and start gorging himself on junk foods—Twinkies, Coca Cola. He'd hit chocolate, and the more he consumed, the worse he'd feel and he'd respond to his depression by consuming ever more junk food. He just sat there before the TV, bringing on the Twinkies...."

The jury was persuaded of White's "diminished capacity" by the arguments of the aptly named Dr. Blinder and the other psychiatric witnesses and refused to find White guilty of murder. Instead, the let him off with a light scolding by finding him guilty of the lesser offense of voluntary manslaughter (killing in the heat of passion). He is now serving a seven-year sentence and will be eligible for parole in about three years.

The facts of the case were never in dispute. White concealed the gun and took along extra bullets. He climbed through the basement window to avoid the metal detectors. Demonstrating what most of us would call premeditation and malice, he killed the two men execution-style. But, if, as the jury found, Dan White did not commit premeditated murder, who or what did? Using

Blinder's analysis, the answer has to be "Cokes and cupcakes."

Dr. Thomas Szasz, professor of psychiatry at the Upstate Medical Center in Syracuse, N.Y., commented in *Inquiry* magazine:

"There is no question that a travesty of justice occurred in the trial of Dan White. How could the killer of San Francisco Mayor George Moscone and Supervisor Harvey Milk—who fired nine bullets into his victims and shot each one twice in the back of the head, execution-style—not be found guilty of murder? The answer is: Easily. Anything is possible in human affairs if one has the power to redefine basic concepts—to say that day is night, that two plus two make five—and get away with it."

"Anything is possible in human affairs if one has the power to redefine basic concepts—to say that day is night, that two plus two make five—and get away with it."

The situation is growing worse, as the number of successful insanity defenses is on the increase. While there are not national figures, psychiatrist Abraham Halpern, clinical professor of psychiatry at New York Medical College and a leading critic of the insanity defense, points to a New York study which reveals a 500 percent increase of successful pleading between the years 1965 and 1976.

As well, all sorts of crime, murder, rape, even bank robbery and house-breaking, are being justified by "insanity."

How did psychiatry gain its stranglehold on the criminal justice system? The answer is by two major but distinctly different routes, which must both be understood before a practical way out can be found.

The first and best-known method is in the insanity defense *per se.* Let us trace its historical development:

In the Anglo-American legal tradition, before a person can be convicted of a crime, two questions must be answered. The first, is, did the accused perform the act in question? The second is, did he have criminal intent? An example will illustrate the point the law is trying to make:

A man is driving a car when a small child darts out in front of him. He tries to avoid hitting the child but cannot do so, and the child is killed. Hypothetically, if this man were tried for murder, he would be found not guilty, because he did not intend to kill. Thus he would be distinguished from a man who saw his enemy on the street and deliberately ran him down.

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"How could one ever prove that a decision to murder your mother with an ax was arrived at in a mature and meaningful way...we would have no chance of convicting anyone for anything if that is the language used."

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From that time on we can trace the continuing and gradual erosion of the concept of criminal responsibility as the perversion of the language became embedded in the legal system.

Criminals were not individuals who had simply violated the rules of the culture, but people who suffered from some form of sickness called "mental illness." Once ethics were redefined in terms of medicine, it was easy continuously to widen the definitions so that any kind of criminality could be excused.

What is at stake here, of course, is our viewpoint on the nature of man. Is he a sentient, essentially spiritual being who makes choices in life? Or is he a material object, acted upon by genes and past experiences, whose choices are predetermined—an object that can neither be praised nor blamed? The evolution of the definitions of insanity reflect the latter, determinist approach.

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There were no major redefinitions until the 1954 *Durham* decision was made by Judge David L. Bazelon in the U.S. Court of Appeals for the District of Columbia: "...An accused is not criminally responsible if his unlawful act was the product of mental disease or defect," and, in 1966, the U.S. Court of Appeals for the Second Circuit handed down the American Law Institute definition was accepted. "...A person is not responsible for criminal conduct if at the time of such conduct

A variant of the insanity plea, the "diminished capacity" defense, was the basis of the so-called "Twinkie defense" used in the case of Dan White (far right), whose controversial trial for the murder of San Francisco city officials Harvey Milk (left) and George Moscone (center) has resulted in current attempts at major legislative overhaul of allowable criminal defenses in California.

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"Dr. Martin Blinder, one of the psychiatrists who testified for White, told the jury White had been depressed before the crime and had been eating junk food, which led to further depression and more junk food, and the sugar made White violent."

"Diminished capacity" was largely developed and popularized by psychiatrist and law Prof. Bernard Diamond, who outlined his case in the *Stanford Law Review,* December, 1961:

"Central to the difficulties with any definition of legal insanity is the all-or-none conceptualizations of the law. A defendant is either sane and totally responsible or insane and not at all responsible. Such all-or-nothing concepts are perculiarly foreign to modern psychiatric thinking."

The trouble with the above restrictive definitions, says Diamond, is that they force the psychiatrist to be either the "tool of vengeance" (i.e., to testify a defendant is sane, thus opening the door to possible punishment for murder, etc.) or to perjure himself and convince the jury the accused is insane when he really isn't (in order to help the defendant avoid punishment).

With commendable frankness, Diamond gives an example of how he committed perjury and recalls a case where he testified for the defense in the murder trial "of a very nice and respectable middle-class woman, the young mother of two children. The defendant, with care and precision, had strangled her second child when he was eight weeks old. He had been crying incessantly and the mother thought she was not able to properly care for the child and that it would be better off dead.

"At the time the deed was committed, the mother knew perfectly well what she was doing. She was not suffering, at that time, from delusions or hallucinations, nor was there any grossly visible evidence of mental abnomality. She knew the nature and quality of her act and that it was wrong. Nevertheless, at the moment of the killing, she believed it to be the only course of action open to her....There was no difficulty in convincing the court that the defendant was legally insane and did not know right from wrong because of mental disease."

Wishing to avoid commiting perjury, Diamond went about finding the soft underbelly of the law through which the role of "modern psychiatric thinking" could be expanded even further, and found the "ideal bridge" in the concept of criminal intent.

Piggybacking his idea on a 1867 Scottish decision, his solution was for psychiatrists to testify that this or that mental condition caused the defendant "diminished capacity" to harbor criminal intent, which, or course, only the psychiatrist could "diagnose." This approach undercut the traditional question whether the defendant had criminal intent, and focuses attention on how *able* the defendant was to formulate intent.

"Thus we arrive at a legal spectrum of an infinitely graduated scale of responsibility which corresponds, or could be made to correspond closely, to the psychological reality of human beings as understood by 20th Century medical psychology," wrote Diamond.

But Diamond does not believe in free-will anyway and all this is academic. "I concede that his whole business of lack of mental capacity to premeditate, to have malice or to entertain intent, is a kind of sophistry which must not be allowed to remain an end in itself. Right now we must utilize these legal technicalities to permit the psychiatrist to gain entrance into the trial court....

"The next step...is to expand the principle of limited or diminished responsibility of the mentally ill offender to include all definitions of crime. It was easier to introduce this principle in the crimes of homicide because there already existed the legal structure

of graduated responsibility for homicide.

"But when the courts, and particularly the public, get used to the idea of giving full consideration to the mental and emotional abnormalities of the homicide offender, there will be little difficulty in having the same principles and practices applied to all crimes. We would then have diminished responsibility in its true meaning extending throughout the penal code and no longer bound to the technicalities of the degrees of homicide."

The rationale used by Dr. Diamond has even found its way into California's definition of "premeditation." Stephen Morse, professor of law and psychiatry and the behavioral sciences at the University of California, describes the legal background of the broadened definition in a 1979 article in the *International Journal of Law and Psychiatry*. The case concerned the murder trial of Dennis Wolff, a young man convicted in the ax murder of his own mother.

"For a year prior to the crime, Dennis Wolff had been obsessed with sex and planned to kidnap women for sexual purposes. He believed he needed to bring them to his house to carry out his plans and therefor decided that it would be necessary to do away with his mother first. He carefully planned the homicide and, after one foiled attempt, he killed her by beating her with an ax handle that had been carefully hidden away for that purpose. He was tried and found guilty of first-degree murder."

"When the case got to the California Supreme Court," Morse told HUMAN EVENTS, "the Court overturned the verdict, arguing that premeditation meant to 'maturely and meaningfully reflect' on the gravity of the contemplated act.

"How could one ever prove that a decision to murder your mother with an ax was arrived at in a mature and meaningful way...we would have no chance of convicting anyone for anything if that is the language used."

Morse has been testifying before the legislature in California, pressing abolition of the "diminished capacity" defense. Other groups working on that behalf include the California State Sheriff's Association, the California District Attorney's Association, and the anti-psychiatry Citizens Commission on Human Rights.

"Psychiatry is not a science. It can have no legal expertise. The labeling of a procedure as 'examination' as in mental status examination, or 'test' as in Rorschach test, doesn't render the effort scientific. The plain fact is that in all of psychiatry and psychology there is not a single scientific test."

Another leading anti-psychiatry activist is psychiatrist Dr. Lee Coleman of Berkeley, who heads the Institute for the Study of Psychiatric Testimony. Dr. Coleman, who works with law enforcement officials debunking psychiatric courtroom testimony, believes psychiatrists have no place in the courtroom at all, and takes an emprical approach:

Psychiatry is not a science. It can have no legal expertise. The labeling of a procedure as 'examination ' as in mental status examination, or to 'test' as in Rorschach test, doesn't render the effort scientific. The plain fact is that in all of psychiatry and psychology there is not a single scientific test.

"Despite our fond hopes, *no one* has a way of 'examining' someone's state of mind, past or present. There are so many tests for ability to meaningfully and maturely premeditate, deliberate, or harbor malice, as in the diminished capacity defense, or for the presence of an 'irresistible impluse' or for knowledge or right and wrong. The best anyone can do is to draw inferences as to mental state, based on behavior or speech."

Not only is psychiatric testimony scientifically worthless and irrelevant, says Dr. Coleman, but it serves to confuse and perplex a jury.

From a recent case he reviewed, Coleman gives us an example of evidence psychiatrists typically introduce. The crime involved the shooting of the defendant's wife followed by his killing of his two children immediately afterwards:

"...Such a psychotic decompensation occurred immediately preceding the alleged offense. By his own report, Mr. X experienced a rather diffuse and global intrusion of multiple paranoid ideas of reference. This global intrusion of such paranoid ideas resulted in a psychotic dissociation in the mind of Mr. X.

"This psychotic dissociation set the stage for his rather automatic and seemingly unprovoked violent outburst against his wife, children and himself....Mr. X's recognition that there no more

bullets in the weapon precipitated in him the resolution of the dissociative reaction which resulted in his appropriate behavior in terms of walking downstairs and attempting to seek help from his sister....His passive withdrawal in terms of his behavior following the offense, i.e., sitting on the couch until the police came, and his feelings and concern and cooperation with the police officers, would also substantiate a rather self-limited but severe psychotic reaction in Mr. X which terminated prior to his returning downstairs from his children's room.

"The above psychological formulation is clearly substantiated by the objective psychological tests conducted."

Call it what you will—mumbo-jumbo, psychobabble, black magic incantations, or psychiatric testimony—if we ask our juries to make sense of it, we must expect repeated travesties of justice.

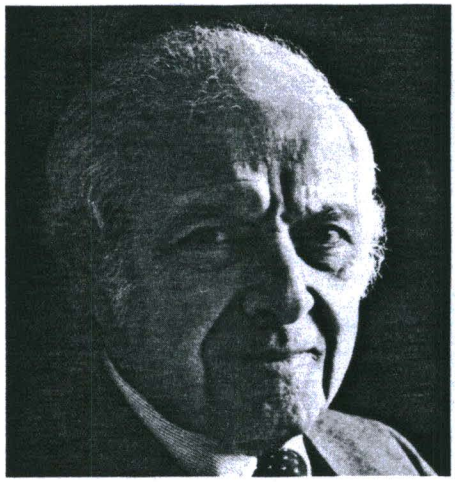
In a decision made in June 1980, the Wisconsin Supreme Court struck down the diminished capacity defense.

"...diminished capacity inevitably opens the door to variable or sliding scales of criminal responsibilty. We should not lightly undertake such a revolutionary change in our criminal justice system." It went on to question whether psychiatry can determine a defendant's intent at the time the crime was committed, and concluded it could not.

"Whether or not there should be criminal responsibilty is essentially a moral issue. It is just, in light of the ethics and standards of our society, to hold a person who is insane accountable for what he has done."

The Court quoted University of Wisconsin Professor of Criminal Law Frank A Remington:

Professor of Psychiatry Thomas Szasz, writing of the San Francisco murder trial, says that "anything is possible in human affairs if one has the power to redefine basic concepts."



There had been no major redefinitions of "legal" insanity until the 1954 Durham decision made by Judge David L. Bazelon in the U.S. Court of Appeals for the District of Columbia.

"In general, it is not at all apparent that psychiatrists know any more than does the layman about whether the defendant had an intent to kill when the act causing death was committed."

Even the hopes that psychiatry would help law enforcement officials to spot habitual murders have been dashed. Targeted by numerous malpractice lawsuits, the American Psychiatric Association has been forced to argue the case for psychiatric incompetence in the courts, and had done so most convincingly. In *Tarassoff v. the Regents of the University of California,* via an *amicus curiae* brief, the APA, citing massive professional literature, disclaimed any special psychiatric ability to protect society from potentially harmful citizens. In an even more compelling brief argued before the Supreme Court *(Estelle v. Smith),* the APA said:

"The professional literature uniformly establishes that [predictions of future violence] are fundamentally of very low reliability and that psychiatric testimony and expertise are irrelevant to such predictions....On the issue of future criminal behavior, it only distorts the fact-finding process. The fundamental disadvantage of utilizing such testimony is that it gives the appearance of being based on expert medical judgment, when in fact no such expertise exists."

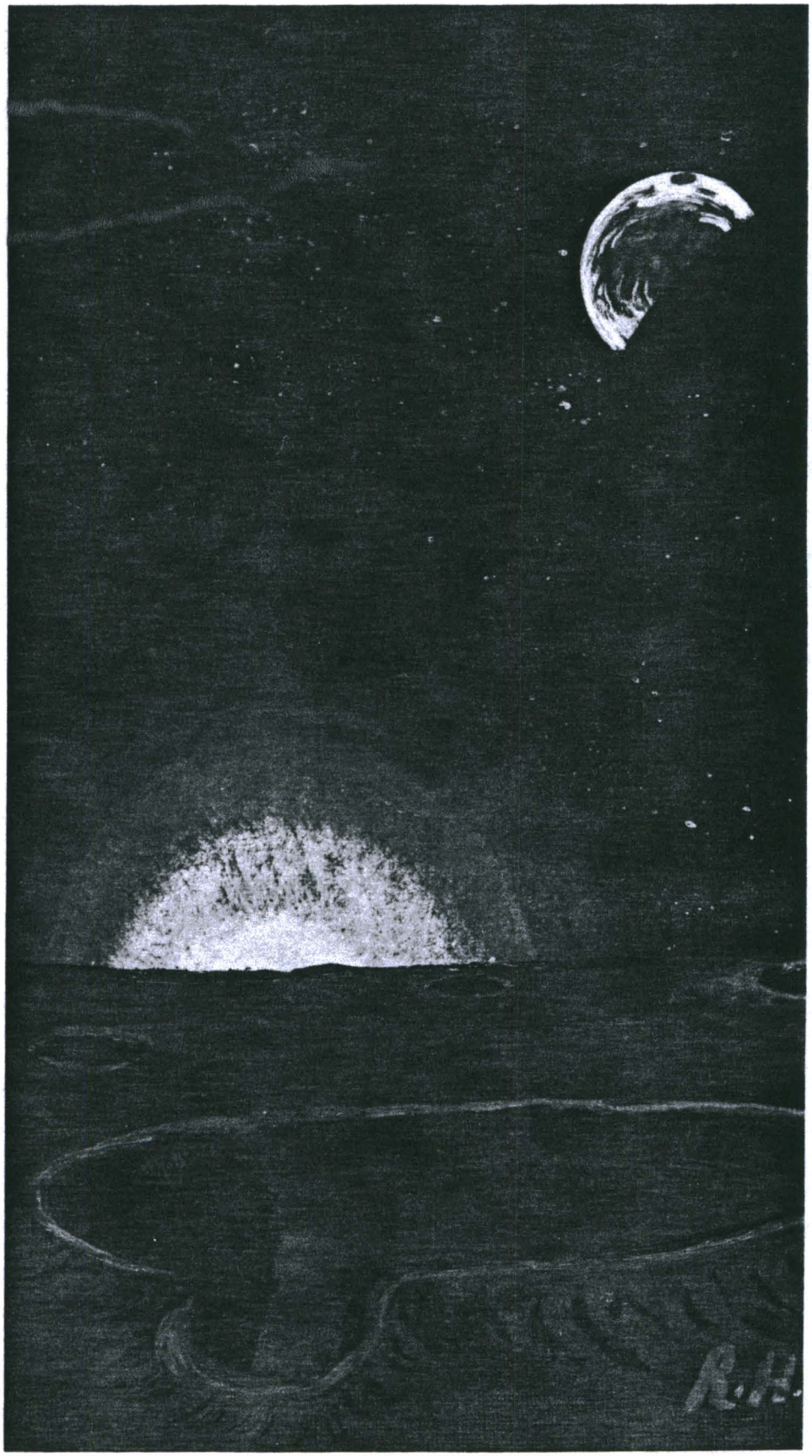
But old myths die hard, and sadly the two bills designed to handle the insanity defense and its variants on the federal level, S 818, introduced by Sen Hatch, and S 1108, introduced by Sen. Edward Zorinsky (D.-Neb.)—while obviously well-intentioned—assumed many of the premises that first got us into trouble. The bills unfortunately swim in a sea of sliding definitions and psychiatric bogeymen, and fail to meet three simple tests that need to be met if the situation is to be corrected. These tests are:

- First, the insanity defense *per se* should be entirely abolished. This is an argument for judicial conservatism, an argument to go back to the system that prevailed in jurisprudence before the modernities of 1800.
- Second, psychiatrists should

not be permitted to testify on criminal intent. They have no business speculating on *how* "mental illness," or even yesterday's breakfast, could explain the defendant's crime. The jury can draw more sensible conclusions about intent by first-hand inference, weighing the evidence placed before it. This would effectively end the psychiatric invasion of *mens rea*, abolish the "diminished capacity" excuse and return the examination of criminal intent to the jury, rather than the "experts."

- Third, psychiatrists should be stripped of their "expert status" entirely. Should a psychiatrist be called by the defense to testify on any grounds not excluded by the above, the jury should know he has about as much understanding of the human mind (probably a good deal less) as the butcher, the baker, the candlestickmaker, and his legal status should reflect that fact.

The problem is that "insanity" is not, nor ever could be, a medical term. It is always an ethical term. Insane acts are those which are counter-survival to a person himself, his family, his country, or to the many unknown individuals we commonly called "mankind." Phonying up scientific names to describe morally and ethically aberrant behavior is anathema to justice. Questions of right and wrong are not irrelevant, they are paramount. They are not unknowable and complex; they can be reasoned and based on common sense. Our laws should reflect these simple truths.



About the Author: Ms. Gallo, a Washington free-lance writer, is currently working on a book about the insanity defense and specializes in the area of psychiatry and human rights. Reprinted by permission of *Human Events*, September 26, 1981.

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THE CRIMINAL CODE REFORM ACT OF 1981 (S. 1630) PART II — THE DEBATE MOUNTS

INTRODUCTION

A November 10, 1981, Heritage Foundation Issue Bulletin examined the proposed "Criminal Code Reform Act of 1981" (S. 1630). This bill, favorably reported by the Committee on the Judiciary, awaits action by the full Senate. S. 1630 is only the most recent in a line of congressional efforts to recodify the criminal law over the last twelve years. While little disagreement exists that federal criminal law needs to be recodified into a single title of the United States Code, the proposed Act "is more than [an] effort at codification and revision." "It is an effort at reform as well" according to the Committee Report. The nature of that effort has engendered considerable controversy ever since Congress first addressed the revision of the Criminal Code.

Since November, Senator Strom Thurmond has attempted to mitigate some of the business-related concerns raised by the earlier Issue Bulletin by promising to amend or clarify certain provisions of S. 1630. In addition, the debate over the proposed Code has become increasingly virulent and raises significant questions about the Code and the manner in which the debate is being conducted. With both opponents and proponents of S. 1630 agreeing that it is one of the most far-reaching legislative proposals in years, it is clear that it merits further examination before a vote on the Senate floor. As Professor Herbert Wechsler aptly stated in testimony before the Senate: "[i]ts promise as an instrument of safety is matched only by its power to destroy."

OVERVIEW

The November 1981 Issue Bulletin on S. 1630 raised both general and specific philosophical and practical questions about

S. 1630's potential application and ability to achieve its stated goal of "streamlining" federal criminal law. The study finds that "the Act attempts too much and suffers from major theoretical, practical and philosophical defects" in its effort to recodify, revise, and extend all federal criminal law at one time. "No one, not even the drafters, seems to understand fully the impact of the proposed revision."

While the Act partly succeeds in eliminating the archaic, vague, or duplicative aspects of the present law, in some respects it merely substitutes new vague or duplicative language for old. Statutory language illuminated by hundreds of years of common law development is thus replaced by new words and definitions which only will gain meaning through de novo interpretation by a federal judiciary already unable to keep pace with its caseload. Federal criminal law could be altered fundamentally as each federal judge struggles to define the new law in his own fashion. Hence, whether S. 1630 can achieve its goal of "streamlining" the law is open to serious question.

The November Issue Bulletin also questions a number of specific provisions of S. 1630 which appear fraught with potential difficulties for the business community. A particular matter of concern has been the potential for prosecutorial abuse in the provisions which deal with Culpable States of Mind (Section 301-3); Attempt (Section 1001); Conspiracy (Section 1002); Solicitation (Section 1003); Racketeering and Operating a Racketeering Syndicate (Sections 1801, 1802, 4011, 4013, 4101); Liability of an Organization for Conduct of Agent (Section 402); Murder (Section 1601); Sentence of Fine (Section 2201); and Order of Notice to Victim (Section 2005); The language of these provisions is general and open to interpretation and abuse for alleged business misconduct, although "just how far and what conduct the new interpretation will reach will depend on innovative and aggressive prosecutors who may attempt to expand their authority."

CONTINUING CONCERNS OVER CORPORATE LIABILITY

Senator Thurmond, in responding to some of the anxieties about the new rules governing corporate liability in S. 1630, promised to sponsor floor amendments to continue current federal criminal law and ameliorate the potential for prosecutorial abuse of certain of the proposed Code's provisions. While the Judiciary Committee Chairman's response represents an important effort to eliminate potential problems in the Criminal Code Reform Act of 1981, significant cause for business concern remains. First, the proposed amendments might be rejected by the Senate or fail to survive a Senate-House conference. Second, an examination of the proposed amendments and some other selected provisions demonstrates that the amendments neither adequately address the areas of concern nor effectively ensure that business will escape the unnecessary harm that can result from a broad prosecutorial reading of general statutory language.

CULPABLE STATES OF MIND

No attempt has been made to amend Chapter 3 of S. 1630 which defines the culpable states of mind for crimes and the proof necessary for each. The Act identifies four states of mind: intentional, knowing, reckless, and negligent. It then applies these states of mind to three components of the actus reus of the crime: conduct, circumstances, and results. While proponents of the legislation laud Chapter 3 for greatly simplifying the law (it reduces the 79 existing terms which define culpability for federal offenses to the four set forth above), opponents view it from a different perspective.

The critical aspect of this section is that it eliminates the fundamental principle of criminal law -- fault is a predicate to liability. S. 1630 provides that a "reckless" state of mind as to "circumstances" and "results" is a sufficient basis for criminal liability unless the statute expressly indicates that a different state of mind applies to a particular offense. According to the Judiciary Committee's Report, "a person is reckless if he is aware of but disregards a substantial risk that a circumstance exists or that a result will occur. A substantial risk is defined as a risk the disregard of which constitutes a gross deviation from the standard of care a reasonable person would exercise under the circumstances...." Moreover, "[r]ecklessness... does not encompass any desire that the risk occur nor an awareness that is it practically certain to occur." In short, intent to commit a crime is no longer required.

The application of this new standard is likely to significantly expand the scope of federal criminal liability when read, as it must be, in conjunction with other provisions of the Act. While "reckless" conduct is defined in part by determining whether the conduct was a "gross deviation" and by examining the "care that a reasonable person would exercise in such a situation," those terms are definitionally subjective and prey to radically broad and variable interpretations by courts and juries. As the former Special Counsel to the Judiciary Committee recognized, "these words are imprecise and must await judicial interpretation and construction on a case-by-case basis."[1] Moreover, interpretations of the statutory language are likely to be turned against businessmen as reference to products liability law, where similar language is construed daily, demonstrates.

The requirement of proof of intent has generally acted as a meaningful check against arbitrary prosecution. Hence, business interests widely oppose the elimination of the criminal intent requirement and favor the substitution of the more objective

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[1] Feinberg, "Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code," 18 Amer. Crim. L. Rev. 123, 135. (1980).

"knowing" standard of culpability to both "circumstances" and "results."

Even putting aside the potential for abuse in the provisions defining culpable states of mind, the discussion underscores practical problems in the application of the Act. A review of sections 301-303, the accompanying portions of the Committee Report, and some relevant commentary[2] indicates that Chapter 3 may simplify the existing law, but substitutes a complexity of its own. Understanding, mastering and applying the culpability framework of S. 1630 is likely to take judges, practitioners, and jurors a significant amount of time. Chapter 3 now requires decisionmakers to distinguish between the conduct, circumstances, and results of an offense in order to determine which state of mind applies. The present law has no such provision. Coupled with the open-ended nature of the terms in Chapter 3, the new terminology is such that the criminal justice system is likely to struggle with it for some time.

This, of course, does not negate the desirability of simplifying the mental state requirements of the existing criminal law. It does suggest, however, that Chapter 3 of S. 1630 should be subjected to further scrutiny to determine whether the "simplification" it embodies can be simplified further while retaining the current scope of federal criminal liability. For example, one might reasonably conclude that applying a "knowing standard" to all components of an offense (conduct, circumstances, and results) would significantly reduce the complexity of the law since decision makers would not have to distinquish between the elements to determine which mental state applies.

MURDER

The murder statute, Section 1601, remains problematical despite Senator Thurmond's effort to relieve the business community's concern that it might open the door to prosecution for unforeseen and unintended homicides. The Act provides that murder is committed if a person "intentionally causes the death of another person." Senator Thurmond has indicated his hope that making the standard of culpability "intentionally," which is higher than the "knowingly causes the death" standard of S. 1722, S. 1630's predecessor in the previous Congress, will "alleviate the concern expressed" by business. However, the change fails to meet the fundamental objection to Section 1601.

The language of Section 1601(a)(2), which must be read in conjunction with the mental elements provisions of Chapter 3, still offers plausible grounds for alleging that product design defects constitute "murder" under appropriate circumstances.

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2 Ibid.

Section 1601(a)(2) provides that murder is committed if one "engages in conduct by which he causes the death of another person under circumstances manifesting an extreme indifference to human life." Since 1601(a)(2) does not expressly provide a standard of culpability, a "reckless" state of mind is all that is required to prove liability by virtue of Section 303(b)(2). The language of the two provisions read together is exceptionally broad. Hence, as stated in the November Issue Bulletin: "[a]ny experienced lawyer passably aware of both criminal and products liability law must shudder at the invitation for abuse provided by the language in this section." Similar language has been interpreted in products liability cases to hold product sellers civilly liable for virtually any "indifference." There is no reason to believe that similarly liberal interpretations would not be extended to the criminal arena.

The potential danger in Section 1601 is amply demonstrated by the Ford Pinto prosecution in Indiana. Ford Motor Company was indicted for reckless homicide and criminal recklessness for "causing the deaths" of three teenagers. Three girls were killed when a van plowed full speed into the back of their parked Pinto. The gas tank was full and the gas cap off at the time the car burst into flames. Nonetheless, the prosecution claimed that the car's design and Ford's failure to remove it from the highways caused their deaths. While the company was ultimately acquitted, the case provides a classic example of the dangers of relying on prosecutorial discretion as a check against broad readings of general statutory language. Neither the language of Section 1601 nor Section 102(c), which sets forth principles of causation, is sufficient to avert abuses of prosecutorial discretion as currently worded.

LIABILITY OF ORGANIZATION FOR CONDUCT OF AGENT

Section 402 of the proposed Code, which provides for criminal liability of an organization for the conduct of an agent, lacks a statutory predecessor and appears to expand the law of agency. The entire section is riddled with vague language subject to broad interpretation. In particular, the provision paves the way for organizational liability for the conduct of an agent acting with only "apparent" authority; under present law, an agent's authority must be "actual" or "implied" for criminal liability to be imposed on an employer. Senator Thurmond's promise to amend Section 402(a)(1) to modify the term "authority" with the terms "actual or implied" will largely ameliorate the concern over this problem.

INCHOATE OFFENSES: ATTEMPT AND SOLICITATION

Senator Thurmond has similarly announced his intention to amend the "attempt" (Section 1001) and "solicitation" (Section 1003) provisions of S. 1630 to eliminate concerns expressed by

the business community. These provisions have been challenged on a variety of grounds: Section 1001 creates a federal "attempt" statute where none exists under current law; criminal solicitation is an entirely new concept; the language of both sections is confusing, extremely broad, and subject to abuse and, as such, capable of application to a wide variety of regulatory offenses. Senator Thurmond has attempted to meet these criticisms by promising an amendment to the general attempt and solicitation provisions which will prohibit their application to non-Title 18 regulatory offenses or the regulatory offenses covering Investment, Monetary and Antitrust Offenses, and Public Health Offenses contained in S. 1630.

These changes significantly reduce, but fail to fully eliminate, concerns over the application of Sections 1001 and 1003. The language of these provisions specifically retains broad attempt and solicitation statutes that do not exist under current law. For example, an individual must currently go almost to the last step toward the commission of a crime to be guilty of "attempt." Under S. 1630, however, he only must take a "substantial step" toward the commission of the crime to be liable.

Moreover, pivotal business provisions such as Section 1734, which covers executing a fraudulent scheme, are not covered by the proposed amendment. Even if they were, the problem here, as in other sections of the proposed Code, lies in building broad concepts into the law. Principles are created which may be acceptable today but which experience teaches will be subjected to expansion tomorrow. While some business activity may be excluded from the coverage of these broad concepts now, it is unlikely that undesirable applications can be avoided in the future.

FINES

Chapter 22 of S. 1630, which governs the imposition of fines for criminal conduct, remains a threat to business despite a purported effort to meet two specific objections to its provisions: the massive increase in the amount of fines and the possibility of pyramiding fines on the basis of allegedly multiple violations of the law growing out of a single transaction. The pertinent provisions of S. 1630, unlike their predecessors in S. 1722, require consideration of the "size of the organization" and a limit on the aggregation of fines.

The changes are helpful to an extent, but fail to eliminate the cause for concern. S. 1630 still mandates a special fine structure applicable only to organizations. The fines for organizations are four to ten times higher than those for individuals and range up to $1,000,000. While Chapter 22 provides guidelines for the courts to use in imposing fines, their amount is likely to vary widely from jurisdiction to jurisdiction and judge to

judge, even for similarly situated companies, given the range of the amount which may be imposed.[3]

Moreover, the language of Section 2202(b) which is intended to limit the pyramiding of fines may prove ineffective. The statutory language contains an important caveat: fines may not be aggregated "for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage." The "separable or distinguishable" harm clause is capable of a broad reading. For instance, prosecutors could claim, as they have in civil actions enforcing the Federal Trade Commission Act, Consumer Product Safety Act, and similar regulatory statutes, that each alleged violation causes separate and distinguishable harm. Since the harm is separable, multiple fines are permissible. Even if the government does not ultimately prevail on such a claim, it may plausibly prosecute it in order to gain settlement leverage over a company. Thus, further consideration of this provision is in order.

ORDER OF CRIMINAL FORFEITURE

Section 2004, which provides for criminal forfeiture of property when a defendent is convicted of racketeering-related offenses, also poses a threat to business. While the provision is no doubt intended as an enforcement tool for use against organized crime, subsection (b) allows for protective orders that could devastate innocent businesses when read in conjunction with the broad, general definitions of racketeering activities in Chapter 18.

Section 2004(b) states that a court may "[a]t any time after the arrest of the defendent...enter a restraining order or injunction,...require a performance bond, and...take such action as is in the interest of justice, with respect to any property that may be subject to criminal forfeiture." A businessman erroneously indicted for racketeering could be plausibly subjected to and destroyed by the discretionary use of protective orders that limit the conduct of his business. Hence, consideration of ways to mitigate the potential for abuse of this section seems in order.

THE NATURE AND CONTENT OF THE CURRENT DEBATE OVER CRIMINAL CODE REFORM

The preceding examination of selected provisions of the "Criminal Code Reform Act of 1981" does not exhaust the potential

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[3] Proponents of the bill argue that S. 1630's provision for a Sentencing Commission will preclude abuse. While we disagree with their assessment, we do not argue the point here.

problems in the bill for either the business community or the general public. It serves to demonstrate, however, that provisions of the legislation are problematical. It also serves as a springboard for considering several important questions about the nature and content of the current debate over criminal code reform including whether the debate as currently conducted is serving the public interest.

The essence of an effort to recodify, revise and reform all federal criminal law at once is such that the legislation and surrounding controversy involve every aspect of federal criminal law from murder, robbery, and kidnapping to economic regulation and union violence to civil rights offenses and pornography. A recent article in Human Events noted that the all-inclusive nature of the debate "has led to a profusion of charges and countercharges concerning almost every imaginable subject in the legal lexicon."[4] While one might expect that the heated nature of the debate over criminal code reform would result in a thorough reassessment of the legislation, statements by proponents of S. 1630 suggest instead that whole bodies of criticism are possibly being dismissed without appropriate consideration.

Organizations ranging from the Moral Majority to the American Civil Liberties Union have criticized the concept as well as specific provisions of S. 1630. The efforts of some of these organizations drew a combined response from several of the principal sponsors of the legislation and the Department of Justice on November 4, 1981. The joint response concentrated on the "Moral Majority... and some other groups [which according to the responders] began a campaign against this important legislation...based on a 25-point memorandum that contains numerous false and misleading allegations reflecting varying degrees of lack of understanding of current Federal statutes, of existing case law, and of provisions of the bill."[5] More recently, in language that echoes both the joint Senate-Justice Department memorandum of November 4 and past and present Committee Reports, Attorney General William French Smith attacked the "mini-crusade" against Criminal Code reform by what he termed its "exceedingly misguided" conservative critics.[6] He stated that:

> They have relied upon mischaracterization, attenuated arguments, and even former provisions of the proposal that have been amended. Worst of all, they misconceive the significant strengthening law enforcement [sic] that

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4 "Dangerous New Criminal Code Reform," Human Events, February 27, 1982, at 172, col. 2.

5 "A Response to Recent Criticisms Disseminated by the Moral Majority, Inc. and Other Groups Concerning S. 1630, The Criminal Code Reform Act of 1981," November 4, 1981 at 1.

6 The Attorney General made his remarks to a meeting of the Conservative Political Action Conference in Washington, D.C.

> would flow from enactment of the code now. After more than a decade of debate, we can no longer afford nit-picking that delays reform of the antiquated hodge-podge of federal criminal law.

Putting aside for the moment the merits of these attacks and the fact that similarly spirited defenses of the Code against its liberal opponents have not been forthcoming, their tone, which has been echoed publicly and privately by Justice officials and Senate staffers, indicates that some careful self-examination is in order.

The attempt by proponents of the proposed Code to characterize all opposition to it as "misguided" and as emanating from a small group of hard-core opponents is itself misleading. The characterization is simply a vehicle for allowing the legislation's proponents to ignore the extent and merit of opposition to the bill. Stated somewhat differently, it permits S. 1630's supporters to dismiss criticism without fully considering its constructive value.

The attitude, if it in fact prevails, is unfortunate. Opposition to the present reform attempt is widespead and encompasses many noted groups and individuals with considerable background in the practice of criminal law. The new statutory language is necessarily general and, concomitantly, subject to varying interpretations. Hence, charges that a particular provision is subject to a broad reading and abuse should not in most instances be too readily dismissed as misguided, even if the proponents believe them to be inaccurate. Such criticisms should at least be regarded as an indication that aspects of the legislation are troublesome and capable of a similar reading by some future prosecutor, court, or jury.

Of course, not all interpretations have merit; but many do. Sponsors of the legislation should at least examine opponents' concerns with an open mind. While the U.S. is a nation of laws not men, men interpret and enforce the laws and have imaginatively stretched the law too often in the past for the possibility of potential abuse to be ignored. If doubt exists on this point, a review of the Justice Department's enforcement of the civil penalty and forfeiture provisions of the various regulatory statutes over the last five or six years should dispel it. The point is simply that the public interest will be better served if the concerns about criminal code reform are given their due and carefully examined rather than being characterized in a pejorative fashion and dismissed.

Finally, it is worth noting that reasonable minds might conclude that the nation can indeed "afford nit-picking that delays reform of the...federal criminal law." Given the importance of the issue, the mere fact that legislation has been debated for over a decade is not a sufficient ground to support its immediate enactment. Rather, the length of the debate indicates

that the legislation needs to be improved. Since it took over 200 years to assemble the U.S. criminal code, it is surely in the public interest that we not rush to judgment to completely revamp it in ten.

Prepared at the request of
The Heritage Foundation by
Nicholas E. Calio,
Litigation Counsel
Washington Legal Foundation

RADIO'S BAD BOY

Stern Takes His Final Bow; an Era of Outrage Is Ended

Controversial radio disc jockey Howard Stern departs for New York this month—leaving behind a reminder of his tempestuous year and a half in Washington: a new record album, *Fifty Ways to Rank Your Mother*.

In addition to Howard's endless repertoire of mother-insult jokes, the new album reflects the bad taste that allowed Stern to terrorize the airwaves with slurs against gays, feminists, God, and Prince George's County. One of Howard's swan songs is his "I Shot Ron Reagan," done in a John Hinckley voice, with background calls to actress Jodie Foster. The song ends with the refrain, "Little rich boys shouldn't make license plates."

Always objectionable, the 28-year-old disc jockey turned the radio market on its ear with his meteoric rise in the morning ratings. With a constant stream of irreverent put-downs, sexual innuendoes, and weather reports direct from God, Stern's show on DC 101 captured 40-year-olds "who had no business listening to REO Speedwagon," observes Steve Kingston, program director at rival WPGC.

A few weeks into his seventeen-month tenure at DC 101, Stern made radio history with a gay "dial-a-date" show that lit up studio phones with the wrath of Moral Majority types.

Tastewise, it was all downhill until Stern was forcibly removed from his microphone at the end of June. In one skit, *Family Feud* host Richard Dawson kissed a contestant with herpes. Stern created the new TV show *Hill Street Jews*. Stern lasciviously described his newswoman's breasts. His alter ego, "Out of the Closet Stern," minced about the airwaves almost every day. Ward Cleaver became a transvestite on one of Stern's nationally syndicated "Beaver Breaks," satirizing the old television show *Leave It to Beaver*. In one episode, Beaver was strip-searched by the PG County police.

On June 25, shortly after appearing on the July *Washingtonian* cover, Howard Stern vanished from the airwaves. A memo instructed DC-101 receptionists, "If anyone calls on the phone to ask where Stern is or what has happened to him, you are to reply that Howard is no longer on the air at DC-101." Callers were told that the station had no further comment, and more information could be obtained only from the station's attorneys.

A few days later, Stern was fired with a month left on his contract. Why did the station abruptly fire its morning moneymaker after spending $250,000 to promote Stern's sociopathic on-air personality? According to DC-101 program director Don Davis, Stern violated a directive of the radio station. Apparently incensed over what he saw as the pirating of his song "Elizabeth Taylor Thighs" and his "dial-a-date" concept, Stern made negative comments about disc jockeys in Detroit and Chicago. He also denigrated WMAL's Harden and Weaver.

Stern's lawyers say his firing was curiously timed—just after the latest Arbitron radio survey, in which Stern's ratings hit a new high. "They put themselves in a position where they could use Howard Stern's numbers through January 1983," says attorney Jeffrey Southmayd. DC 101's Davis dismisses the allegation, saying listener surveys are always being conducted.

Concerned that Stern's irreverence would corrupt their children, Maryland and Virginia PTA parents tried to pressure DC 101 into cleaning up Stern's act. One elementary school in Montgomery County refused to allow him to speak to a third-grade class. In Fairfax, a disgusted schoolteacher confiscated a youngster's pictures of the disc jockey. An outraged Prince George's politician sought to ban Stern's body and voice from the county.

Stern frequently instructed black callers to forgo their "slave" names and issued them new African-sounding names on the spot. One of his racial comments so incensed a black listener that he drove to the station to confront the disc jockey. The station management finally calmed the angry visitor by pointing out that Stern's throaty-voiced newswoman, Robin Quivers, was black. Last fall, the threats of several offended listeners were genuine enough to require the presence of bodyguards, Stern says.

But Stern has some fans who were upset over his untimely departure from DC-101. "I am sure that when he goes to New York, he will rank you for what happened," warned a listener.

Two weeks after Stern was taken off the air, he made the first of several guest appearances at other Washington rock stations. At rival WAVA, Stern twitted his former employers by calling up other disc jockeys who had been fired from DC-101.

Stern's shoes as Washington's morning rock king have been filled on DC-101 by the "Greaseman," an adrenaline-filled screamer from Jacksonville, Florida. The Greaseman, whose reputation in Jacksonville inspired the song "Ode to the Greaseman," alludes to nights of wine, women, and song in his home, the Grease-palace.

It will take a lot of smooth talking to match Howard Stern's outrageous success.

—LEE MICHAEL KATZ

Howard Stern's Album Cover
Leaving a Legacy of Controversy and High Ratings

IN THE MEDIA

Was It a Times (NY) Writer Who Fooled the Times (DC)?

Faces were red at the *Washington Times* early in July over a letter to the editor. The letter-writer pointed out the word "flack," used in an editorial, should be spelled "flak." In part, the letter read: "Like your editorials. Mostly. Even the ones that read like they're written by a refugee from Madison Avenue. You know the ones. Rarely have both subjects and predicates." The letter went on in this style for a while, and then came the signature: Quinn Crowninshield, Falls Church. "Quinn" and "Crowninshield," of course, are the two middle names of *Washington Post* executive editor Ben Bradlee's young son, born in the spring. *Times* editorial-page editor Anne Crutcher was out of town when the letter arrived, and an assistant did not catch the obvious hoax until the paper was on the street.

So who was responsible? Some suspect a certain columnist with the *New York Times*, who in the past has groused publicly about the use of the word "flack" for "flak," and who recently wrote a column deploring Madison Avenue-style writing. Want to confess, Bill Safire?

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON

MALCOLM RICHARD WILKEY
U. S. CIRCUIT JUDGE

21 Sept 82

Steve –

As per our phone conversation.

Hope it helps !

First Draft Corrected
File - Crim copy

Constitutional Question pp 13 et seq.

CONSTITUTIONAL ALTERNATIVES TO THE EXCLUSIONARY RULE

U.S. Circuit Judge Malcolm Richard Wilkey

South Texas School of Law Forum on the Exclusionary Rule

Houston, Texas, 23 September 1982

The timeliness of this forum could hardly be improved upon. Two weeks ago the President called for the adoption of a large scale exception to the exclusionary remedy, and the Senate Committee on the Judiciary published the print of its hearings on the exclusionary rule bills now before it. The demands to do something about this absurd, and uniquely American, rule of evidence which has such baleful consequences is rising sharply among the lay public, the Congress, the Executive Branch, and even the Supreme Court itself. A demand for action as wide and strong as this indicates not only that action should be taken, but that it will be taken, and that it will be upheld as constitutional.

In the Supreme Court the immediacy of the need to develop a workable alternative to the exclusionary remedy has grown more intense. After Chief Justice Burger's classic dissent in Bivens [1] in 1971, dissatisfaction with the exclusionary rule as a method of enforcing the constitutional protection of the Fourth Amendment has been reiterated in the opinions of Justices Stewart, White, Blackmun, Powell, and Rehnquist. In one opinion after another they have recognized the cost of this remedy and cut back on its applicability in diverse situations. The latest is U.S. v. Ross, [2] in which two of the Court's previous precedents were specificially reversed and the automobile exception to the warrant requirement was held to embrace the entire vehicle, all of its nooks, crannies, and separate containers therein.

It is true that the Court has cut back, limited, disparaged the efficacy of the rule, indicated that other methods of enforcing the Fourth Amendment might

be satisfactory, but has not let go of the rule completely. It is almost as if the High Court has hold of a Tar Baby and is waiting for someone to show it how to let go. There are ways to let go of the exclusionary rule and at the same time increase respect and support for the Fourth Amendment.

I. WHAT THE EXCLUSIONARY RULE HAS COST US

In my March 1982 monograph on "Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule," [3] I discussed at some length twelve costs of the exclusionary remedy. Without going into a detailed description of each, well-known to students in the criminal justice field, let me enumerate these twelve recognized costs to the American people and our system of justice:

Cost 1: "The criminal is to go free because the constable has blundered."[4]

Cost 2: Only the undeniably guilty benefit from the exclusionary rule, while innocent victims of illegal searches have neither protection nor remedy.

Cost 3: The exclusionary rule in any form vitiates all internal disciplinary efforts by law enforcement agencies.

Cost 4: The disposition of exclusionary rule issues constitutes an unnecessary and intolerable burden on the court system.

Cost 5: The exclusionary rule forces the Judiciary to perform the Executive's job of disciplining its employees.

Cost 6: The misplaced burden on the Judiciary deprives innocent defendants of due process.

Cost 7: The exclusionary rule encourages perjury by the police.

Cost 8: The exclusionary remedy makes hypocrites out of judges.

Cost 9: The high cost of applying the exclusionary rule causes the courts to expand the scope of search and seizure for all citizens.

Cost 10: The exclusionary rule is applied with no sense of proportion to the crime of the accused.

Cost 11: The exclusionary remedy is applied with no sense of proportion to the misconduct of the officer.

Cost 12: All of the above costs result inevitably in greatly diminished respect for the judicial process among lawyers and laymen alike.

These twelve costs are virtually undenied and undeniable. In one form or another each of these costs has been lamented by Justices of the Supreme Court itself, particularly snce the dissent of Chief Justice Burger in Bivens. The proponents of preserving the exclusionary remedy are forced to admit the existence of these high costs to the American people, and yet with a straight face they just assume that the only purported rationale of the rule outweighs these confessed costs. I can think of no other public policy, of no other legal doctrine, which has developed so many obvious disadvantages over such a long period of time, almost seventy years, and still remains with us. Surely it is the Great Irrationality in our system of justice.

The Great Irrationality, the exclusionary remedy which excludes but does not remedy, logically should never have been expected to do what its proponents tout it for. Ten years ago Judge John Gibbons of the United States Third Circuit published a very perceptive article[5] in which he analyzed, not by empirical data how the exclusionary remedy failed, but by the strict rules of logic why it never should have been expected to succeed in the first place. The mechanism of the criminal justice process — the time involved from investigation until final determinative appeal; the parcellation of responsibility among the investigating police, the prosecuting attorneys, and the courts; the difficulties of instructing police in the finest points of search and seizure law; the disagreement among courts on those same points — all mitigate agianst the application of the exclusionary remedy having any meaningful effect whatsoever on police discipline.

Not only does logical theory indicate that the remedy should not be expected to work, Chief Justice Burger and others have pointed out that from the very

nature of the rule such results are not susceptible to empirical proof. There is no way to measure whether the police do better after evidence is thrown out of court because of their errors, nor to measure their understanding of the fine rules of search and seizure law, nor their confusion at critical times because of the extremely technical nature of the rules, nor the resulting losses in arrests and detection of crime, nor the number of prosecutions which are dropped immediately after arrest because of the attorneys' judgment (good or bad) that the exclusionary remedy would bar the essential evidence. Dallin Oaks, who has made the most extensive and intensive study of the empirical data available, reached the ultimate conclusion that "as a device for directly deterring illegal searches and seizures by by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement directed at prosecution.[6] Perhaps the most damning indictment of the efficacy of the rule has come from the Supreme Court itself, which said in U.S. v. Janis: "No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situation in which it is now applied."[7] If you want to count heads on the High Court, Justice Blackmun, the writer, was joined by Chief Justice Burger and Justices White, Powell, and Rehnquist. Justices Brennan and Marshall dissented (as did Stewart); Justices Stevens and O'Connor arrived after Janis was argued.

II. WORKLOAD OF THE COURTS

Both as a citizen and as a judge I am acutely conscious that in innumerable cases "the criminal is to go free because the constable has blundered."[8] When I say

"innumerable cases," I remind you that we must count both the thousands of cases dismissed by judges in court and the other thousands which are never prosecuted because of the anticipated effect of the exclusionary remedy. Yet this cost to society should not cause us to ignore the tremendous impact that administering the rule has on the courts' sheer workload. A 1979 General Accounting Office study,[9] while drawing its data only from cases in selected United States attorneys' offices, yet inadvertently revealed the enormous extra work that the exclusionary remedy costs trial courts. Fourth Amendment suppression motions emerged as far and away the most frequent single issue in the trial of criminal cases. The GAO conclusions stated on page 1: "Thirty-three percent of the defendants who went to trial filed Fourth Amendment suppression motions."[10]

The critical point in the whole path of criminal justice is the trial; it is the heart of the burden on the court system. A huge percentage of criminal matters investigated never reach trial. It is the trial which consumes the labors of the judges in chambers as well as in the courtroom. It is in the contested case that the application of the exclusioanry rule may well decide the issue. The Fourth Amendment suppression motion is the most important and frequent single issue arising in criminal trials. In the GAO study 60.1 percent of all motions filed involved the Fourth Amendment. The next most numerous type motion, confessions, amounted to only 23.2 percent. Thus, there is no single legal issue which even comes close to Foruth Amendment search and seizure motions for importance in the trial of criminal cases.[11] Irrespective of whether the evidence is excluded or not, the burden on the trial court is undeniable.

As an appellate judge I can testify that it is not only the trial judges who are burdened with difficult exclusionary rule questions. Frequently the only appellate issue is the validity of the search. Whether the most damning evidence shall be

suppressed is an issue which not only is the most frequent but also generates the most labor in the appellate courts. For example, the recent Supreme Court case of U.S. v. Ross,[12] generated in the D.C. Circuit five separate opinions in rendering the en banc decision, after two opinions written by the panel. The Supreme Court, recognizing the highly unsatisfactory state of its own law on search and seizure, devoted fifty pages to its five opinions in the same case, in which it reversed two of its most recent search and seizure cases.

The Supreme court really hasn't cleaned up the mess of search and seizure law to the extent that it can take a holiday from deciding these ticklish issues. In the current term starting in October 1982 eight of twenty-three criminal cases already granted certiorari involve the Fourth Amendment and the exclusionary rule. Compare this eight out of twenty-three statistic with the GAO statistic that thirty-three percent of all defendants going to trial raise Fourth Amendment suppression motions. If any participant later in this forum tries to tell you that the exclusionary rule is really not very important in criminal law and has little impact on the system of justice, you may judge the accuracy of his other remarks by his attempted distortion of the facts re the burden thrust on the entire court system, from the trial court to the Supreme Court, by the exclusionary rule.

IV. VIABLE LEGISLATIVE AND JUDICIAL ALTERNATIVES TO THE EXCLUSIONARY RULE

As we can see by the above, our nearly seventy years of experience with the exclusionary rule have produced some astonishing results and attitudes. To my mind one of the most astounding and incomprehensible attitudes on the part of the proponents of the exclusionary rule is their blithe assumption that there are really no alternatives to employing the exclusionary remedy. No alternatives? No alternatives to a system of deterrence which has never been proved to deter? No alternatives to a system of deterrence which has such admittedly horrible effects

disciplining Executive Branch employees entirely by judicial action? No alternatives to a system which frees the admitted guilty and never compensates the innocent victims of illegal searches? No alternatives, when no other civilized country in the world protects its citizens against illegal searches and seizures by the mandatory suppression of material evidence?

Most emphatically I say there are several alternative choices for enforcing the Fourth Amendment protection against unreasonable searches and seizures. To enumerate: The first and most logical alternative would be to adopt a system under which the Executive Branch disciplines its own people. While the judiciary may ultimately have the responsibility for implementing all constitutional protections, this does not mean that the judiciary must intervene in every single instance of an alleged violation, as happens with the exculsionary rule as the sole method of enforcing the Fourth Amendment. While individual law enforcement agencies may be too close to their own people always to discipline them effectively, yet this does not preclude the setting up of an overall disciplinary board or agency in the Executive Branch, where the alleged misdeeds of enforcement officials can be investigated, tried, and punished appropriately — without any impact on the trial of the original accused for his crime.[13] [14]

Second, surely a civil tort remedy can be created, under the Federal Tort Claims Act or elsewhere, to give victims of searches and seizures a claim remedy against erring police officers. Under the present exclusionary rule no one is compensated in any way for a constitutional violation, unless he is actually guilty of possessing incriminating material objects and is successful in having them suppressed. If the search turns up nothing incriminating, no matter how outrageous the violation, the victim of the search has no remedy whatsoever against the government.

The above two remedies, in general outline, are the remedies usually relied upon in other countries in the world with judicial systems similar to ours — as in England, Israel, the British Commonwealth nations — to discipline their law enforcement personnel and to protect the citizenry against the illegal searches and seizures. There is no reason why similar remedies could not work in the United States of America. The existence of viable alternative remedies to enforce the Fourth Amendment would make totally unnecessary the illogical exclusionary rule, as Chief Justice Burger advocated in his Bivens dissent.

I have suggested a third method of enforcement which, even in the absence of any congressional legislation on the matter, could be implemented by our judicial system to enforce the Fourth Amendment in a much more logical fashion. There could be a mini-tirial of the alleged offending officer after the trial of the original accused for his substantive crime.[14-15] If a motion charging the officer with an illegal search were made, the trial judge would reserve judgment on that extraneous matter until the guilt or innocence of the accused had been established. The evidence seized would come in, for the officer's conduct is totally irrelevant to the question of whether the narcotics, the unlicensed gun, or the contraband were found in the possession of the accused, i.e., irrelevant to the guilt of the defendant.[16-17]

The material evidence would be admitted, though, only on condition that the conduct of the officer be appraised later. After subsequent judicial inquiry into the officer's conduct, if the officer overstepped the bounds, the trial judge would then inform the agency that the conviction of the accused would stand only if proportional disciplinary measures were taken against the officer and it was so reported to the court within a given time. But, if the agency did not discipline the officer sufficiently to act as a deterrent to not only his but his colleagues' future

misconduct of this type, then the motion of the defense to exclude the seized evidence would be granted under the present exclusionary rule. The result in the usual case would be insufficient evidence to sustain the conviction. Of course, if the trial judge found that the officer's conduct was well within Fourth Amendment standards, then there would be no exclusion of the evidence and no required punishment of the officer.

This, I submit, would form an effective and rational deterrent to law enforcement officials' violations of the Fourth Amendment standards of unreasonable searches and seizures. It would result in freeing the criminal only if the law enforcement agency were recalcitrant and refused to punish its erring officer. Assuming that the law enforcement agency took disciplinary action, this method would not free the obviously guilty, but instead would result in the proportionate punishment of the erring officer while the obviously guilty also received his just deserts. It is my belief that if a United States district court inaugurated a system of required investigation and punishment of alleged Fourth Amendment violators — separate and distinct from the trial and conviction or acquittal of the original accused — the Supreme Court ultimately would sustain this as a far more effective and logical method of enforcing the Fourth Amendment.

IV. IMPLEMENTATION OF THE VIABLE ALTERNATIVES

The greatest practical obstacle to substituting any intelligent and more effective alternative for the exclusionary remedy, or outright repealing it or modifying it, is the sheer mystique which has grown to surround the rule. The most articulate supporters of the rule have long since appeared to attach far more importance to the rule itself than to the constitutional prohibition for which it is designed as a purely ancillary support. They now argue that the rule is a solemn

constitutional mandate, and I have no doubt as the years go on that they will claim that it is Divinely Inspired. Recently I have begun to anticipate that some academician would come up with a third stone tablet, which Moses carelessly dropped on his way down from Mt. Sinai, on which the exclusionary rule would be inscribed.

That is why the next, the last, and the major portion of this paper examines in detail the total absence of any constitutional requirement for the exclusionary remedy. It was a method chosen by the Court some seventy years ago in the absence of any apparently more effective means; a tool, nothing more; a tool which can be discarded when better tools are available, as they clearly are now.

Largely because of the rule's mystique, largely because of the mistaken notices that there are no viable alternatives, getting any effective legislation through both Houses of Congress will be difficult, as Senator Thurmond, Chairman of the Judiciary Committee, has frankly admitted. Somehow the supporters of the rule have created the illusion that if this particular rule of evidence is changed, the police in America will run wild. Why this should be true, when the police in no other civilized country in the world are governed by the absurd exclusionary rule — and they don't run wild in England, Canada, Germany, etc. — has never been satisfactorily explained. Even if for reasons which on analysis appear silly and unfounded, the rule's supporters are entrenched, and we might as well recognize the fact.

That is why I have long believed that the path to a repeal of the exclusionary rule lies in explaining that our overall objective must be to enforce the Fourth Amendment; no one is advocating the repeal of the Fourth Amendment. The question is simply what means and methods are most effective in protecting the American public from unreasonable searches and seizures, and, at the same time,

allowing the truly guilty to be punished. If enough people can be convinced that there are effective alternatives to the exclusionary remedy, which will be much more truly effective in controlling the police, in reducing the number of illegal searches, in enforcing the Fourth Amendment, and at the same time protecting the public against criminals, then we can get somewhere.

I would hope that the Congress in its legislative process would come up with three things: (1) a system of disciplining the police in the federal system, (2) a civil remedy against the Government for all victims of illegal searches, and (3) repeal of the exclusionary rule as therefore unnecessary in enforcing the Fourth Amendment. If outright repeal is not politically possible, then I would be very happy to see the first two measures alone enacted.

I say this because I have confidence, based on analysis of the attitudes of the individual Justices on the Supreme Court, that once the alternate effective enforcement measures, such as effective police discipline and a civil tort remedy, are in place, the Supreme Court itself will declare the exclusionary rule is unnecessary and, because of its manifold vices, abolish it.

Turning back to the legislative possibilities of disciplining the federal police and creating a civil tort remedy for victims, why should these two measures not be possible? Who can be against more effective discipline of federal law enforcement officers, brought about by the creation of an overall multi-service disciplinary board, before which grievances against law enforcement agents' conduct can be brought? Who can be against the creation of a civil remedy, meaningful because allowed to be brought against the Government with its larger purse, when at the present time the exclusionary rule offers nothing in the way of recompense to innocent victims of illegal searches? Surely those of the liberal spectrum in our politics, mostly those who support the exculsionary rule, cannot be against

additional measures to enforce the Fourth Amendment.

If any supporters of the exclusionary rule oppose such additional measures, they run the risk of revealing themselves as (1) more in love with the exclusionary rule than with the constitutional protection of the Bill of Rights, or (2) they really think of criminal justice as a game in which the criminal ought to win if he scores on some technical point.

Implementation of my mini-trial after the principal criminal case could be done by legislation, but I have more hope that it will be inaugurated by some courageous district judge. The lower federal courts are not powerless to show the way to the Supreme Court; if the lower courts have a rational approach, they should have some confidence that the High Court will sustain them. The Fifth Circuit has stepped out with its "good faith exception," yet to be tested in the Supreme Court. I would urge that for a trial court to admit the evidence seized by an alleged illegal search during the main trial, and then conduct an examination into the legality of the search and the conduct of the officer after the conviction, with punishment to be administered to the officer if he erred, or, alternatively, the conviction to be set aside, would be a very rational approach for a trial court to take to enforce the Fourth Amendment.

I think the Supreme Court would seize upon this as a viable alternative to the exclusionary rule and validate any conviction so obtained. We all know that there are many cases in which the trial court reserves judgment on the legality of the search until after the jury's verdict. What I suggest is really only one additional step: If the trial court finds the search illegal, then instead of automatically setting aside the conviction, the trial court should offer the agency the alternative of proportional punishment of the officer for his offense against the Fourth Amendment, if the agency wants the conviction to stand. If the officer is punished

appropriately, in the court's judgment, then the mandate of the Fourth Amendment will have been vindicated fully. Surely the Supreme Court would sustain this, and surely law enforcement officers would get the word on what is legal and illegal in searches and seizures much more quickly than they do now by final decrees some five years after the event.

V. IS THE EXCLUSIONARY REMEDY CONSTITUTIONALLY MANDATED?

In the last year or two supporters of the exclusionary rule remedy have been shifting ground rather rapidly in two directions. First, there is a shift from emphasizing deterrence as the rational; we are seeing a rather strenuous effort to revive the now abandoned and discredited previous rationales of judicial integrity and protection of privacy. The difficulty with this attempted shift is that the Supreme Court itself repeatedly and without exception since 1965 has said that deterrence is the only rationale of the exclusionary rule. The second shift by the supporters of the exclusionary remedy is from the attempt to establish that deterrence actually results from the application of the rule to an effort to claim that the exclusionary remedy is constitutionally required and that the Congress therefore has no power to change it. The difficulty with this particular gambit is that the origin of the rule in the Supreme Court was a deliberate choice of remedies to enforce the Fourth Amendment, that there has never been a holding by the Supreme Court that the rule is constitutionally required, that there have been specific statements by several Justices that it is not constitutionally required, and that, if the rationale supporting the rule is deterrence, this is a pragmatic doctrine which embraces no constitutional requirement whatsoever.

I suspect that these two shifts are not unrelated. If deterrence is demonstrably not working, or logically can never be shown to work, then other supporting rationales must be found. If the deterrence theory is obviously

pragmatic, not constitutional, then other rationales must be found if the constitutional embediment claim is to be sustained. It is probably easier to assert that the preservation of judicial integrity is constitutionally mandated, or that somewhere in the Constitution there is a right to privacy, then it is to assert that a remedy like the required exclusion of evidence (never applied during the first 125 years of the Constitution) is somewhere found there.

An illustration of the shift toward a constitutionally-based claim and a shift toward the judicial integrity and the right to privacy rationales is found, for example, in the writings of Professor Yale Kamisar, a leading defender of the exclusionary rule. In 34 double column pages in Judicature in November 1978 and February 1979 Professor Kamisar nowhere claimed that the exclusionary remedy was constitutionally mandated. As I pointed out in my reply article in the same publication, his argument was simply that we have a choice of methods to enforce the ban against unreasonable searches and seizures and the exclusionary rule is the best choice. Now, however, we are hearing noises from Professor Kamisar that the exclusionary remedy is indeed compelled by the Constitution, although the only Supreme Court authority he has cited for this in testimony before the Senate and elsewhere is Mapp v. Ohio,[16] a case I shall deal with later.

A. The deterrence rationale is a totally pragmatic doctrine.

In Linkletter v. Walker Justice Clark wrote for the Court unequivocably: "All of the cases since Wolf [1949] requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action."[17] If deterrence is the rationale — and the Supreme Court has said many times since Wolf that it is — then this is a purely pragmatic reason for the exclusionary remedy, not a constitutional one. A pragmatic doctrine rests on results obtained. If there are no visible results obtained, the doctrine should not be, and has not been,

applied.[18] If, on an overall evaluation of the 70-year history of the rule, deterrence does not work, then the reason for the rule is no longer valid, and there is nothing in the Constitution to force the retention of this particular remedy for enforcement of the Fourth Amendment. Cessat ratione, cessat lex.

Is there any constitionally guaranteed right which can be abandoned in any particular case, if desirable results do not look likely to be achieved? Surely not. While constitutional rights have limitations, and sometimes there are conflicting constitutional rights, yet I am not aware of any constitutional right which is applied or not applied depending on the Court's evaluation of the relative social gains and costs resulting.

B. The Court has placed limitations on the remedy's applicability by balancing its probable effectiveness versus its recognized social costs.

Repeatedly, especially in recent years, the Supreme Court has declined to apply the exclusionary rule to bar evidence obtained by an illegal search and seizure when the recognized social costs of applying the rule were arguably greater than any visible effective deterrence which might be achieved.

1. Retroactivity

For example, we have already mentioned the Court's refusal to apply the rule retroactively. In United States v. Johnson,[19] the most recent case, the Court held that no new Fourth Amendment rule will be applied retroactively except to cases pending on direct appeal. The Court fashioned a particularly limited rule for exclusionary remedy cases, twice citing the existence of the remedy as a reason not to give new Fourth Amendment holdings full retroactive effect.[20] While the Court in Johnson split five to four, with Justice Blackmun writing the majority for himself, Justices Brennan, Marshall, Powell, and Stevens, with dissent by Justices White, Chief Justice Burger, Justices Rehnquist, and O'Connor, yet since the

dissent urged the application of the earlier case of United States v. Peltier,[21] the entire Court in 1982 thus agreed that exclusionary remedy cases necessitate especially limited retroactive treatment.

In Peltier the Court (Justice Rehnquist writing, with Chief Justice Burger, Justices White, Black, Powell) held that the policies underlying the exclusionary remedy do not require retroactive application — new rules need not be applied to conduct which occurred before the rules were announced.[22]

In Williams v. United States[23] Justice White stated for the Court (Chief Justice Burger, Justices Stewart, Blackmun) that "[t]he purpose of the exclusionary rule fashioned by this Court as a Fourth Amendment mechanism" is not furthered by retroactive application.[24] Justices Brennan and Black concurred in the result, Justices Harlan and Marshall concurred and dissented. Many other holdings of the Supreme Court refusing to apply the exclusionary remedy retroactively clearly show that the remedy itself is of less than constitutional stature.[25]

2. "Attenuation of the Taint"

The Supreme Court cases admitting evidence in spite of the fact that it was illegally obtained, but because there has been an "attenuation of the taint," illustrate the lack of any constitutional requirement in the exclusionary rule. In United States v. Ceccolini[26] the Court (Justice Rehnquist writing, joined by Justices Stewart, White Powell, and Stevens, with Chief Justice Burger concurring in the judgment) held that the exclusionary rule does not apply to voluntarily offered live witness testimony. In so doing the Court discussed its previous holding in Brown v. Illinois[27] and stated that Brown holds that "[e]ven in situations where the exclusionary rule is plainly applicable, [there is no per se] rule that would make inadmissible any evidence . . . which somehow came to light through a chain of causation that began with an illegal arrest."[28]

In Brown v. Illinois, supra, which holds as the Supreme Court opinion in Ceccolini summarized it, Justice Blackmun's opinion for the Court was joined by Chief Justice Burger, Justices Douglas, Brennan, Stewart, Marshall, Powell, and Rehnquist. In addition, Justices Powell and Rehnquist, in a separate concurring opinion, differentiated clearly the Fourth Amendment violation for the application of the exclusionary rule, stating that the Court's holding "recognizes the competing considerations involved in a determination to exclude evidence after finding that official possession of that evidence was to some degree caused by a violation of the Fourth Amendment."[27] In short, a constitutional violation of the Fourth Amendment need not trigger application of the judicially created exclusionary rule. "All Fourth Amendment violations are, by constitutional definition, 'unreasonable.' There are, however, significant practical differences that distinguish among violations, differences that measurably assist in identifying the kinds of cases in which disqualifying the evidence is likely to serve the deterrent purposes of the exclusionary rule."[28]

3. Impeachment

Impeachment of testimony is another area in which the Supreme Court has held the exclusionary rule inapplicable, thus demonstrating its lack of constitutional mandate. In United States v. Havens[29] the Court (Justices White writing, Chief Justice Burger, Justices Blackmun, Powell, and Rehnquist) held that a defendant's statements on cross-examination are subject to impeachment by "illegally obtained" evidence, "inadmissible on the Government's direct case . . . ."[30] Havens follows the precedent of Justice Frankfurter's opinion in Walder v. United States.[31]

4. Good faith exception

In Franks v. Delaware[32] the Court held that a search warrant based on

a false statement may not be invalidated if the statements are made in good faith; to require invalidation the false statements must be made knowingly and intentionally or with reckless disregard for the truth.[33] Justice Blackmun, writing for himself, Justices Brennan, Stewart, White, Marshall, Powell, and Stevens, noted the relevance of the fact that the "exclusionary rule, created in Weeks . . . is not a personal constitutional right, but only a judicially-created remedy extended where its benefit as a deterrent promises to outweigh the societal costs of its use . . . ."[34]

If, in 1978, seven members of the Court joined in a statement that the "exclusionary rule . . . is not a personal constitutional right, but only a judicially-created remedy extended where its benefit as a deterrent promises to outweigh the societal costs of its use . . . .," I submit that the exclusionary rule indeed is not constitutionally mandated. When we further consider that the other two Justices in Franks, who dissented on other grounds, were Chief Justice Burger and Justice Rehnquist, we begin to get the picture that there are very few voices on the present Court which would assert that the exclusionary remedy is an unchangeable constitutional requirement.

The following year the High Court in Michigan v. DeFillippo[35] in an opinion by Chief Justice Burger, joined by Justices Stewart, White, Blackmun, Powell, and Rehnquist, held that the fruits of an "unreasonable" arrest need not be excluded if officers had a good faith belief as to the constitutionality of the statute which authorized their action.[36]

5. Standing

In Rakas v. Illinois[37] the Court (Justices Rehnquist writing for Chief Justice Burger, Justices Stewart, Powell, and Blackmun) held that a defendant may not exclude evidence derived from an allegedly illegal search of a third person's property, citing the rule of United States v. Calandra[38] that "the application of the

[exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[39] While the Court in Rakas disclaimed reliance on "standing" analysis, yet, as the cases cited by the Court show, this same type of issue had previously been analyzed in terms of standing.[40]

In 1980 two cases, Rawlings v. Kentucky[41] and United States v. Salvucci[42] applied Rakas v. Illinois. Salvucci holds that defendants charged with crimes of possession do not, simply because of the nature of the offense charged, have "automatic standing" to challenge the admission of seized evidence. The exclusionary rule, as "one form of remedy afforded for Fourth Amendment violations, is properly available only to those whose Fourth Amendment privacy rights have been directly violated."[43] In Salvucci Rehnquist wrote for Chief Justice Burger, Justices Stewart, White, Blackmun, Powell, and Stevens, while only Justices Brennan and Marshall dissented.

6. Application of the exclusionary remedy to proceedings other than the criminal trial

Surely true constitutional guarantees should be applied in all judicial proceedings, not just in some where they are thought to achieve certain desired objectives. Yet, the High Court has repeatedly refused to apply the exclusionary rule to proceedings other than the criminal trial, thus giving the clear implication that the rule itself is not of any constitutional dimension.

In United States v. Calandra[44] the Court, speaking through Justice Powell, with Chief Justice Burger and Justices Stewart, White, Blackmun, and Rehnquist concurring, held that the exclusionary rule may not be invoked to exclude evidence before a grand jury. The grand jury is, of course, part of the criminal process. Justice Powell's opinion describes the nature of the rule as "a judicially-created remedy designed to safeguard Fourth Amendment rights generally through