Continued from previous folder

its deterrent effect, rather than a personal constitutional right of the party aggrieved."[44]

In Stone v. Powell[45] the Court (Justice Powell writing, joined by Chief Justice Burger, Justices Stewart, Blackmun, Rehnquist, and Stevens) held that exclusionary rule issues may not be relitigated on habeas corpus unless the trial court failed to give defendant a "full and fair opportunity" to present its exclusionary rule claims. Again, the Court describes the nature of the exclusionary rule as "a judicially-created means of effectuating the rights secured by the Fourth Amendment."[46] The Court added: "Post- Mapp decisions have established that the rule is not a personal constitutional right."[47]

In United States v. Janis[48] Justice Blackmun, joined by Chief Justice Burger, Justices White, Powell, and Rehnquist, held that there should be no "extension of the judicially-created exclusionary rule" to prevent admissibility of evidence seized by state law enforcement officers into civil proceedings involving the United States.[49]

Thus we see that six Justices on the present Court -- Chief Justice Burger, Justices White, Blackmun, Powell, Rehnquist, and Stevens have consistently declined to extend the exclusionary rule to proceedings other than the criminal trial itself, thus impliedly holding that the rule itself is not constitutionally mandated. Only Justices Brennan and Marshall have consistently dissented from these holdings, although Justice White did dissent on other grounds, not inconsistent with the majority's position on this particular point, in Stone v. Powell.

In all five of the other categories of cases examined above, it is fair to say that these same six Justices have, with occasional exceptions, written or joined in opinions indicating strongly and clearly that the exclusionary rule cannot be

constitutionally mandated, otherwise the holding and the result reached in the particular cases could not have been reached. The cases examined in the six sections above cover the period 1971 to the present date. Since the decisions in these cases, Justice O'Connor, who indicated at her confirmation hearings reservations about the application of the exclusionary rule, has joined the Court.

A balancing of a doctrine's probable effectiveness versus its recognized social costs is not the hallmark of a constitutional right. Compare, for example, the First Amendment right of free speech. Free speech is generally thought to be only limited by the existence of a clear and present danger of violent action, or, in the obscenity cases, suppression is only justified if the alleged artistic work is totally devoid of any social value. Ask yourself, could there possibly be a balancing of the comparative merit of any publication versus the mischief, unhappiness, and general unrest it might cause? No, we go on the assumption that under the First Amendment what is one man's dogma is another man's heresy. Even when national defense is involved, as in the Pentagon Papers case, publication is not restrained.[50] Have we ever denied a criminal defendant his choice of counsel on the grounds that in the court's judgment he would really be better off with another one? The Sixth Amendment forbits such abridgement of the right to counsel.

It should be obvious to all that the way the Supreme Court has treated the exclusionary remedy for Fourth Amendment violations, applying it when there was some arguable deterrence of future violations to be obtained and not applying it when deterrence was unlikely, indicates beyond question that the Supreme Court itself does not regard the exclusionary remedy as constitutionally mandated.

~~by the Constitution.~~ It is clear from the way the rule originated in Weeks v. United States[51] that the Court was simply choosing a method of enforcement of the Fourth Amendment. In his memoirs Justice Douglas confirmed this, saying that at the time it chose the exclusionary rule the Court confronted the choice of three possible methods, and that he believed it chose correctly.[52] The Constitution prohibits unreasonable searches and seizures, it may mandate a remedy to enforce that prohibition, but nowhere does the Constitution mandate any particular remedy to the exclusion of all other possible remedies.

~~I think~~ It was either John Marshall in McCulloch v. Maryland,[52] or Alexander Hamilton, speaking of the powers implied in the Constitution, who used the example that if a man were commanded to cut down a tree, it could be reasonably implied that he was authorized to use an ax to do it. Similarly, if the Constitution prohibits unreasonable searches and seizures, it can reasonably be implied that Congress may pass legislation to enforce this provision, or, in the absence of legislation by Congress, the Supreme Court may select a method of enforcement. But if the Supreme Court in 1820 had found an implied power to use an ax, there is no reason that in 1982 the man could not use a chain saw. Similarly, if the Supreme Court seventy years ago chose the exclusionary remedy as a method of enforcement, there is no reason why today it or the legislature could not choose another method.

Implementing constitutional provisions is by no means reserved for the judiciary. Due to the broad character of our Constitution the details of enforcement of constitutional rights are largely left to legislation. The Constitution states expressly that "all legislative powers herein granted shall be vested in the Congress of the United States."[53] No legislative power, whatever, has been left to the Supreme Court.

Nature abhors a vacuum, and constitutional provisions, particularly the

protections of the Bill of Rights, cannot be left without enforcement. In fact, it is usually only when the legislative branch is seen to have failed in implementing a constitutional provision that the judiciary feels compelled to take action. However, where the Supreme Court or a lower federal court has supplied a remedy in a case where no statutory remedy for enforcement has been provided by Congress, that remedy can prevail only until the Congress, by appropriate legislation, provides another remedy and thus occupies the field. Two examples illustrate both Supreme Court action to fill a gap and Supreme Court deference to legislative action.

In dealing with the privilege against self-incrimination and immunity the Supreme Court originally stated that the only effective remedy to vindicate Fifth Amendment rights of persons compelled to testify would be immunity provisions which "afford absolute immunity against future prosecution for the offense to which the question relates."[54] In 1970 Congress enacted a statute which did not afford absolute immunity from future prosecution, but which did provide immunity from the use of compelled testimony and evidence derived therefrom.[55] Although not quite meeting the standard of absolute immunity which had originally been selected by the Supreme Court as a method of protection under the Fifth Amendment, this statutory provision was upheld by the Supreme Court in Kastigar v. United States.[56]

Similarly, in Wade v. United States, to enforce the Sixth Amendment right to counsel, the Supreme Court announced an exclusionary rule applying to uncounselled identifications. While doing this, the Court acknowledged that legislative or administrative strictures could cure the defect and make it unnecessary to use suppression of testimony to enforce desired police conduct.[57]

The same logic applies when the remedy is the exclusionary rule to enforce the Fourth Amendment. In Wolf v. Colorado[57] the Supreme Court recognized that

the exclusionary rule is not mandated by the Fourth Amendment but is a judicially created rule which can be abolished by Congress. Justice Frankfurter, writing for the Court, held:

> It [the exclusionary rule] was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision is a matter of judicial implication.[57]

Likewise, Justice Black, another recognized civil libertarian, in a concurring opinion noted that the Fourth Amendment does not bar the use of evidence unlawfully obtained, and that Congress has power to legislate in this field. Justice Black stated:

> I agree . . . that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.[58]

D. The Sole Decision From Which Proponents of the Rule Attempt to Derive a Constitutional Requirement.

While no Supreme Court decision has ever held that the exclusionary remedy itself is constitutionally required, and while the Court itself in Wolf v. Colorado squarely held in the opinion by Justice Frankfurter that it was not, and while various individual Justices (totalling at this time a majority of the present Court) have stated or implied repeatedly that the exclusionary rule is not mandated by the Constitution and is only one of several possible methods to enforce the Fourth Amendment, yet in their desperation proponents of the rule have fastened upon the 21-year-old case of Mapp v. Ohio[69] as so holding. It does not.

Even if the language of Justice Clark's plurality opinion for four Justices is read to mean everything that some proponents of the rule claim that it does, yet Mapp as a Supreme Court holding should appeal to only those supporters of the rule who don't know how to count Justices' votes. While Justice Black joined with Justice Clark's group of four in voting for the disposition of the case, Justice Black

plainly stated:

> The Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures.[65]

The four dissenters, led by Justice Frankfurter, of course agreed with this view as to the nonconstitutional character of the exclusionary rule. Thus in Mapp there are five Justices of the Supreme Court stating that the exclusionary remedy is only a chosen method of enforcing the Fourth Amendment, and no more. How anyone can derive from this that Mapp "holds" that the exclusionary rule is part and parcel of the Constitution is beyond me.

I respectfully submit that even the plurality opinion of Clark and the other three Justices does not support any argument for a constitutional requirement of the exclusionary rule. In contrast to previous exclusionary rule cases, Mapp does not pretend to rest on the exercise of the Supreme Court's supervisory power, because while the Supreme Court does have that power over the lower federal courts, it certainly does not have such power over the states. Consistently, the rationale of deterrence is absent from Mapp. Mapp was the last case that relied on protecting the privacy of the individual as a rationale for the exclusionary rule, and it was this privacy rational that justified applying the rule to the states.[66] Justice Clark very plainly stated:

> Since the Fourth Amendment right of privacy has been declared enforceable against the states through the due process clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.[67]

Justice Clark also said that the exclusionary rule "is an essential part of both the Fourth and Fourteenth Amendment."[68]

I read this language simply to say that the states, by virtue of the Fourteenth Amendment, are obligated to protect the right of privacy just as is the Federal

Government, and that the exclusionary rule, if it is reasonable in the federal system, is equally reasonable as a method of enforcing the Fourth (Fourteenth) Amendment in the states. If the exclusionary rule is an essential part of the Amendments, it is simply because the Supreme Court has chosen this method of enforcement. This and nothing more. The language of Justice Clark in Mapp adds nothing to the argument that the rule itself, as distinguished from some method of implementing the Fourth Amendment, is constitutionally required. This is clear when we recall it was precisely in Mapp that Justice Black, whose fifth vote was necessary to the decision, said in his concurrence that no provision expressly precluding the use of illegally seized evidence could be inferred from the basic protection against unreasonable searches and seizures. Since the result reached in Mapp must rest, not only on Justice Clark's opinion but also on Justice Black's opinion, it is impossible to argue that the exclusionary rule is now constitutionally mandated by Mapp, no matter how Clark's opinion is interpreted.

E. Many Justices (including a majority on the present Supreme Court) have stated, or joined in holdings, that the exclusionary remedy is NOT constitutionally mandated.

Justice Frankfurter's powerful and unequivocal statement for the Court in Wolf v. Colorado, "It [the exclusionary remedy] was not derived from the explicit requirements of the Fourth Amendment; . . ." but rather was "a matter of judicial implication,"[69] was one of many similar expressions by Justice Frankfurter.

Justice Black, who concurred in Wolf in a separate opinion (see Part C. above) was even more clear and explicit in Berger v. New York:

> Had the framers of the [Fourth] Amendment desired to prohibit the use in court of evidence secured by an unreasonable search or seizure, they would have used plain, appropriate language to do so, just as they did in prohibiting the use of enforced self-incriminating evidence in the Fifth Amendment. Since the Fourth Amendment contains no language forbidding the use of such evidence, I think there

4 page insert p. 27

It is obvious that if Justice Harlan could speak of overruling Mapp and Kerr, he did not view the exclusionary rule as constitutionally mandated.

Even Justices ~~officially~~ often considered as supportive of the rule, such as Justice Stewart, did not ascribe a constitutional requirement to the rule, even in cases applying it. In Elkins v. United States, though extending the exclusionary rule to prohibit admission of evidence seized illegally by state officers into federal court, Justice Stewart acknowledged that "[w]hat is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts."[72] (FOOTNOTE: 364 U.S. 206, ___ (1960).) ~~I.e., not the Fourth Amendment itself.~~ Later, in ~~Lefkowitz~~ Lee v. Florida, although applying the exclusionary rule there, Justice Stewart describes the rule as "judicially devised."[73] (FOOTNOTE: 392 U.S. 378, 385 (1968).)

Turning from Justices who have left the Court to those now composing the nine, Chief Justice Burger, in his renowned dissent in Bivens v. Six Unknown Named Agents, makes clear that the exclusionary rule is merely a judicially-created remedy: "[T]he exclusionary rule does not ineluctably flow from a desire to insure the Government plays the 'game' according to the rules. If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule."[74] (FOOTNOTE: 403 U.S. 338, 414 (1971) (dissenting opinion).)

Justice Rehnquist, dissenting in Robbins v. California,[75] called upon the Court to abolish the exclusionary rule, citing his dissent (FOOTNOTE for Robbins v. California: 49 U.S.L.W. 4904, 4910 (1981).)

California v.
in Minjares. In Minjares Justice Rehnquist and Chief Justice Burger had argued that the Court should reevaluate the exclusionary rule.[76] (FOOTNOTE: 443 U.S. 916 (1979).) Justice Rehnquist's opinions for the Court in United States v. Peltier, supra, United States v. Ceccolini, supra, Michigan v. Tucker,[77] (FOOTNOTE: 417 U.S. 433, 446-47 (1974).) Rakas v. Illinois, supra, and United States v. Salvucci, supra, all definitely in applied, from the results reached and the rationale in those required
cases, that the/constitutional protection of the Fourth Amendment is one thing but the method of enforcement, the exclusionary ~~rule~~ remedy, is yet another.

Perhaps the clearest distinction drawn by Justice Rehnquist between the requirement of the Constitution and the superimposed exclusionary rule was in Scott v. United States[78] (FOOTNOTE: 436 U.S. 128 (1978).) in which the exclusionary rule was not applied but the analysis addressed the legality of the search. Approaching the distinction between the constitutional prohibition ~~against unreasonable searches~~ and the exclusionary ~~rule to enforce the Amendment~~ remedy, from an examination of the illegal search itself rather than the application of the rule, Justice Rehnquist for the Court pointed out that one should distinguish "what is necessary to establish a . . . constitutional violation and what is necessary to support a suppression remedy once a violation has been established. In view of the deterrent purposes of the exclusionary rule, consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate after a . . . constitutional violation has been established. But . . . [s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."[79]

(FOOTNOTE: Id. at 135-37.) In other words, objective criteria alone are to be used to evaluate whether the search was illegal or not, but subjective criteria might be employed to evaluate whether the exclusionary remedy was to be applied in this particular case; i.e., the determination of an illegal search is by unconstitutionally fixed principles, but the exclusionary rule application is optional. Joining Justice Rehnquist in this important statement of distinction between the Amendment and its enforcing tool were Chief Justice Burger, Justices Stewart, White, Blackmun, Powell, and Stevens, with only Justices and Marshall in dissent.

Justice Powell's language in his opinions in United States v. Calandra, supra, and Stone v. Powell, supra, would seem to place him in the ranks of those who would make a clear demarcation between the constitutional protection of the Fourth Amendment and the chosen enforcement method of the exclusionary remedy. In Calandra Justice Powell referred to the exclusionary rule as "a judicially created remedy . . . rather than a personal constitutional right of the party aggrieved."[60] (FOOTNOTE: 414 U.S. at 347-48 (1974.) In Stone Justice Powell described the rule as "a judicially created means of effectuating the rights secured by the Fourth Amendment."[61] (FOOTNOTE: 428 U.S. at 482 (1976).) "Post-Mapp decisions have established that the rule is not a personal constitutional right."[62] (FOOTNOTE: Id. at 486.) Justice Powell, so far as my research has been able to determine, has never dissented from any of the High Court's opinions limiting or qualifying the exclusionary rule.

Justice Blackmun likewise would appear to be with those Justices who see a clear distinction between the Constitution itself and the method of enforcing it. In United States v. Janis, supra, Justice Blackmun wrote that there should be no "extension of the judicially created exclusionary rule." 43/ (FOOTNOTE: 428 U.S. 433, 454 (1976).) Justice Blackmun's language in Franks v. Delaware, supra, was even stronger and more explicit. In his opinion for seven Justices of the Court, he observed 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 cost of its use . . . ." 44/ (FOOTNOTE: 438 U.S. 154, 165-67 (1978). This language, as I have noted above, gained the adherrence of Justices Brennan, Stewart, White, Marshall, Powell, and Stevens. Only the Chief Justice and Justice Rehnquist were in dissent, and it is perfectly obvious from their own writings that they would certainly not disagree with the above-quoted statement of Justice Blackmun and all the other Justices in Franks v. Delaware. Only last term it was Justice Blackmun's opinion for the Court in United States v. Johnson which twice cited the rationale of the exclusionary rule as a reason not to give new Fourth Amendment holdings full retroactive effect. 45/ (FOOTNOTE: 50 U.S.L.W. 4742, 4746, 4749 n.21.) Like Justice Powell, so far as my research has been able to discover, Justice Blackmun has not dissented from any of the holdings limiting or qualifying the exclusionary rule.

> is no such constitutional rule. So I continue to believe that the exclusionary rule formulated to bar such evidence in the Weeks case is not rooted in the Fourth Amendment. . . .[70]

Only ten years after Mapp Justice Harlan called for a thorough-going reappraisal of the rule in his concurring opinion in Coolidge v. New Hampshire:

> From the several opinions that have been filed in this case, it is apparent that the law of search and seizure is due for an overhauling . . . . I would begin this process of reevaluation by overruling Mapp v. Ohio, 367 U.S. 643 (1961), and Ker v. California, 374 U.S. 23 (1963). . . .[71]

4 pages omitted. insert here

Justice White's opinion for the Court in United States v. Havens, supra, holds that a defendant's statements on cross-examination are subject to impeachment by "illegally obtained evidence" which would be inadmissible on the Government's direct case . . . .[72] Earlier Justice White had written the opinion for the Court in Williams v. United States, supra, which held that "the purpose of the exclusionary rule fashioned by this Court as a Fourth Amendment mechanism"[87] is not furthered by retroactive application. Justice White joined in the numerous other opnions of the Court in the last decade limiting or qualifying the exclusionary rule. While he did dissent in Stone v. Powell, supra, his dissent is noteworthy for advocating a "good faith" exception to the application of the rule,[88] which is hardly consistent with any belief that the rule is constitutionally required.[89] Justice White termed "[t]he exclusionary rule, a judicial construct."[89] Justice White's only other dissent in the cases discussed herein was in Rakas v. Illinois, supra, on the ground that a passenger in an automobile could assert Fourth Amendment rights, even though claiming no possessory rights in the car or its contents. He concurred in Justice Rehnquist's opinion two years later in United States v. Salvacci, supra, likewise dealing with the standing question.

Justice Stevens, coming to the Court at the beginning of 1976, has participated in fewer of the cases discussed above than any other Justice. Justice

Stevens' position is more difficult to determine than perhaps that of any other Justice on the present Court. However, it was his opinion in United States v. Ross,[90] the leading Fourth Amendment case last term which limited the scope of the exclusionary rule as applied to automobile searches. Justice Stevens has concurred in one or more of the opinions in five of the six categories on limiting or qualifying the exclusionary rule, as discussed in Part B. above. He dissented in United States v. Havens, supra, the impeachment of testimony holding. He also dissented in Michigan v. DeFillippo, supra, involving an officer's good faith belief as to the constitutionality of the statute, and in Rakas v. Illinois, supra, involving standing, although he concurred in the later standing case of United States v. Salvacci, supra.

Justice O'Connor joined with the strong majority of the court in limiting the application of the exclusionary rule in the automobile searches in Ross, supra, and joined with Justice White, Rehnquist, and the Chief Justice in dissent in United States v. Peltier, supra. Justice O'Connor also expressed reservations about the desirability of the exclusionary rule at her confirmation hearings.

Justices Brennan and Marshall have consistently been in the van or urging the application of the exclusionary rule in situations where other members of the Court have favored not applying it. Not surprisingly, in dissent in Stone v. Powell, supra, Justice Brennan stated: "Unlike the Court I consider that the exclusionary rule is a constitutional ingredient of the Fourth Amendment, . . ."[91] Justice Marshall concurred in this opinion.

To summarize: I have examined the opinions of Black, Frankfurter, Harlan, Stewart, and all nine members of the present High Court, for their statements as to any constitutional requirement for the exclusionary rule. I think it's fair to say that five Justices of the present Supreme Court — the Chief Justice, Justices

White, Blackmun, Powell, and Rehnquist — have written opinions in which they clearly differentiated between the constitutional prohibition against unreasonable searches and seizures and the chosen method of the exclusionary rule as a nonconstitutionally required enforcement tool. Justices Stevens and O'Connor have joined in opinions which clearly imply they each recognize a distinction between the Amendment and the remedy, but their opportunity for participation in exclusionary rule cases has been less than that of the other members of the Court. Only Justices Brennan and Marshall of the present Supreme Court have pronounced in an opinion that the exclusionary rule is constitutionally mandated.

THE WHITE HOUSE

WASHINGTON

October 18, 1982

MEMORANDUM FOR KENNETH CRIBB

FROM: STEPHEN H. GALEBACH

SUBJECT: Insanity Defense; Letter from ITT

Aside from the two curricula vitae, the important item of interest in this letter is the three page article by Bruce Ennis in The Nation.

Ennis argues against certain bills introduced in Congress, on grounds that they would eliminate the mens rea element of certain serious crimes. He says that to eliminate mens rea would violate constitutional prohibitions against cruel and unusual punishment and deprivation of liberty without due process of law. Ennis makes the point that required elements of crime, such as mens rea, reflect a consensus, developed over hundreds of years, concerning the circumstances under which society believes criminal punishment to be appropriate.

Of course, Ennis's objections do not apply against the Administration proposal, since we do not eliminate the mens rea element for any particular crime.

Next, Ennis argues against the same idea we have proposed, saying it is a "harsh" proposal. He also says that "without major changes in the mens rea requirement, sentencing procedures and options, and the civil commitment process, it would be an unwise one."

Why does Ennis believe that a change such as we propose would be harsh and unwise? He does not say, but one can surmise that he believes an affirmative defense should still be available for someone who does not know right from wrong or who cannot control himself from taking a certain criminal act.

A good response is:

- The law presumes everyone to know right and wrong, and it is a particularly good presumption in the case of someone who has the wit to commit an intentional crime.

- People do have free will and, while we certainly want to allow a defense for actions that were not done voluntarily (such as when one person forces another to pull a trigger), we do want to treat human beings as responsible moral agents.

Further, we should not allow psychiatrists to distort the criminal justice process by trying to claim that someone does not know right from wrong -- a judgment on which psychiatrists will virtually never be able to agree; the only cases in which they will be able to agree, are cases in which the defendant lacks mens rea. Also, we should not allow psychological testimony saying that someone could not control himself from taking a bad act -- all of us would like to rationalize our misbehavior from time to time, by saying "the devil made me do it," and we should not allow defendants or psychiatrists to come into court with this sort of transparent excuse.

Finally, Ennis concludes by saying that the best way to reform the insanity defense is to turn it into an affirmative defense, instead of an element on which burden of proof rests with the prosecution. Ennis also believes that expert witnesses should not be able to offer opinions on ultimate questions for the jury to decide, such as whether a defendant pleading insanity knew right from wrong.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

October 15, 1982

FOR: MICHAEL UHLMANN

FROM: KENNETH CRIBB, JR.

Could you, Bill or Steve evaluate the attached letter from ITT and render any advice on Monday, 18 October 1982.

Thank you.

Press Club Forum

12 OCT

International Telephone and Telegraph Corporation
Washington Office
1707 L Street, N.W.
Washington, D.C. 20036
Telephone (202) 296-6000

October 11, 1982

Ms. Marilee Melvin,
Office of the Counselor to the President
The White House
Washington, D.C 20500

Dear Ms. Melvin,

Joe Slevin, of Knight-Ridder, asked me to fill you in on the National Press Forum on the insanity plea in which Mr. Meese will be participating.

This session will be the latest in a series of monthly forums put on by the National Press Foundation and the National Press Club. While they quite often dwell on political topics, they also have included such diverse subjects as ERA and "Money and Professional Sports."

The October 19 session is designed to approach the subject of the insanity defense from the standpoints of (a) the need for legislative change, (b) the civil liberties involved and (c) the pyschiatric viewpoint. Mr. Meese will, of course, address himself to the first position, though he should not feel restricted to it. The others on the panel are Attorney Bruce J. Ennis, the former national legal director for the American Civil Liberties Union and a member of the American Bar Association task force studying the laws governing mentally disabled defendants, and Dr. Loren H. Roth, a noted forensic psychiatrist, a professor from the University of Pittsburg and director of the Western Psychiatric Institute and Clinic. Their bios are attached. The moderator will be Laura Kiernan, a court reporter for the Washington Post who, most recently, covered the Hinckley trial.

The evening will begin with cocktails at 6:30 p.m. in the main ballroom of the National Press Club. The program will begin promptly at 7 p.m. since it is carried live by National Public Radio. We normally also receive coverage from the Cable-Satellite Public Affairs Network (C-SPAN) but all media are invited to cover and I would guess that this subject will draw a number of them. The public also is invited to attend but the forums do not normally draw large crowds.

We will ask each speaker to give a five minute opener, addressing the subject from his standpoint. After all have completed opening remarks, the moderator and then the audience will direct questions to the panel. It will formally end at 8 p.m. when the program leaves the air but the audience and panel sometimes remain if the discussion is interesting.

I will be out of town all of this week but if you have any questions, you can call Joe Slevin (637-3625) or you can contact Jim Noone of my office (296-7594).

Again, we are pleased that Mr. Meese will be joining us for the forum. It should be an interesting and stimulating discussion.

Sincerely,

Bernie Goodrich

Bernard A. Goodrich, Director
Public Relations - Washington

cc: Joseph Slevin

296-6000 (o)
241-2210 (h)

For National Press Club Record, Oct. 14

Experts on law and psychiatry will address the question "The Insanity Plea - Is It Just? at a National Press Club Forum Tues., Oct. 19, at NPC. Panel members: Counselor to the President Edwin Meese III, former prosecuting attorney; Atty. Bruce J. Ennis, member of American Bar Assoc. task force studying the insanity defense, and Dr. Lauren Roth, U. of Pittsburgh professor and director of law and psychiatry, Western Psychiatric Institute & Clinic. Moderator will be Laura Kiernan, Washington Post legal writer. In addition to offering their own views, panelists will answer audience questions. Cash bar, 6:30 p.m.; program 7 p.m.

ARTICLES.

KNOWING RIGHT LAWS FROM WRONG

Straight Talk About the Insanity Defense

BRUCE J. ENNIS

A Washington, D.C., jury's finding that John Hinckley was not guilty by reason of insanity of the attempted assassination of President Reagan triggered widespread outrage among Americans. Pundits rushed to their typewriters to denounce the verdict and call for changes in the insanity defense. Columnist George F. Will understandably criticized the "incompatible marriage of psychiatry and law," which allows culprits like Hinckley to escape responsibility for their actions. In *The New Republic*, law professor Stephen Cohen reviewed the arguments for the insanity defense and concluded that "as it now exists it should be abolished." A *New York Times* editorial rejected abolishment but discussed some "changes worth considering." *The Washington Post* agreed: "Something new has to be considered."

In Congress, which must do the considering, there are a raft of proposals, some old, some new, in the legislative hopper. They range from abolishment of the defense to creation of a "guilty but insane" verdict. While I agree that reforms are in order, the remedies now before Congress reflect confusion about the insanity plea and would radically revise not only the definition of what constitutes a *defense* to a crime but also the definition of crime itself.

In order to grasp why that is so it is necessary to understand the concepts underlying the insanity defense. Unfortunately, there is no agreement on the definition of those concepts. In fact, one of the reasons it is so difficult to make sense of the insanity defense is that people are not talking the same language.

The first concept involved is *mens rea* ("culpable mind"). With most crimes, conviction requires proof not only of a particular act (*actus reus*) but also of a particular mental state accompanying the act (*mens rea*). These are the necessary "elements" of the crime. Each element must be proved in order to establish a prima facie case—that is, a case in which the evidence will be sufficient to justify conviction unless the defendant rebuts it. The prosecution has the burden of proving these elements, including *mens rea*, and it must prove each of them "beyond a reasonable doubt."

The *mens rea* element is not the same for all crimes. Some crimes require only proof of a negligent state of mind; others require proof of a reckless state of mind. But for most serious crimes, the prosecution must prove that the defendant intended to commit the proscribed act, whatever his state of mind. However, there is no consensus on what is meant by intent. In jurisdictions adopting a narrow interpretation of the intent requirement, intent means only that the defendant had a conscious objective to commit the proscribed act. Whether he could appreciate the wrongfulness of his conduct or could conform his conduct to the law would be irrelevant to that narrow *mens rea* requirement (although it might be relevant to an "affirmative defense" of insanity, as I will explain later). In jurisdictions adopting a broad interpretation, intent means *sane* intent—that is, he defendant not only consciously knew what he was doing but also could appreciate the wrongfulness of his act and could control his behavior.

Obviously, in a jurisdiction where intent is broadly defined, the prosecution has to prove much more about the defendant's mental state in order to make out a prima facie case than in a jurisdiction where intent is narrowly defined. It is difficult to say whether the intent requirement is constitutionally required.[1] But most courts and scholars agree that the Constitution requires at least proof of a narrow intent, in the sense of conscious objective, as an element of all serious crimes.[2] Accordingly, I shall assume that the prosecution has to prove intent, but only in the narrow sense of conscious objective, in order to establish a prima facie case. Once the prosecution has introduced sufficient evidence to establish such a case, the defendant has to either rebut that case by introducing contrary evidence or overcome it by establishing what the law calls an affirmative defense.

An affirmative defense is a legally sufficient justification for a defendant's behavior, even if that behavior would otherwise warrant conviction. In effect, an affirmative defense overcomes an unrebutted prima facie case. For example, even after the prosecution establishes a prima facie case of murder by proving that the defendant consciously caused the death of a human being, the defendant could escape responsibility by establishing that he acted in self-defense. Similarly, the defendant could overcome a prima facie case by convincing the judge or the jury that although he consciously intended to take a human life, he did not know his conduct was wrongful or he could not control his behavior because he was insane.

Bruce J. Ennis, a partner in the Washington, D.C., firm of Ennis, Friedman, Bersoff & Ewing, is a former National Legal Director of the American Civil Liberties Union and is a member of the American Bar Association task force studying the laws governing mentally disabled defendants.

1. Several state courts have indicated that a broad interpretation might be constitutionally required, and that is the position adopted by an American Bar Association task force studying this issue. The A.B.A. itself has not taken a position.

2. If this were not so, a legislature could constitutionally authorize a first-degree murder conviction for a 2-year-old who accidentally killed someone while playing with a gun, or for an adult with the I.Q. of a 2-year-old. Substantive due process and the right to be free from cruel and unusual punishment would probably preclude a legislature from providing that a defendant could be found guilty of first-degree murder without *any* evidence of intent, even in the narrow sense of the word.

Three examples will illustrate the difference between the mental state the prosecution would have to prove to establish a narrow, prima facie case of conscious intent and the mental state the defendant would have to prove to establish an affirmative defense of insanity.

(1) A blatantly psychotic person opens his car door without looking. A passing bicyclist hits the door and dies. The defendant caused the death, but he did not consciously intend to do so. In those circumstances, the defendant would not be guilty of murder because one of the elements of that crime—conscious intent—would be missing. The defendant would not have to rely on an affirmative defense of insanity, or on any other affirmative defense, because the prosecution did not make out a prima facie case of murder.

(2) A blatantly psychotic person suffocates a baby. Evidence introduced by the prosecution shows that the defendant, though psychotic, consciously intended to kill something but thought he was suffocating a kitten, not a baby. Would the defendant need to rely on an affirmative defense of insanity? No, because the prosecution would not have proved one of the elements of murder, the conscious intent to take a *human* life.

(3) A blatantly psychotic person kills a Presidential candidate. The prosecution shows that the defendant, though psychotic, knew he was taking a human life and consciously intended to do so. Would the defendant need to rely on an affirmative defense of insanity? Yes, because even though he was blatantly psychotic, he consciously intended to take a human life. The defense might be able to overcome the prosecution's case by showing that although the defendant consciously intended to take a human life, he did not appreciate the wrongfulness of his act—for example, he believed creatures from another world had instructed him to kill the candidate before he gained power and launched a nuclear war.

Another conceptual confusion is the important but usually ignored difference between an ordinary defense and an affirmative defense. The prosecution must prove that all the necessary elements of a crime were present. In a prosecution for murder, the defense might contend, for example, that there was no proof that the defendant caused the death of a human being. Even though this is called a defense, the defendant is not compelled to establish that he did not cause the death. Rather, the prosecution must prove that he did. Similarly, the defendant could escape conviction for murder if the prosecution failed to prove that he consciously intended to cause the death of a human being, and the defendant would be acquitted without having to raise an affirmative defense.

In an ordinary defense, the burden of proof is always on the prosecution, and properly so. But in a true affirmative defense, the burden shifts to the defendant. If the insanity defense were treated like any other affirmative defense, the defendant should bear the burden of proving it, and that is indeed the rule in several states. But in most states, once a defendant introduces evidence that he was legally insane at the time the proscribed act was committed, the prosecution is required to prove he was not. That is sometimes difficult to do, as the Hinckley verdict shows.

Although the point is certainly debatable, I believe legislatures could not constitutionally eliminate mental state, or *mens rea*, requirements as elements of certain serious crimes, but they could constitutionally eliminate the affirmative defense of insanity. That would be a harsh measure, and without major changes in the *mens rea* requirement, sentencing procedures and options, and the civil commitment process, it would be an unwise one. But once a legislature has provided that the prosecution must prove whatever mental-state element the Constitution would require for a particular crime, there would be no Constitutional obligation to provide for an affirmative defense of insanity.

Many of the bills now pending in Congress ignore *mens rea* and the important distinctions between an ordinary defense and an affirmative defense. For example, H.R. 6653 (introduced by Representative John Myers on June 22, 1982) provides that "mental condition shall not be a defense to any charge of criminal conduct." If "defense" means affirmative defense, the bill is probably constitutional (although it may not be wise). But if by "defense" the bill means that a defendant can be convicted of murder when the prosecution has failed to show even conscious intent, it is, in my view, unconstitutional.

Several bills provide that "a defendant is guilty but insane if his actions constitute all necessary elements of the offense charged other than the requisite state of mind, and he lacked the requisite state of mind as a result of mental disease or defect."[3] These bills effectively eliminate the *mens rea* element from the definition of the crime, at least when that element is missing because of a mental disease or defect.

If society wants to change the definition of a particular crime to eliminate the element of mental state, it should do so straightforwardly, so the constitutionality of the change could be tested directly. Although the bills now before Congress and state legislatures are ostensibly designed only to revise "the insanity defense," their effect would be to abolish the mental-state elements of every crime to which they apply. This would establish a very bad precedent, one which would allow a defendant to be found guilty of a crime even if the prosecution had not proved all the elements of that crime. In the bills now pending, the element involved is mental state, but a legislature could decide to allow de-

3. H.R. 6716 (introduced by Representative F. James Sensenbrenner and others, June 24, 1982). See, to the same effect, H.R. 5395 (introduced by Representative Matthew Rinaldo, Jan 28, 1982); H.R. 4898 (introduced by Representative Harold Sawyer, Nov. 4, 1981); and S. 1106 (introduced by Senator Edward Zorinsky, May 5, 1981). These bills authorize criminal punishment of defendants found guilty but insane. The only real difference from a simple "guilty" verdict is that the defendant is supposed to receive psychiatric treatment in an appropriate facility (which might be a mental hospital rather than a prison) while serving his criminal sentence. That result could be achieved by a statute authorizing treatment for all mentally disabled prisoners, without tinkering with the insanity defense or creating a new verdict. For related bills, see H.R. 6497 (introduced by Representative Robert McClory and others, May 26, 1982); S. 2572 (introduced by Senator Strom Thurmond and others, May 26, 1982); S. 1558 (introduced by Senator Orrin Hatch, July 31, 1981); H.R. 6661 (introduced by Representative Mario Biaggi, June 23, 1982); H.R. 6702 (introduced by Representative Dennis Hertel, June 24, 1982); and H.R. 6717 (introduced by Representative Clay Shaw, June 24, 1982).

fendants to be found guilty of crimes even if the prosecution failed to prove other elements. For example, one element of the crime of conspiracy is the commission of an overt act to further the conspiracy. A legislature could arguably pass a law providing that a defendant could be found guilty even if he did not engage in an overt act, especially if his failure to engage in that act resulted from a mental disease or defect.

The elements required to establish guilt of a particular crime reflect a consensus, developed over hundreds of years, of the circumstances in which society believes criminal conviction and punishment is appropriate. That consensus is based on complex value judgments on such questions as how much individual freedom society can tolerate; how much security and public order society needs; how important it is to punish or deter the conduct in question; whether the punishment prescribed for the crime is disproportionate to its impact on the victim or on society; and whether others whose mental state is similar to the defendant's could or would be deterred by the prospect of conviction.

Strong arguments can be made for abolishing or substantially revising the affirmative defense of insanity. As I have indicated, I would favor placing the burden of proof on the defendant. Such a rule would be easier for juries to understand. It seems fair to place on the defendant the burden of justifying conscious and intentional conduct which, if not justified, would violate criminal law. And I believe expert witnesses should not be permitted to offer opinions on questions that are ultimately for the jury to decide, such as whether a defendant pleading insanity knew right from wrong. Such a reform would help juries understand that the final decision is up to them rather than to the experts.

Some of the bills now pending in Congress and state legislatures that would effectively eliminate any mental-state requirement in prosecutions for crime are a drastic revision of an ancient consensus that *some* level of mental culpability should be proved by the prosecution before an individual can be subjected to criminal punishment. Such a revision should not be achieved indirectly under the guise of revising the insanity "defense."

CURRICULUM VITAE

Loren H. Roth, M.D., M.P.H.
Revised 9/82

BIOGRAPHICAL

Name: Loren H. Roth
Birthdate: May 9, 1939
Citizenship: U.S.A.
Social Security Number: 302-32-7783
Business Address: Western Psychiatric Institute and Clinic
3811 O'Hara Street
Pittsburgh, PA 15261 Tel.#412-624-2162
Home Address: 114 Yorkshire Drive
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Married: Ellen A. Roth, Ph.D., M.F.A., ATR
Son: Jonathan A. Roth, age 15
Daughter: Alexandra M. Roth, age 3

EDUCATION AND TRAINING

Undergraduate			
1957-61	Cornell University Ithaca, New York	B.A. 1961	Philosophy
1959 (Summer)	Exchange Student Oxford University Oxford, England		English Literature
Graduate			
1961-63 1964-66	Harvard Medical School Boston, Mass.	M.D. 1966	Medicine
1971-72	Harvard School of Public Health. Boston, Mass.	M.P.H. 1972	Behavioral Sciences
Fellowships			
1960-61	Cleveland Heart Association Cleveland, Ohio		Student Fellow
1963-64	Massachusetts General Hospital Boston, Mass.		Post-Sophomore Fellow, Pathology
Post Graduate			
1966-67	University Hospitals Western Reserve University Cleveland, Ohio		Medical Intern
1969-70	Yale University, New Haven, Conn.		Resident in Psychiatry
1970-72	Massachusetts General Hospital Boston, Mass.		Resident in Psychiatry
1972-73	American University Law School Washington D.C.		Student, Law and Social Deviance

APPOINTMENTS AND POSITIONS

Academic		
1969-74	Mental Health Career Development National Institute of Mental Health Rockville, Maryland	
1972-74	Center for Studies of Crime & Delinquency National Institute of Mental Health Rockville, Maryland	Staff Psychiatrist
1974-	Western Psychiatric Institute and Clinic Assistant Professor, Dept. of Psychiatry University of Pittsburgh Pittsburgh, Pennsylvania	Director Law and Psychiatry Program
1978-82	Associate Professor of Psychiatry	
1982-	Professor of Psychiatry	
Non-Academic		
1967-69	United States Federal Penitentiary Lewisburg, Pennsylvania	General Medical Officer

CERTIFICATION AND LICENSURE

Specialty Certification - American Board of Psychiatry and Neurology, Certificate #22,262

Medical Licensure

M.D. California, Connecticut, Maryland, Massachusetts, Pennsylvania

MEMBERSHIPS IN PROFESSIONAL AND SCIENTIFIC SOCIETIES

1971 - American Psychiatric Association - Fellow, 1982

1972 - American Academy of Psychiatry and the Law.
Vice President - 1975-77

1973 - Group for the Advancement of Psychiatry - GAP,
Committee on Psychiatry and Law - Co-Chairman, 1979-1980,
Chairman, 1981-

1975 - American Society of Criminology.

1976 - American College of Utilization Review Physicians.

1976 - American Society of Law and Medicine.
Board of Directors, 1982.

1982 - American College of Psychiatrists - Fellow

HONORS

1961 Phi Beta Kappa, Phi Beta Phi, Honors in Philosophy, Cornell University.

1966 Cum Laude Graduate, Harvard Medical School, Boyleston Society.

1978 "Outstanding Teacher Award" WPIC Psychiatric Residents.

1982 William E. Schumacher Distinguished Lecturer, Maine Department of Mental Health and Mental Retardation, Portland, Maine.

PUBLICATIONS

Refereed articles

1. Weidner, M.D., Roth, L.H., Simeone, F.A. Myocardial Response to Prolonged Acute Oligemic Hypotention. Surgery 50:75-82, 1961.

2. Roth, L.H. Treating the Incarcerated Offender. Corrective Psychiatry and Journal of Social Therapy 15(1):4-14, 1969.

3. Roth, L.H. Territoriality and Homosexuality in a Male Prison Population. American Journal of Orthopsychiatry 41:510-513, 1971.

4. Roth, L.H., Rosenberg, N., Levinson, R.B. Prison Adjustment of Alcoholic Felons. Quarterly Journal of Studies on Alcohol 32:382-393, 1971.

5. Roth, L.H., Ervin, F. Psychiatric Care of Federal Prisoners. American Journal of Psychiatry 128: 424-430, 1971.

6. Roth, L.H. The Bugaboo of Control--The Universal Prison Dynamic. The Newsletter of the American Academy of Psychiatry and the Law 3(3):20-22, 1972.

7. Roth, L.H. Some Comments on Labelling. The Bulletin of the American Academy of Psychiatry and the Law 3:123-131, 1975.

8. Meisel, A., Roth, L.H. The Child's Right to Object to Hospitalization, Some Empirical Data. Journal of Psychiatry and Law 4:377-392, 1976.

9. Roth, L.H., Meisel, A. Dangerousness, Confidentiality, and the Duty to Warn. American Journal of Psychiatry 134:508-511, 1977.

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10. Meisel, A., Roth, L.H., Lidz, C.W. Toward a Model of the Legal Doctrine of Informed Consent. American Journal of Psychiatry 134:285-289, 1977.

11. Roth, L.H., Meisel, A., Lidz, C.W. Tests of Competency to Consent to Treatment. American Journal of Psychiatry 134:279-284, 1977. Reprinted in MEDICAL ETHICS: A Clinical Textbook and Reference for the Health Care Professions. Abrams N., Buckner M. (Eds.), Charlestown, Mass., M.I.T. Press/Bradford Books, 1981. Reprinted in INSANITY AND RATIONAL AUTONOMY: Ethical and Legal Issues in Mental Health Care. Edwards R.B. (Ed.), Buffalo, NY, Prometheus Books, 1982. (Forthcoming). Reprinted in Samuel Gorovitz: MORAL PROBLEMS IN MEDICINE (2nd Edition). Englewood Cliffs, NJ, Prentice-Hall, Inc. January, 1983.

12. Roth, L.H. Involuntary Civil Commitment: Right to Treatment - Right to Refuse Treatment. Psychiatric Annals 7(5):244-257, 1977. Reprinted in PSYCHIATRISTS AND THE LEGAL PROCESS: Diagnosis & Debate, Psychiatric Annals, Insight Communications, Bonnie R. (Ed.) Inc. New York, NY, pp.332-345, 1978.

13. Soloff, P. H., Jewell, S., Roth, L.H. Civil Commitment and the Rights of the Unborn. American Journal of Psychiatry 136(1):114, 1979.

14. Fink, W.L., Roth, L.H. Altruistic Murder-Suicide: A Case Report and Clinical Indications. Hospital & Community Psychiatry 30(8):558-559, 1979.

15. Roth, L.H. A Commitment Law for Patients, Doctors and Lawyers. American Journal of Psychiatry 136:1121-1127, 1979. Reprinted in MEDICAL ETHICS AND THE LAW: IMPLICATIONS FOR PUBLIC POLICY. Hiller M. (Ed.), Cambridge, Mass., Ballinger Pub. Co., 1981, pp.267-282. Reprinted in INSANITY AND RATIONAL AUTONOMY: Ethical and Legal Issues in Mental Health Care. Edwards R.B. (Ed.), Buffalo, NY, Prometheus Books, 1982. (Forthcoming)

16. Roth, L.H., Wolford, J., Meisel A. Patient Access to Records: Tonic or Toxin. American Journal of Psychiatry. 137(5):592-596, May 1980.

17. Huber, G., Roth, L.H. Preserving the Confidentiality of Medical Record Information Regarding Nonpatients. University of Virginia Law Review 66:583-596, April, 1980.

18. Roth, L.H. Mental Health Commitment - The State of the Debate, 1980. Hospital & Community Psychiatry, 31(6):385-96, June, 1980.

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19. Kaufmann, C.L., Roth, L.H.: Psychiatric Evaluation of Patient Decision-Making: Informed Consent to ECT. Social Psychiatry. 16:11-19, 1981.

20. Lidz, C.W., Gross, E., Meisel, A., Roth, L.H.: The Rights of Juveniles in "Voluntary" Psychiatric Commitments: Some Empirical Observations. Bulletin of the American Academy of Psychiatry and the Law VIII:168-174, 1980.

21. Ashley, M., Sestak, R.M., Roth, L.H.: Legislating Human Rights: Informed Consent and the Pennsylvania Mental Health Procedures Act. Bulletin of the American Academy of Psychiatry and the Law VIII:133-151, 1980.

22. Appelbaum, P.S., Roth, L.H.: Clinical Issues in the Assessment of Competency. American Journal of Psychiatry 138:1462-1467, 1981.

23. Meisel, A., Roth, L.H.: What We Do and Do Not Know About Informed Consent: An Overview of the Empirical Studies. Journal of the American Medical Association (JAMA) 246: 2473-2477, 1981. To be reprinted by Acron Verlag, Berlin, Germany. (Forthcoming).

24. Kaufmann, C.L., Roth, L.H., Lidz, C.W., Meisel, A.: Informed Consent and Patient Decisionmaking: The Reasoning of Law and Psychiatry. International Journal of Law and Psychiatry, 4:345-361, 1981.

25. Munetz, M.R., Roth, L.H.: Helping Chronic Patients Understand Agency Communications. Hospital & Community Psychiatry 33:151-152, 1982.

26. Appelbaum, P.S., Roth, L.H.: Competency to Consent to Research: A Psychiatric Overview. Archives of General Psychiatry 29:951-958, 1982. Reprinted in French in CAHIERS de BIOETHIQUE, 4:425-452, 1982. Published under the supervision of the Center for Bioethics, Clinical Research Institute of Montreal, Canada.

27. Roth, L.H., Appelbaum, P.S., Sallee, R., Reynolds, C.F., Huber, G.: The Dilemma of Denial in the Assessment of Competency to Refuse Treatment. American Journal of Psychiatry 139:910-913, 1982.

28. Roth, L.H., Lidz, C.W., Meisel, A., Soloff, P.H., Kaufman, K., Spiker, D.G., Foster, F.G.: Competency to Decide About Treatment or Research: An Overview of Some Empirical Data. International Journal of Law and Psychiatry 5:29-50, 1982.

29. Huber G., Roth, L.H., Appelbaum, P.S., Ore, T.: Hospitalization, Arrest or Discharge: Some Legal and Clinical

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30. Munetz, M.R., Roth, L.H., Cornes, C.L.: Tardive Dyskinesia and Informed Consent: Myths and Realities. AAPL Bulletin, 1982. (In Press.)

31. Schmid, D., Appelbaum P.S., Roth, L.H., Lidz, C.W.: Confidentiality in Psychiatry: The Patient's View. Hospital & Community Psychiatry, 1982. (In Press.)

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1. Roth, L.H. (with) Kahn, B., Klein, J., Major, J., Montgomery, J. "Deer Island - An Empirical Study," pages 1-267 (Systems analysis of a house of correction), report solicited by Office of Justice Administration, City of Boston, (LEAA) and submitted to Kevin White, Mayor, Boston, Massachusetts, 1971.

2. Shah, S., Roth, L.H. Biological and Psychophysiological Factors in Criminality. Chapter 4 of Handbook of Criminology, Glaser, D. Editor, 101-173, 1974. Rand McNally College Publishing Co.

3. Roth, L.H. (major contributor). Clinical Aspects of the Violent Individual. A.P.A. Task Force Report #8. July, 1974.

4. Book Review: Psychiatry and Law, Slovenko, R. Psychiatry 38:394-397, 1975.

5. Roth, L.H. (major contributor). Sexual Psychopathic Legislation: The Thirties to the Eighties. Group for the Advancement of Psychiatry. Report #98, 1977, pp.839-956.

6. Book Review: Consent Handbook. American Journal of Psychiatry 135(1):148-49, 1978.

7. Roth, L.H. (major contributor). Report on Legal and Ethical Issues, The President's Commission on Mental Health, Vol.IV, 1978, pp. 1359-1516. Contributor to sections of report concerning confidentiality, mental health commitment, human experimentation, ethics.

8. Roth, L.H. Clinical and Legal Considerations in the Therapy of Violence-Prone Patients, in Part II of CURRENT PSYCHIATRIC THERAPIES 18:55-64. Jules H. Masserman, M.D. (ed). New York, Grune & Stratton, Inc. 1978.

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9. Roth, L.H. Correctional Psychiatry, Chapter 28, in MODERN LEGAL MEDICINE, PSYCHIATRY AND FORENSIC SCIENCE, pp.677-719. Curran, W., Peety, C., McGarry, A.L. (eds). Philadelphia, F.A. Davis, 1980.

10. Lidz, C.W., Roth, L.H.: The Signed Form - Informed Consent? Chapter in SOLUTIONS TO LEGAL AND ETHICAL PROBLEMS IN APPLIED SOCIAL RESEARCH. Boruch, R.F., Ross, J., Cecil, J.S. (Eds.) New York, Academic Press Inc., 1982.

11. Roth, L.H., Appelbaum, P.S.: What We Do and Do Not Know About Treatment Refusals in Mental Institutions, Ch. 17, in REFUSING TREATMENT IN MENTAL INSTITUTIONS: VALUES IN CONFLICT, pp. 179-196 Doudera, A.Ed., Swazey, J.T., (eds.) Ann Arbor, MI, Washington, D.C., AUPHA Press, 1982.

12. Book Review: R.A. Burt: Taking Care of Strangers, the Rule of Law in Doctor-Patient Relations. International Journal of Law and Psychiatry 5:116-121,1982.

13. Roth, L.H.: Competency to Consent to or Refuse Treatment, in PSYCHIATRY 1982: THE AMERICAN PSYCHIATRIC ANNUAL REVIEW, pp. 350-360. Grinspoon, L. (Ed.) Washington D.C., American Psychiatric Press, 1982.

14. Appelbaum, P.S., Roth, L.H.,: Treatment Refusal in Medical Hospitals. A Report to the President's Commission for the Study of Ethical Issues in Medicine and Biomedical and Behavioral Research, July, 1982.

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1. Roth, L.H., The Alcoholic Felon. 4th Annual Meeting Clinical Society Commissioned Officers Association, U.S.P.H.S., Boston, 1969.

2. Roth, L.H. Comment, Sex in Prison. Sexual Behavior, January 1972, p.43.

3. Roth, L.H., Rollins, M.A., Ervin, F. Violent and Non-Violent Prisoners, A Comparison #1. A.P.A., Dallas, 1972.

4. Roth, L.H., Rollins, M.A., Ervin, F. Violent and Non-Violent Prisoners, A Comparison #2. A.P.A., Dallas, 1972.

5. Roth, L.H. News From the Psycholegal Centers - Law and Psychiatry Program Description (description of model program in psychiatry and law). The Journal of Psychiatry and Law 3:239-256, 1975.

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6. Roth, L.H. "Voluntary" Castration. Hastings Center Report 6:4,30, 1976.

7. Roth, L.H. Parental Love and Care: The "Due Process" to Which Children Are Entitled. Hospital & Community Psychiatry 28:211, 1977.

8. Lasell, R.L., Roth, L.H. Psychiatrists in Community Care-How Few Will Do? American Psychiatric Association, Toronto, Canada, 1977.

9. Roth, L.H., Spiker, D., Foster, F.G.: Consent to Electro-convulsive Treatment: The Doctor-Patient Dialogue. American Psychiatric Association, Toronto, Canada, 1977.

10. Roth, L.H. Competency to Consent. VI World Congress of Psychiatry, Hawaii, 1977.

11. Meisel, A., Roth, L.H. Must a Man Be His Cousin's Keeper? Hastings Center Report 8(5):5,6, 1978.

12. Roth, L.H., To Respect Persons, Families, and Communities: Some Problems in the Ethics of Mental Health Care. Psychiatry Digest, 40(10):17-26, October, 1979.

13. Roth, L.H.: Editorial. The Right To Refuse Treatment. Hospital & Community Psychiatry Vol. 32:233, 1981.

14. Appelbaum, P.S., Roth, L.H.: In the Matter of PARR: Rape Counseling and Problems of Confidentiality. Hospital & Community Psychiatry, 32:461-462, 1981.

15. Roth, L.H.: EULOGY for Jonas Robitscher, M.D. Bulletin of the American Academy of Psychiatry and the Law, Vol. IX. pp. 10-14, 1981.

16. Roth, L.H.: Can the Mentally Ill Give Informed Consent? Health, 13(9):45-7, 1981.

17. FEEDBACK. Roth, L.H.: Psychotropic Drugs and the Right to Refuse Treatment. Hospital & Community Psychiatry 32:733, 1981.

18. Roth, L.H.: Methodologic Constraints in Studying Issues of Patient/Subject Rights. Eighth International Congress on Law and Psychiatry, Quebec City, Canada, June, 1982.

19. Roth, L.H.: Psychiatric Research - The IRB Perspective. AAPL, New York, 1982.

Other (national panel and symposium participation, etc.)

1. Psychiatric Care of Federal Prisoners. American Correctional Association, Cincinnati, 1970.

2. Violent and Non-Violent Alcoholic Offenders, Joint LEAA, NIMH, Department of Transportation Conference, College Park, Maryland, 1972.

3. Violence in Institutions. Roth, L.H., Moderator, A.P.A., Dallas, 1972. Reprinted "Tracing the Emotional Roots of Prison Violence." Frontiers of Psychiatry 3(6): 1,2,8, March, 1973.

4. Dangerousness, Law and Mental Commitment Practices, A.P.A., May, 1974.

5. Informed Consent: A First Step Through Film. A.P.A., May, 1975.

6. Lidz, C.W., Meisel, A., Roth, L.H. Panel: Informed Consent - Some First Steps. Ethical Issues in Mental Health Research. Carnegie Mellon University, November, 1975.

7. Roth, L.H., Meisel, A., Lidz, C.W. Workshop: Obtaining Informed Consent from Psychiatric Patients. American Psychosomatic Society. March, 1976.

8. "Operation Baxstrom." American Academy of Psychiatry and the Law. October, 1976.

9. The Right to Refuse Treatment - (Videotape presentation). Association of American Law Schools, Georgia, December, 1977.

10. Roth, L.H., Meisel, A., Lidz, C.W., Zerubavel, E. One-half day Symposium: Informed Consent and Its Application to Psychiatry. VI World Congress, Hawaii, August 28-September 3, 1977.

11. Patients Rights and Confidentiality. Half-day session, American Psychiatric Association, May, 1978.

12. One-half day Symposium: NIMH FORUM: Applied Ethics in Mental Health Research With the Aged. 32nd Annual Meeting of the Gerontological Society, Washington, D.C., November 26, 1979.

13. One-half day Symposium: Litigation Update, 1980: Prospects and Problems. American Psychiatric Association, San Francisco, May, 1980.

14. Plenary Speaker - "Patients' Rights and Doctors' Responsibilities." Institute of Hospital and Community Psychiatry, Boston, MA, September, 1980.

Other (national panel and symposium participation, etc.) (cont'd)

15. Appelbaum, P.S., Roth, L.H.: Competency to Consent to Research: A Psychiatric Overview. Presented at the NIMH Workshop on Empirical Research on Informed Consent with Subjects of Uncertain Competence, Rockville, MD, 1981.

16. Keynote Speaker - "Planning and Delivery of Mental Health Forensic Services." National Association of State Mental Health Program Directors. Washington, D.C., October, 1981.

17. Keynote Speaker - "Competency to Consent to or Refuse Treatment." The Fifth Annual Symposium on MENTAL HEALTH AND THE LAW. The Institute of Law, Psychiatry, and Public Policy, University of Virginia and the Virginia Department of Mental Health and Mental Retardation, Williamsburg, VA, December, 1981.

18. One-half day Symposium: Underserved Populations in Psychiatry: Chronic patients and Prison Inmates. American Psychiatric Association, Toronto, Canada, May, 1982.

19. One-half day Symposium: Treatment Refusal: Clinical and Legal Perspectives. American Psychiatric Association, Toronto, Canada, May, 1982.

20. One-half day Symposium: The Insanity Defense on Trial. National Conference of State Legislatures Annual Meeting, Chicago, IL, 1982.

21. Address: "Special Populations: Are They Always at Risk?" Conference - Research with Special Populations. Public Responsibility in Medicine and Research, Boston, 1982.

Submitted Papers

1. Sparr, L.F., Roth, L.H.: Civil Commitment Over the Family's Objections. Submitted to The Bulletin of the American Academy of Psychiatry and the Law, 1982.

2. Appelbaum, P.S., Roth, L.H., Lidz, C.W.: The Therapeutic Misconception: Informed Consent in Psychiatric Research. Submitted to the International Journal of Law and Psychiatry, 1982.

3. Appelbaum, P.S., Roth, L.H.: Involuntary Treatment in Medicine and Psychiatry. Submitted to the American Journal of Psychiatry, 1982.

4. Appelbaum, P.S, Roth, L.H.: Patients Who Refuse Treatment in Medical Hospitals. Submitted to the Journal of the American Medical Association, 1982.

Submitted Papers (cont.)

5. Roth, E.A., Roth, L.H.: Do Children Understand Psychiatric Hospitalization? Submitted to the American Journal of Psychiatry, 1982.

Books in Preparation

Lidz, C.W., Meisel, A., Zerubavel, E., Ashley, M., Sestak R., and Roth, L.H. Informed Consent? An Empirical Study of Decision-Making in Psychiatric Treatment. Guilford Press, New York, 1982.

Roth, L.H. (Ed.): Clinical Treatment and Management of the Violent Person. Crime and Delinquency Issues: A Monograph Series, NIMH, 1982.

PROFESSIONAL ACTIVITIES

Teaching - University of Pittsburgh, Department of Psychiatry

1. Seminars for psychiatric residents and medical students in law and psychiatry, social and community psychiatry, medical ethics.

2. Clinical supervision of psychiatric residents: in-hospital ward work, and outpatient psychotherapy.

3. Clinical and administrative supervision of psychiatric residents in social and community psychiatry.

4. Chairman - Utilization Review - WPIC, 1975-

Research

Grants and Contracts Received

1. Roth, L.H., Principal Investigator. "An Empirical Study of Informed Consent in Psychiatry." NIMH Funded Grant R12 MH27553, 1976-1979.

2. Roth, L.H., Winslade, W. (Co-Principal Investigators): Empirical Case Studies of Legal and Ethical Issues in Psychiatric Research. Foundations Fund for Research in Psychiatry, 1980-82.

3. Roth, L.H.: Development of a Monograph Entitled "Treatment and Handling of the Violent Person." NIMH, 1980-81. (Contract).

4. Appelbaum, P.S., Roth, L.H. (Co-Principal Investigator): "Treatment Refusal in the Medical Hospital." President's

Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Washington, D.C., 1981-82. (Contract).

Editorships

Editorial Board, Criminology. 1974-1978.

Editor, NEWSLETTER of the American Academy of Psychiatry and the Law. 1976-1979.

Associate Editor, The Bulletin of the American Academy of Psychiatry and the Law. 1975- .

Editorial Board, Law and Human Behavior, 1980 -

Editorial Board, International Journal of Law and Psychiatry, 1980 -

Associate Editor, American Journal of Psychiatry, 1982 -

Consulting Editor, Criminal Justice and Behavior, 1982 -

Service

1. National Committee Work

American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual, 1972-1974.

Chairman, 12th Annual Mental Health Career Development Conference, NIMH, Williamsburg, (Problems of Aging), 1973.

American Psychiatric Association Council on Professions and Associations, 1975-78. Vice Chairperson, 1977-78.

American Psychiatric Association Commission on Judicial Action, 1974-1981.

(Help formulate and construct amicus briefs for A.P.A. in national mental health cases, e.g., Wyatt v. Hardin, Kremens v. Bartley, Parham v. JL and JR, Addington v. Texas, Smith v. Estelle, Project Release v. Prevost, Rennie v. Klein, Rogers v. Okin, Pennhurst State Hospital and School v. Halderman, Romeo v. Youngberg, Mills v. Rogers, Scott v. Plante, Byers v. United States of America, Harris v. Pulley.

Co-Chairman, A.P.A. Commission on Judicial Action, 1978-79.

Chairman, A.P.A. Commission on Judicial Action, 1979-83.

1. National Committee Work (cont'd)

Expert testimony on behalf of the American Psychiatric Association, e.g., Livingston v. Estelle. (Misuse of psychiatric testimony concerning death penalty). Dallas, TX, 1978

Bimonthly news column for APA Psychiatric News, Judicial Action Report. 1978-

American Psychiatric Association, Task Force on Human Experimentation, 1977-1979.

President's Commission on Mental Health, Task Panel on Legal and Ethical Issues. (Rosalynn Carter Commission). 1977-78.

United Mental Health, Inc., Allegheny County, Pennsylvania. Board of Directors - 1978-82.

Mental Patients Rights Committee, Allegheny County, Pennsylvania. Board of Directors - 1978-

Appellant, In re B, Appeal of Dr. Loren Roth, No. 150 March Term, 1977 (Pa.,394 A.2d 419, 1978). (Major legal case establishing right to privacy and confidentiality of mental health records for patients in Pennsylvania.) See Sadoff, R.L. Pennsylvania Psychiatrist Vindicated in Refusing Judge's Request for Records. Legal Aspects of Medical Practice, 7(2):38,39, 1979.

American Psychiatric Association: Task Force To Develop Model Legislation on Commitment, 1980-.

American Academy of Child Psychiatry: PROJECT FUTURE Task Force on Children, Families, and the Law, 1980-.

Pennsylvania Psychiatric Society: Task Force on Ethics, 1981-.

Expert testimony on behalf of the American Psychiatric Association on the Insanity Defense before the Committee on the Judiciary United States Senate (Senator Arlen Specter's Sub-Committee on Criminal Law), and the House of Representatives (Congressman John Conyers' Sub-Committee on Criminal Justice), Washington, DC, 1982.

American Psychiatric Association: Ad Hoc Committee on the Insanity Defense - Chairman, 1982.

2. Consultantships

Consultant, Deer Island House of Correction, Boston, 1970-71.

Psychiatric Consultant (John Howard Pavilion, Forensic Psychiatry), St. Elizabeths Hospital, 1973-74.

2. Consultantships (cont'd)

Mental Health Professional Advisory Committee, Pennsylvania Mental Health, Inc. 1975-77.

Consultant, Law and Psychiatry, Department of Welfare, State of Pennsylvania, 1974 -.

Consultant Reviewer and Site Visitor - Law and Mental Health Projects. Crime and Delinquency Section, NIMH. 1977- .

American Bar Association, Commission on the Mentally Disabled, 1978.

Member of NIMH Study Section, Criminal and Violent Behavior, 1979-1982.

ADAMHA. Protection of Human Subjects in Psychiatric Research, 1979 - 1980.

Consultant, Allegheny County Jail, Pittsburgh, Pa. 1980-82.

Testimony before the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Washington, D.C., 1981.

National Academy of Sciences, Institute of Medicine: Institute of Medicine Workshop on Behavioral Research and the Secret Service, Washington, D.C., 1981. See, BEHAVIORAL SCIENCE AND THE SECRET SERVICE: Toward the Prevention of Assassination. National Academy Press, Washington, D.C., 1981, pp.181-182. (Contributor)

National Center for State Courts. Member of National Advisory Board of the Involuntary Civil Commitment project, 1981-1982. Member of Advisory Board on Mental Disability and the Law, 1982- .

Chairman, Statewide Independent Review Committee for Farview State Hospital, 1982-85. Appointed by Helen O'Bannon, Secretary, Department of Public Welfare, Commonwealth of Pennsylvania.

Member of The Task Force on Special Dispositional Statutes, Sentencing and Treatment of Mentally Disabled Prisoners. Criminal Justice Mental Health Standards Project. American Bar Association, Washington, DC, 1982.

Consultant Reviewer: American Journal of Psychiatry, Archives of General Psychiatry, Hospital and Community Psychiatry, Bulletin of the American Academy of Psychiatry and the Law, Criminology, Law and Policy Quarterly, Law and Human Behavior, International Journal of Law and Psychiatry, Science, Criminal Justice and Behavior.

BRIEF BIOGRAPHICAL DESCRIPTIONS
OF PARTNERS AND ASSOCIATES

ENNIS, FRIEDMAN, BERSOFF & EWING

BRUCE J. ENNIS

Bruce J. Ennis received his A.B. from Dartmouth College and his J.D. from the University of Chicago Law School, where he was on the Law Review and was elected to the Order of the Coif. After clerking for the chief judge of a federal district court, he spent three years as an associate at the Wall Street law firm of Chadbourne, Park, Whiteside & Wolfe, where he specialized in government contracts and general corporate litigation on behalf of a broad range of clients, including Sperry Rand, North American Rockwell, American Tobacco, Trans World Airlines, General Time, and Anaconda Copper. He then became Director of a New York Civil Liberties Union project to expand the rights of mentally ill and mentally retarded persons through test case litigation. In 1977, he was named National Legal Director of the American Civil Liberties Union, with overall responsibility for a nationwide litigation program, particularly at the Supreme Court level. In that capacity he argued three cases in the United States Supreme Court and participated as counsel in more than 150 others. In 1981 he directed the highly publicized and successful challenge to the Arkansas "creation science" statute.

Mr. Ennis' background gives him the capacity to apply creative and successful approaches to the legal problems of a wide range of clients, including business and professional corporations as well as individuals. He has the ability to use litigation if necessary, but also the whole range of negotiating, advising, and lobbying skills to advance the interests of his clients.

Mr. Ennis is the author of numerous books and articles, and has frequently appeared on national television programs such as ABC News Nightline, The Donahue Show, The Today Show, the McNeill-Lehrer Report, and Firing Line. He is a member and Chairman of the American Bar Association's Commission on the Mentally Disabled and of an ABA Task Force studying the laws governing mentally disabled criminal defendants. He is Chairman of the Board of the Mental Health Law Project, a public interest law firm which he co-founded in 1972. He has also served on the boards of directors of three other professional organizations, is a member of the American Trial Lawyers Association, and has been an adjunct Professor of Law at New York University.

News Brief

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This News Brief is a summary of a current Editorial Research Report which may be of interest to you or your students. The full 6,000-word report is in the library.

HELPING VICTIMS OF CRIME

by Marc Leepson

Editorial Research Reports

WASHINGTON, May...--Many of the 57 million Americans who become victims of crime every year find that the criminal justice system dispenses more justice to criminals than to victims. The legal rights of defendants have been clearly spelled out by the U.S. Supreme Court. But until recently, the judicial system paid only scant attention to the needs of the victim. This situation appears to be changing with the emergence of victim compensation and assistance programs in many states and localities.

"The plight of the innocent citizen victimized by lawlessness deserves immediate national attention," President Reagan said April 15, four days before the start of the second annual National Victims Rights Week. "Too often their pleas for justice have gone unheeded and their wounds -- personal, emotional and financial -- have gone unattended." Later that week the president set up a federal Task Force on Victims of Crime. But the administration has no plans to provide federal funds for victim compensation, preferring instead to encourage states and municipalities to run their own programs.

In fact, interest in the rights and problems of crime victims has resulted in a rash of activity on state and local levels in recent years. Today, 33 states and the District of Columbia have programs to compensate victims of violent crime. In 1981 alone, six states -- Colorado, Missouri, Nevada, New Mexico, Oklahoma and West Virginia -- enacted victim compensation legislation.

Scores of localities have established victim assistance programs that provide services ranging from day care for children of witnesses to psychological counseling for crime victims themselves. And an increasing number of judges around the country are requiring persons convicted of non-violent crimes to make financial restitution to their victims.

The most popular method for helping victims today is compensation, the awarding of money by the state to victims of violent crime or their families to help compensate them for medical or funeral expenses, lost wages or other financial losses suffered as a result of a crime committed against them. The 33 state programs now in existence vary widely in size and scope, ranging from California's,

(MORE)

which is expected to give out some $15 million this year to more than 6,000 victims, to North Dakota's, which has an annual budget of about $100,000 and handles an average of one claim a month.

Most state programs provide compensation only if a victim is not reimbursed by insurance or other state or federal programs and most set maximum awards, from $1,500 in Colorado, to $50,000 in Ohio and Texas. Some states restrict their programs to state residents. All require that the victim cooperate with law enforcement officials. Victims must report the crime within a certain period -- usually 48-72 hours -- and work with the police to help find the offender. The states do not compensate victims if they provoked the crime or were involved in an illegal activity at the time of the incident.

Victim compensation programs are funded either from general taxpayer revenues, fines imposed on convicted criminals, or a combination of both. Five of the six states that enacted victim compensation legislation in 1981 chose to fund their programs through penalty assessments on offenders. Missouri's new law, for instance, requires all those convicted of crimes to pay $26 into a special fund from which the state hopes to realize $250,000 a year to compensate victims.

Renewed interest in victim compensation has been paralleled by a growing movement on the part of states and municipalities to assist crime victims in other ways. These include protecting witnesses from intimidation, helping to return stolen property, providing ombudsmen and counsel for victims and compensating victims for courtroom appearances.

As is the case with victim compensation programs, victim assistance programs face constant financial pressures. Some states have cut funding for local victim programs, but few observers believe the states will stop supporting the programs altogether. "In today's climate I think a politician would be very hesitant to do away with [such] programs," said Lucy Friedman, executive director of New York City's Victim Services Agency. "Victim assistance is a so-called 'popular' movement at the moment. I don't know how long it will stay that way. What's more important is that it stay that way long enough for us to send down roots."

Congress is now working on a bill that would aid crime victims without using federal funds. The legislation, introduced April 22 by Sen. John Heinz, R-Pa., and 33 cosponsors, would establish federal guidelines for the fair treatment of crime victims and witnesses. It also would require probation officers to notify federal judges about the financial, social, psychological and medical impact of crimes on victims. "We see the bill as a first step in working with witnesses and victims," said a Heinz aide, "and as a model for the states to look at."

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