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CRIMINAL LAW AND PROCEDURE

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INTRODUCTION

Many commentators, most notably, Chief Justice Burger, have repeatedly bemoaned the burgeoning federal caseload.[1] Proliferation of litigation is nowhere more obvious than in criminal cases.[2] In light of a staggering number of decisions during the survey period, it would be folly to attempt encyclopedic coverage of the work of the Fifth Circuit in the areas of Criminal Law and Procedure.

Selection is thus necessary. Establishing criteria to determine noteworthy cases becomes the most important job of the Symposium author if this volume is to retain value. A number of criteria were considered for this article, but rejected: for example, lawyers, especially law professors, are trained to dissect individual judicial decisions, and to bring to light poor reasoning and a judge's result-orientation. It is tempting to pick those occasional opinions whose reasoning is suspect. Such an article is more sophistic than useful to practitioners of criminal law for whom this article is written. After some deliberation this writer chose areas of the law where change has been endemic. An obvious example is the fourth amendment.[3] An important observer of constitutional criminal procedure, Professor Yale Kamisar,[4] concluded two years ago that the Burger Court had not significantly dismantled the fourth

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1. *See, e.g.*, Hellman, *"Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?"*, 67 JUDICATURE 28 (1983).

2. For example, there were over 200 cases during the survey period involving criminal law and procedure.

3. U.S. CONST. amend. IV.

4. In addition to numerous articles on criminal procedure, Professor Kamisar is an editor of the widely accepted text Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE (5th ed. 1980) [hereinafter cited as MODERN CRIMINAL PROCEDURE. *See also* Kamisar, *Does (Did)(Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983).

amendment protections erected during the previous two decades.[5] A year later, he abandoned that optimistic assessment.[6] His consternation is no doubt even greater after the Court's most recent term.[7] A review of the United States Supreme Court's recent revision of the fourth amendment is beyond the scope of this article. But it does discuss the effect that the Supreme Court's decision in *Illinois v. Gates*[8] has had on Fifth Circuit decisions.

Other areas of the law appear almost as unsettled as procedure: perhaps more than any other circuit, the Fifth Circuit has given shape to the controversial Racketeering Influence and Corrupt Organizations (RICO) statute.[9] Originally ignored by federal prosecutors,[10] RICO has more recently been characterized as "The New Darling of the Prosecutor's Nursery,"[11] in part as a result of permissive judicial decisions defining the scope of RICO.[12]

The Fifth Circuit initially led the dramatic expansion of RICO,[13] but for a time it appeared that the court was retrenching.[14] The court's major RICO decision during the survey period evinces its continued willingness to expand RICO's application.[15] The court's compliance was most notable in the increasingly important area of criminal forfeiture.

Commentators have frequently observed the Supreme Court's inability to clarify the law governing the death penalty.[16] The work

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5. Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62 (V. Blasi ed. 1983) [hereinafter cited as THE BURGER COURT].

6. *See* Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 260 n.23 (1984).

7. *See, e.g.*, Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984); United States v. Karo, 104 S. Ct. 3296 (1984); Massachusetts v. Upton, 104 S. Ct. 2085 (1984); Florida v. Meyers, 104 S. Ct. 1852 (1984); Oliver v. United States, 104 S. Ct. 1735 (1984).

8. 462 U.S. 213 (1983).

9. 18 U.S.C. §§ 1961-1968 (1982).

10. *See* Magarity, *RICO Investigations: A Case Study*, 17 AM. CRIM. L. REV. 367, 367 (1980).

11. *See* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980).

12. *Id.* at 169. *See also* Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 294-302 (1983).

13. *See, e.g.*, United States v. Elliott, 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1979).

14. *See* Tarlow, *supra* note 12, at 384-98.

15. United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 996 (1984).

16. *See, e.g.*, Blasi, *The Rootless Activism of the Burger Court*, in THE BURGER COURT, *supra* note 5, at 213-14.

of the Fifth Circuit during the survey period includes several of the most widely reported death penalty decisions and demonstrates that America has entered a new era of frequent executions after a long prohibition, followed by a period of relative restraint. The decisions reviewed reflect cause for concern: the rush to judgment may lead to questionable results.

Finally, since John Hinckley's acquittal by reason of insanity for the attempted assassination of President Reagan, there has been pressure on Congress to change the scope and effect of the insanity plea.[17] Without awaiting congressional action, the Fifth Circuit has modified the insanity defense, narrowing its application,[18] despite the fact that the parties did not urge such a holding.[19]

I. THE FOURTH AMENDMENT: NOW YOU SEE IT . . .

In an essay published in 1983, Professor Kamisar concluded that "the fears that the Burger Court would dismantle the work of the Warren Court (or the Bill of Rights itself), and the reports that such dismantling was well under way, seem to have been considerably exaggerated."[20] During the same year, he dramatically revised his assessment of the Court's performance after the 1983 term had ended.[21] Supporters of judicial restraint of police conduct experienced even greater consternation during the most recent term.[22]

Once its members recover from vertigo, the criminal defense bar must assess the continued availability of fourth amendment challenges. But this is not an appropriate forum in which to review the work of the Supreme Court.[23] At the same time, numerous de-

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17. *See* Caplan, *Annals of Law: The Insanity Defense*, NEW YORKER MAG., July 2, 1984 at 69; Note, *The Proposed Federal Insanity Defense: Should the Quality of Mercy Suffer for the Sake of Safety?*, 22 AM. CRIM. L. REV. 49 (1984).

18. United States v. Lyons, 704 F.2d 743 (5th Cir. 1983).

19. *Id.*

20. Kamisar, *supra* note 5, at 68.

21. *See* Kamisar, *The 1982-83 Term and Police Investigatory Practices: An Overview*, in J. CHOPER, Y. KAMISAR, & L. TRIBE, 5 THE SUPREME COURT: TRENDS AND DEVELOPMENTS, 85, 88-90 (1984).

22. *See, e.g.*, Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984); United States v. Leon, 104 S. Ct. 3405 (1984); United States v. Karo, 104 S. Ct. 3296 (1984); Segura v. United States, 104 S. Ct. 3380 (1984); ; Massachusetts v. Upton, 104 S. Ct. 2085 (1984); Florida v. Meyers, 104 S. Ct. 1852 (1984); Oliver v. United States, 104 S. Ct. 1735 (1984); United States v. Jacobsen, 104 S. Ct. 1652 (1984).

23. *See, e.g.*, Wasserstrom, *supra* note 6, which provides an excellent review of developments during the 1983 term of the Supreme Court.

cisions during the survey period involved difficult issues raised by *Illinois v. Gates*.[24] This section is devoted to an extended discussion of those cases.

Illinois v. Gates Tipster, and the Fifth Circuit

On May 3, 1978, the Bloomingdale, Illinois police department received an anonymous letter concerning drug related activities of Lance and Sue Gates.[25] The letter included details of an impending trip to West Palm Beach, Florida. Observations by Drug Enforcement Administration agents corroborated some of the information in the letter.[26]

Based on the letter and the corroborative details, a Bloomingdale detective obtained a search warrant for the Gates' automobile and condominium.[27] The police executed the warrant on May 7. In the ensuing search, police found about 350 pounds of marijuana in the automobile and weapons and drug paraphernalia in the apartment.[28]

Charged with violation of state drug laws, the Gates moved to suppress the physical evidence on the ground that the warrant did not support a finding of probable cause.[29] The trial court agreed and its order suppressing the evidence was affirmed by the Illinois intermediate appellate court and the state supreme court.[30]

Gates received considerable attention when the Court requested that the parties brief the question whether the exclusionary rule should be modified.[31] Apparently, no majority emerged on that issue. The case was decided on the sufficiency of the warrant's statement of probable cause, as the parties had framed the issue prior to the grant of certiorari.

The Supreme Court reversed the decision of the state supreme court.[32] That court had found the letter inadequate under both prongs of the "*Aguilar-Spinelli*" test, and that corroboration failed

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24. 103 S. Ct. 2317 (1983).
25. *Id.* at 2325.
26. *Id.* at 2325-26.
27. *Id.* at 2326.
28. *Id.* at 2326.
29. People v. Gates, 82 Ill. App. 3d 749, 752, 403 N.E.2d 77, 80 (1980), *aff'd*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981).
30. 403 N.E.2d at 81.
31. 103 S. Ct. 436, 436 (1982). *See* Wasserstrom, *supra* note 6, at 341-46.
32. 103 S. Ct. at 2336.

because the police observed only "innocent activity."[33] Justice Rehnquist's opinion held that the test should be abandoned: such a "rigid legal rule [is] ill-suited to an area of such diversity."[34] In its place, the Court revived the "totality of circumstances analysis" in place of a test which had "encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate."[35] Informant reliability and underlying circumstances remain relevant to the magistrate's inquiry, but are not "independent requirements to be rigidly exacted in every case."[36] While the *Gates* warrant may have failed the *Aguilar-Spinelli* test, the Court found its statement of probable cause sufficient under its new test.[37]

A number of questions must be raised in *Gates'* wake: (1) does it apply to defendants whose convictions are still on direct appeal? (2) was *Aguilar-Spinelli* unworkable, as suggested by Justice Rehnquist? (3) is the Court's new test workable? and (4) will the new rule make a difference?

Retroactivity: A New Twist?

Prior to *Fay v. Noia*[38] which expanded issues cognizable under the writ of habeas corpus, retroactivity was not a serious issue. A new rule was given retroactive application to litigants who had not exhausted their appeal rights.

New substantive rules and expanded review created a dilemma for the court: a newly announced rule might free countless prisoners, creating an unwieldy burden for the court system and a windfall to defendants for whom retrial would be impossible. Thus, in an era that witnessed new rights for the criminally accused, the Court developed rules limiting retroactivity.[39]

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33. 85 Ill. 2d at 390, 423 N.E.2d at 893.

34. 103 S. Ct. at 2329.

35. *Id.* at 2330 (footnote omitted).

36. *Id.* at 2327-28 (footnote omitted).

37. *Id.* at 2334-36. *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

38. 372 U.S. 391 (1963). Fay v. Noia has been cut back by subsequent Supreme Court decisions. *See, e.g,* Sumner v. Mata, 449 U.S. 539 (1981).

39. *See, e.g.*, Michigan v. Payne, 412 U.S. 47 (1973); Ivan V. v. City of New York, 407 U.S. 203 (1972); Adams v. Illinois, 405 U.S. 278 (1972); DeStefano v. Woods, 392 U.S. 631 (1968); Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618

Given the Supreme Court's retrenchment, courts now face a new dilemma: police conduct unlawful at the time may be challenged after the Court has authorized such conduct. Or, evidence seized in violation of the fourth amendment may no longer be subject to suppression because it is within one of the newly created exceptions to the exclusionary rule.[40]

The Fifth Circuit addressed this issue during the survey period in *United States v. Kolodziej*.[41] A panel of the Fifth Circuit held that the affidavit procured by the government to search the defendant's home was insufficient in that it fell "short of providing any specific fact or circumstance which would indicate how [the government's source] came to know where the money was kept, or that it was earned in illicit drug transactions. It is also silent on the narcotics themselves. . . ."[42] Failure to state the circumstances underlying an informant's knowledge violated the first prong of the *Aguilar-Spinelli* test; therefore, the district court had been correct in suppressing fruits of the police search.

Subsequently, the government petitioned the court to rehear the case in light of *Gates*. The court denied the petition, but substituted a revised section dealing with the sufficiency of the affidavit.[43]

The court did not resolve whether *Gates* was retroactive. Instead, it assumed that *Gates* applied and found that "even under the more flexible 'totality of the circumstances' standard established in *Gates*, the government has failed to shoulder its burden of demonstrating that there was sufficient probable cause . . . to support the search warrant."[44]

The retroactivity issue was faced squarely in *United States v. Mendoza*.[45] Luis Carlos Mendoza and Oscar Tabares were convicted of conspiracy with intent to distribute[46] and possession with

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(1965).

40. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405 (1984).
41. 706 F.2d 590 (5th Cir. 1983).
42. *Id.* at 599.
43. United States v. Kolodziej, 712 F.2d 975 (5th Cir. 1983).
44. *Id.* at 977.
45. 722 F.2d 96 (5th Cir. 1983).
46. 21 U.S.C. § 841(a)(1) (1982).

intent to distribute cocaine.[47] On appeal, they challenged the legality of the stop and search of Mendoza's automobile.[48]

The defendants were convicted before the Supreme Court's decision in *Gates,* but their appeal was decided after *Gates.*[49] Their appeal included a challenge to the sufficiency of an informant's tip.[50] In *Mendoza,* the police received an anonymous tip that Oscar Tabares would be moving a large amount of cocaine from New Orleans to Miami over the holidays.[51] The police set up surveillance, resulting in observation of numerous details. As the court observed, "the individual details . . . might also be consistent with innocent behavior."[52]

Despite that, the court held that the informant's tip plus corroboration was sufficient to justify the stop of automobiles driven by Tabares and Mendoza. It did so in reliance on *Gates,*[53] and observed that " '[t]his may well not be the type of "reliability" or "veracity" necessary to satisfy some views of the "veracity prong" of Spinelli but we think it suffices for the practical common-sense judgment called for in making a probable cause determination.' "[54]

Subsequently, Mendoza and Tabares petitioned for rehearing en banc on the ground that the court erroneously applied *Gates* in deciding their appeal.[55] Because of the court's suggestion that a different result might be required under *Aguilar-Spinelli,* the Court could not avoid the retroactivity question.[56]

The court began its analysis with *United States v. Johnson,*[57] the Supreme Court's most recent discussion on the retroactivity issue.[58] According to the Fifth Circuit, the general rule is that "all 'new' rules of constitutional law must, at a minimum, be applied to all those cases that are still subject to direct review by the Court at

47. *Id.* § 846 (1982). *See* United States v. Mendoza, 722 F.2d 96 (5th Cir. 1983).
48. *Mendoza,* 722 F.2d at 97.
49. United States v. Mendoza, 727 F.2d 448 (5th Cir. 1984) (per curiam denial of en banc rehearing).
50. 722 F.2d at 99-100.
51. *Id.* at 97.
52. *Id.* at 101.
53. *Id.*
54. *Id.* at 102, (quoting Illinois v. Gates, 103 S. Ct. at 2335).
55. *Mendoza,* 727 F.2d at 448.
56. *Id.* at 449.
57. 457 U.S. 537 (1982).
58. 727 F.2d at 449.

the time the new decision is handed down."[59]

Johnson discussed a situation in which a "new" rule is announced which in fact is "clearly controlled by past precedent."[60] "In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."[61] If the decision is "entirely new and unanticipated," it is applied prospectively only, at least if the rule invalidates previously constitutional governmental action.[62] The interests protected are justified reliance on the old rule by law enforcement officials and the orderly administration of the criminal justice system.[63] A third situation may arise, not applicable in *Mendoza*, whereby "a trial court lack[s] authority to convict or punish a criminal defendant in the first place."[64]

There is a fundamental difference between *Johnson* (and cases discussed therein) and *Mendoza*. As indicated above, retroactivity is a relatively recent phenomenon with its origin in the Warren Court's expansion of the rights of criminal defendants.

The Fifth Circuit found that *Johnson* addressed the converse situation in which a new rule curtails defendants' rights: "the court noted [in Johnson] that *to protect a defendant from an unfavorable ruling*, full retroactivity had been recognized 'as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place.' "[65]

Finding *Mendoza* not clearly within any of the three categories discussed in *Johnson*, the court asked "whether retroactive application of *Gates* to all cases still pending on direct appeal is fair."[66] The court found retroactive application fair in a singularly unilluminating discussion:

> As in *Johnson*, retroactive application of *Gates* "to all previously nonfinal convictions provides a principle of decisionmaking consonant with" the Court's "original understanding of retroactivity," is capable of general applicability, "comports with our judicial responsibilities 'to do justice to each litigant on the merits of his own

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59. *Id.*
60. *Id.*
61. 457 U.S. at 549.
62. 727 F.2d at 449.
63. 457 U.S. at 544; Stovall v. Denno, 388 U.S. at 297.
64. 457 U.S. at 550. *See, e.g,* Moore v. Illinois, 408 U.S. 786 (1972).
65. 727 F.2d at 449 (emphasis added).
66. *Id.* at 450.

case,' " and furthers the goal of "treating similarly situated defendants similarly."[67]

It concluded that *Gates* was appropriately applied to cases on direct appeal when *Gates* was decided.[68]

The court's analysis is superficial. First, *Johnson* did not note that full retroactivity was applied in certain cases "to protect a defendant from an unfavorable ruling."[69] The Supreme Court has simply not resolved whether its new restrictive fourth amendment decisions are retroactive. Second, the Fifth Circuit did not explain why retroactive application of *Gates* is fair. The Court's rote recitation masks a difficult issue.[70]

Retroactivity decisions reflect a conflict in values. Our judicial system values repose, as evidenced by rules governing res judicata. But principles of equality militate in favor of affording all litigants the same rights. Although not phrased in those terms, retroactivity cases reflect a compromise between those extremes. In cases not implicating fact-finding integrity, the Court has considered bona fide reliance by law enforcement and the affect on the administration of justice.[71]

When a rule constricts liberty, the interest in efficient administration of justice will not weigh heavily. The prison gates will not open; mass retrials of convicted defendants will not be necessary. Similarly, reliance is not an important factor: when the rule narrows defendants' rights, the defendants' claim of reliance will be ill-founded. Defendants would not have altered their conduct in reliance on one rule of law as opposed to another.[72]

The issue comes down to fairness. But *Mendoza* offers no understanding why the court's rule is fair. It suggests that full retroactivity is fair because it "treat[s] similarly situated defendants similarly."[73]

The last proposition is debatable. It would seem that there are

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67. *Id.* (citing United States v. Johnson, 457 U.S. at 555).

68. 727 F.2d at 450.

69. 457 U.S. at 549-51. *Johnson* held that Payton v. New York, 445 U.S. 573 (1980) (requiring an arrest warrant for an arrest made in the home) was retroactive.

70. *See Johnson*, 457 U.S. at 555.

71. *Id.* at 544. *See also* Solem v. Stumes, 104 S. Ct. 1338 (1984).

72. The court in *Mendoza* correctly observed that "persons engaged in unlawful activity . . . could hardly have been depending on *Aguilar* and *Spinelli* to shield their illegal conduct." 727 F.2d at 450.

73. *Id.*

a number of classes of litigants to be compared. Mendoza has been treated similarly to the *Gates* defendants: the law was changed after they were the victims of searches illegal at the time, now made legal. But there are defendants, similarly situated to Mendoza, who have been treated differently. Thus an indeterminate number of defendants may have been subjected to illegal searches about the same time as was Mendoza. In some of those cases, evidence may have been suppressed and the state or government decided not to appeal. In others, defendants may have lost suppression motions and been convicted more expeditiously than were Mendoza and Tabares, even if the search was contemporaneous. Having docketed an appeal earlier than Mendoza and Tabares, their cases may have been decided favorably under *Aguilar-Spinelli*, prior to the Court's *Gates* decision. Those defendants are similarly situated to Mendoza, but for factors unrelated to the merits of their appeals, they avoid Mendoza's unhappy fate.

In addition, the court should have addressed the extent to which changing the procedural rule to the defendant's disadvantage violates the constitutional protection against the ex post facto clause.[74] It is blackletter law that "[a] retroactive statutory change in the rules of evidence is ex post facto, whether it excludes formerly-admissible evidence which is favorable to the defendant or, as more frequently is the case, admits formerly-inadmissible evidence which is favorable to the prosecution."[75] Arguably, that the court applied its new rule to the defendants in *Gates* evidences the Court's view that a narrowing decision does not always violate a defendant's rights under the ex post facto clause.

But the concerns of fairness underlying the ex post facto clause are certainly relevant to the resolution of a case like *United States v. Mendoza*.[76] *Mendoza* may ultimately be the course chosen by the Supreme Court. The Fifth Circuit's decision did not go far in explaining why that should be the case.

Gates: Was It Necessary? Does It Matter? Will It Work?

Whether *Gates* was necessary, whether results will differ, and whether the *Gates* test will work are interrelated questions. A number of cases decided by the Fifth Circuit during the survey

74. U.S. CONST. art. I, §§ 9, 10.
75. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 92 (1972) (footnotes omitted).
76. 727 F.2d 448 (5th Cir. 1984) (per curiam denial of en banc rehearing).

period suggest the following answers to those questions: probably not; maybe; it depends.

Was Gates Necessary

On January 19, 1983, Frances Phillips reported to the Baton Rouge office of the Bureau of Alcohol, Tobacco and Firearms that her husband, a convicted felon, had a sawed-off shotgun either in his car or in his apartment.[77] A Bureau agent found no firearms registered to the defendant. On the basis of the foregoing information, a Bureau agent obtained a search warrant for Phillips' apartment where agents found the shotgun.[78]

Phillips unsuccessfully moved to suppress the physical evidence and was thereafter convicted of possession of an unregistered firearm and possession of a firearm by a convicted felon.[79] On appeal, he challenged the lawfulness of the search because, he contended, the affidavit was insufficient.[80]

The court relied on *Gates* in affirming Phillips' conviction,[81] but it did so only after discussing how the case would have been decided under the *Aguilar-Spinelli* test.[82] The problem in *Phillips* was whether there was an adequate showing of the informant's reliability:

> The defendant notes that Agent Jones had never met Mrs. Phillips before she gave her statement, and that he knew nothing about her from any other source. The defendant also points out that Agent Jones made no effort to corroborate any of Mrs. Phillips' story, other than to check if there was a gun registered in the name of Melvin Phillips. Finally, the defendant argues that because his wife had just left home, Agent Jones should have suspected that Mrs. Phillips was acting out of a vengeful motive and thus that she was not credible.[83]

Gates rejected *Aguilar-Spinelli* because it was rigid and "en-

77. United States v. Phillips, 727 F.2d 392, 393 (5th Cir. 1984).
78. *Id.* at 394.
79. *Id.*
80. *Id.* at 395. He also contended that he was entitled to an evidentiary hearing under Franks v. Delaware, 438 U.S. 154 (1978). The Court had little difficulty disposing of that claim. *Id.* at 400.
81. 727 F.2d at 400.
82. *Id.* at 395-96.
83. *Id.* at 395.

couraged an excessively technical dissection of informants' tips . . . ."[84] *Phillips* demonstrates that the rules developed under *Aguilar-Spinelli* were not unworkable, especially in light of the recognition that the two prongs of *Aguilar-Spinelli* focused on relevant considerations.[85]

Cases like *Aguilar* and *Spinelli* demonstrate a heightened concern about reliance on anonymous tips and unsavory paid informants. Anonymous tips can be readily fabricated, or, if real, can be inaccurate because the informant may merely want to harass the "suspect." Paid informants are often petty criminals, not noted for veracity.[86] There is concern that such people will use unsubstantiated rumors instead of personal knowledge to keep a flow of information to the police. The reliability prong is particularly important in such cases.

Police often receive information from other classes of people: for example, from victims or witnesses of crime, or unpaid informants.[87] *Phillips* exemplifies the problem: Frances Phillips turned in her husband in part out of fear or anger because he had abused her. The police and magistrate knew her identity but she had never provided information to the police in the past.[88]

In cases involving paid confidential informants, courts generally agreed that the best proof of reliability was a recitation "that the informant has previously given tips that proved to be correct."[89] That evidence is obviously not available when the police are faced with an informant for the first time.

Aguilar and *Spinelli* did not dictate the absurd result that such information was useless.[90] The police had several options. They could corroborate the tip, and the circumstances under which the tip was given might validate its reliability. For example, it

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84. 103 S. Ct. at 2330.

85. *Id.* at 2334.

86. *See, e.g.*, State v. Paszek, 50 Wis. 2d 619, 184 N.W.2d 836 (1971): "Information supplied to officers by the traditional police informer is not given in the spirit of a concerned citizen, but often is given in exchange for some concession, payment, or simply out of revenge against the subject." 184 N.W.2d at 842.

87. *See, e.g.*, People v. Johnson, 15 Cal. App. 3d 936, 93 Cal. Rptr. 534 (1971).

88. 727 F.2d at 395.

89. *Id.* at 396.

90. But see Illinois v. Gates, 103 S. Ct. at 2332, suggesting that under *Aguilar-Spinelli* there was "virtually no place for anonymous citizen informants . . . ." That view simply ignores the suggestion made in *Spinelli* that the appropriate police response to such a tip is to corroborate the information.

might be sufficient that the tip was against the informant's penal interest.[91] Although not without debate, the fact that an unpaid informant was willing to be identified might show reliability.[92] Also subject of debate, some cases have held that a very detailed tip might demonstrate the informant's reliability.[93] Courts have also exempted eye-witnesses and crime victims from the reliability prong.[94] While the cases demonstrate some gray areas, it is inaccurate to characterize the cases as excessively technical and inflexible. Instead the courts' interpretations reflect an understanding of the concerns underlying *Aguilar* and *Spinelli*: the rule bent when there were sound reasons supporting the reliability of the tip.[95]

Phillips illustrates that point. Frances Phillips was not an anonymous tipster, a paid confidential informant or a crime victim.[96] She was akin to both the anonymous tipster, in that she demonstrated a vengeful motive, and the crime victim, in that she "did not participate in the crime, [so that] there was no danger that her tip was given to exculpate herself or to curry favor with the police."[97]

The court's decision demonstrates an awareness that "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."[98] The court indicated that it would have found the warrant valid: "Mrs. Phillips gave her statement in the form of an affidavit, thus subjecting herself to possible prosecution had she lied . . . . [T]he affidavit Mrs. Phillips signed explicitly provided that she was subject

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91. *See, e.g.*, United States v. Harris, 403 U.S. 573 (1971) (plurality opinion).

92. *Compare* United States v. Campbell, 575 F.2d 505 (5th Cir. 1978) *and* United States v. Darensbourg, 520 F.2d 985 (5th Cir. 1975) *with* United States v. Flynn, 664 F.2d 1296 (5th Cir.), *cert. denied*, 456 U.S. 930 (1982).

93. *See infra* text accompanying notes 112-17. *See also* W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.3 (1978).

94. *See, e.g.*, United States v. Bell, 457 F.2d 1231, 1238 (5th Cir. 1972).

95. *See, e.g.*, People v. Johnson, 15 Cal. App. 3d 936, 93 Cal. Rptr. 534 (1971):

> While obviously there is always the remote possibility that the report of a mother that her child has been abducted may later prove to have been inaccurate, mistaken or untruthful, nevertheless the heinous and dangerous nature of the reported crime is such that responding officers should not be required to insist that the reporting mother "prove her case" in the street before acting in reliance upon her representations.

93 Cal. Rptr. at 536.

96. 727 F.2d at 396-97.

97. *Id.* at 397.

98. United States v. Ventresca, 380 U.S. 102, 109 (1965).

to prosecution for false statements or representations."[99]

Phillips was a difficult case, but the court's analysis was neither excessively technical nor rigid. Had *Aguilar-Spinelli* controlled, the court would have resolved the problem in terms of the rationale for the rule, not by resorting to rigid rules. At the same time, the rationale for the *Aguilar-Spinelli* rule was comprehensible. A reasonable person contemplating the problem was not faced with arcane legalisms. The fact that there are hard cases in the law does not mean that its rules are unworkable.[100]

Does Gates Matter? Will It Work?

There have been at least two different responses to *Gates*. Professor Wasserstrom, not generally enamored with the recent trend in Supreme Court decisions eroding fourth amendment protections,[101] gives *Gates* mixed reviews:

> When that evidence consists in whole or in part of an informer's tip, common sense dictates that in determining how much to credit the tip it is necessary to consider the likelihood that the informant is either lying or misinformed. The Court's opinion in *Gates* recognized this. Moreover, where the police seek a warrant, probable cause is to be determined by the magistrate, not by the police. Therefore, the police should be required to tell the magistrate what they know about the informant and the source of his information, rather than merely assert in conclusory terms that he is "credible" or "reliable." This is the teaching of *Aguilar*, and that teaching is reaffirmed in *Gates*.[102]

Professor Wasserstrom found the *Aguilar-Spinelli* rule subject to criticism as confusing and unnecessarily limited.[103]

By contrast, Professors Kamisar and LaFave are skeptical: "[T]hey hear echoes in *Gates* of the totality of the circumstances

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99. 727 F.2d at 398.

100. It is particularly ironic that Justice Rehnquist wrote *Gates*. It was critical of the formulation of rules and cited the flexibility of the totality of the circumstances test as a reason for its adoption. This approach contrasts rather markedly with Rehnquist's insistence on bright line rules to govern police conduct. *See, e.g.*, United States v. Robinson, 414 U.S. 218 (1973).

101. *See* Wasserstrom, *supra* note 6; *see also* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981).

102. Wasserstrom, *supra* note 6, at 333-34. *But see id.*, at 334-40.

103. *Id.* at 333.

approach used by the court to assess the voluntariness of confessions before *Miranda v. Arizona*, 384 U.S. 436 (1966)."[104] Application of the totality of the circumstances approach was characterized by a pro-prosecution bias,[105] by the absence of clear guidelines,[106] and ultimately by the need for frequent Supreme Court intervention to avoid injustice.[107]

Lower courts have not decided enough cases to prove which view is correct. If Professors Kamisar and LaFave are correct, *Gates* will prove unworkable: magistrates and police will lack guidance on how to balance the multiple factors that comprise a totality of circumstances and may use the imprecision to sanction and to conduct searches without probable cause. If courts insist on hard evidence that tips are reliable and not supported by conclusory allegations, *Gates* may make little difference.

The cases decided during the survey period are inconclusive. As discussed above, *Mendoza* suggested that a different result would have been required by the *Aguilar-Spinelli* test.[108]

In *Mendoza,* the Jefferson Parish Sheriff's Office received information from the Drug Enforcement Administration

> that the DEA had received information from an anonymous source in Miami, Florida, that an individual named Oscar Tabares, living at a specified address in Gretna, Louisiana, and having a specified telephone number, would be moving a large shipment of cocaine "during the holidays" from the New Orleans area to Miami.[109]

Apparently in recognition that this tip was insufficient to establish probable cause, JPS narcotics officers established a round-the-clock surveillance of Tabares' home in an attempt to corroborate the tip.[110]

The court listed the corroborative detail developed during the

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104. *Id.* at 333 n.392. *See also* MODERN CRIMINAL PROCEDURE 553-59 (5th ed. 1980) (discussing the shortcomings of "voluntariness" test).

105. MODERN CRIMINAL PROCEDURE, *supra* note 4, at 557: "[T]he local courts almost always resolved the almost inevitable 'swearing contest' over what happened behind the closed doors in favor of the police . . . ."

106. *Id.*

107. *Id.* at 558. Similar problems have arisen in the context of consent searches where the Court has also relied on the totality of circumstances test. *Compare* Florida v. Royer, 460 U.S. 491 (1983) *with* United States v. Mendenhall, 446 U.S. 544 (1980).

108. *See supra* text accompanying notes 53-56.

109. 722 F.2d at 97.

110. *Id.*

surveillance as follows: (1) Tabares drove to and from various locations in a manner calculated to elude surveillance; (2) Tabares made use of pay telephones; (3) Tabares made a thorough inspection of the under carriage of his automobile; (4) on September 5, 1982, Tabares went to a hotel room which had been registered to a man with a Miami, Florida, address; (5) on September 6, 1982, a man, observed leaving the hotel room which Tabares had visited the previous day, proceeded to the airport in a manner which was clearly calculated to elude surveillance; (6) after being asked to identify himself at the airport, the man produced identification in the name of Francisco Garcia (the room had been registered to Francis Gomez), a Florida license which listed a Miami, Florida, address, an Argentinian passport, while he claimed to reside in New York and to be an Ecuadorian citizen; (7) on September 6, Tabares met with a man (later identified as Mendoza) who was driving a Ford car with a temporary Florida license tag and both men proceeded, in a manner apparently calculated to elude surveillance, to a warehouse; (8) the Florida-licensed automobile was driven into the warehouse while Tabares parked his car outside; Tabares and Mendoza remained for forty-five minutes behind closed doors in a warehouse with no apparent air conditioning; and (9) the Ford automobile was then driven from the warehouse by Mendoza who was observed to be perspiring heavily.[111]

Obviously the JPS officers provided copious corroborative detail. Even though the Court believed that the facts presented an *Aguilar-Spinelli* problem, it noted that much of the detail was "consistent with innocent behavior."[112] Although *Spinelli* suggested that the police might corroborate an otherwise defective tip, the Supreme Court never resolved an issue which divided lower courts: must corroborative detail be incriminatory or may the detail corroborate facts not directly bearing on guilt?[113] *Spinelli* was the source of the problem: it criticized the government's allegedly corroborative facts as merely innocent seeming detail, thereby suggesting that detail be incriminating.[114] But the Court also relied on *Draper v. United States*[115] as a "suitable benchmark"[116] for establishing probable cause. *Draper* found probable cause to arrest

111. *Id.* at 101.
112. *Id.*
113. *See* W. LaFave, *supra* note 93, at § 3.3.
114. 393 U.S. at 414.
115. 358 U.S. 307 (1959).
116. 393 U.S. at 416.

based on a tip plus corroboration, but the corroborative details were entirely consistent with innocent activity. For example, it included the color of Draper's suit and shoes and a description of his "gait."[117]

Even without resolving that conflict, the Fifth Circuit did not have to decide *Mendoza* by resort to *Gates,* with the attendant retroactivity question.[118] While some of the detail, viewed out of context, may have been innocent, much of the detail taken together was entirely consistent with the tip: the surveillance supported the tip and the facts observed (elusive behavior, false information, even use of pay phones near one's home and office) suggested that a drug deal was about to be made.[119] Thus, a fact innocent in one setting quickly becomes suggestive of criminal activity in another.

Mendoza is inconclusive on whether *Gates* will make a difference. But the court's suggestion that *Aguilar-Spinelli* would have produced a different result may make a difference. If the Fifth Circuit suggests that *Gates* is a watered down probable cause standard, magistrates and district courts will get the message that less scrutiny needs to be applied to warrant affidavits.

Phillips represents a more responsible approach to the problem. As indicated above, its careful analysis of the question under both tests suggests that the difference between *Gates* and *Aguilar-Spinelli* is small indeed.[120]

The court resolved the issue consistent with its understanding of *Gates* as follows: there was no doubt concerning Mrs. Phillips' "basis of knowledge."[121] The veracity prong could have been stronger, but it was certainly stronger than an anonymous tip. In addition to shoring up one slightly weak prong by reference to the other, the court stressed that *Phillips* involved a warrant, requiring resolution of close cases in favor of probable cause, thereby encouraging the use of warrants.[122] Finally, the court admonished that *Gates* would not be a vehicle to erode fourth amendment protections:

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117. 358 U.S. at 313.
118. *See supra* text accompanying notes 45-76.
119. 722 F.2d at 101-02.
120. *See supra* text accompanying notes 87-100.
121. 727 F.2d at 395.
122. *Id.*

> We do not view *Gates* as an endorsement of slovenly or careless law enforcement work. Such work will continue to produce problems for the prosecution, the defense and the courts engaged in a case by case analysis rather than a repair to certain and definite rules. The Court in *Gates* stated that *Aguilar* has provided guidance in determining the existence of probable cause and it is not anticipated that departure from these guidelines will be looked upon with favor.[123]

Issuance of warrants often permit the most intrusive police conduct: entry into the home.[124] If courts are to preserve fourth amendment values, it is hoped that the *Phillips* decision will be followed and that *Gates* will not invite an open season on our privacy.

II. RICO: *UNITED STATES v. CAUBLE*

A. Facts

Prosecutions under RICO are usually well-publicized,[125] often involving numerous defendants[126] and requiring lengthy and complex trials.[127] *United States v. Cauble*,[128] the major RICO case during the survey period, was no exception.

Rex Cauble, a self-made multi-millionaire, was the "legendary founder of Cutter Bill's [Western Wear], purveyors of such items as $6,000 suede Malaysian crocodile boots with a matching $15,000 blazer and a $110,000 silver Rolls Royce pickup for the cowboy who has everything."[129] He was also the general partner in Cauble Enterprises, a limited partnership organized under Texas law.[130]

Cauble Enterprises apparently experienced hard times during late 1976 and early 1977.[131] Within a short period of time, its fortunes improved dramatically. Its cash deposits at one bank were in

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123. *Id.* at 400.

124. *See, e.g.*, Payton v. New York, 445 U.S. 573 (1980) (holding arrest warrant is necessary if arrest is made in one's home based on heightened privacy interests in one's home).

125. *See, e.g.*, United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978), *aff'd on rehearing*, 590 F.2d 1379 (5th Cir.)(en banc), *cert. denied*, 444 U.S. 846 (1979).

126. *See* Tarlow, *supra* note 12, 301-02.

127. *See, e.g.*, United States v. Marcello, 537 F. Supp. 1364 (E.D. La. 1982), *aff'd sub nom.* United States v. Roemer, 703 F.2d 805 (5th Cir. 1983) (eighteen week trial).

128. 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 996 (1984).

129. Tarlow, *supra* note 12, at 300 n.25.

130. 706 F.2d at 1331.

131. *Id.* at 1338.

excess of $690,000 in 1978, more than three times its deposits in 1977, and more than 45 times its deposits in 1976.[132]

Cauble allegedly earned in excess of $400,000 from illegal drug transactions[133] and in turn, he deposited large amounts of cash in Cauble Enterprises' bank account.[134] Cauble did not participate directly in drug smuggling operations. Instead, he aided importation of at least 147,000 pounds of marijuana during a three year period.[135] He did so by financing travel of the smugglers, providing loans for the purchase of marijuana, and allowing facilities of Cauble Enterprises to be used by the smugglers to plan operations and to store and distribute marijuana.[136]

Cauble was indicted along with other members of the "Cowboy-Mafia"[137] for violating substantive provisions of RICO[138] and for conspiring to violate RICO,[139] along with other charges.[140] The government also sought forfeiture of Cauble's interest in the partnership.[141] The jury found Cauble guilty of all of the alleged offenses and found in favor of forfeiture.[142] Cauble appealed from a judgment of sentence of concurrent five year terms of imprisonment and from the order of forfeiture. The Fifth Circuit affirmed the judgment of sentence.[143]

Because RICO prosecutions seldom involve "small fry,"[144] the cases are vigorously litigated, with extensive challenges made post-trial.[145] Judge Rubin's opinion is noteworthy because of its detailed discussion of RICO. In effect, it is a primer for an attorney whose client may face a RICO charge. It is also noteworthy for its handling of Cauble's challenge to the order of forfeiture and evinces

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132. *Id.* at 1339.
133. Tarlow, *supra* note 12, at 321 n.128.
134. 706 F.2d at 1338-39.
135. *Id.* at 1329.
136. *Id.* at 1339-41.
137. *Id.* at 1329.
138. Cauble was charged with violating both § 1962(a) and § 1962(c). *Id.* at 1330-31.
139. 18 U.S.C § 1962(d) (1982).
140. 706 F.2d at 1329.
141. *Id.* RICO provides for criminal forfeiture in 18 U.S.C. § 1963 (1982).
142. 706 F.2d at 1329-30.
143. *Id.* at 1330.
144. *See* United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir.), *cert. denied*, 441 U.S. 933 (1979) (suggesting that "RICO may impermissibly reach 'small fry' with only a tangential relationship with a criminal enterprise . . .") *But see* United States v. Elliott, 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1979).
145. *See, e.g.*, United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978), *aff'd on rehearing*, 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 846 (1979).

that the Fifth Circuit is likely to give the government free reign in its use of RICO forfeiture provisions.

B. RICO Offenses: A Primer

RICO has produced a debate virtually unprecedented in substantive criminal law.[146] Proponents of RICO call it a "carefully crafted statute,"[147] and contend that it is a needed weapon in an effective law enforcement arsenal against organized crime.[148] Opponents have criticized its vague language;[149] they have chastised the government's "zealous exploitation" of broad judicial interpretations of RICO;[150] they have challenged its use against many "small-time criminals or businessmen who do not appear to be the intended targets of the legislation."[151]

The courts of appeal share with scholarly commentators the same ambivalence about RICO's permissible scope. Several courts, including the Fifth Circuit, have applied RICO well beyond the feared infiltration of legitimate businesses by organized crime.[152] Liberal readings of its provisions have enmeshed the government in what was once considered the grist of the state and local law enforcement mill.[153] Some courts, led by the Fifth Circuit, have upheld convictions for RICO conspiracies unrestrained by traditional limitations on conspiracy prosecutions.[154]

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146. *See, e.g.*, Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations, (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1012-13 (1980). *See also* Tarlow, *supra* note 12, at 294 nn.3-4 (listing commentaries).

147. Blakey & Gettings, *supra* note 146, at 1026 n.91 (citing Iannelli v. United States, 420 U.S. 770, 789 (1975)). Professor Blakey was Chief Counsel to the Senate Subcommittee on Criminal Laws and Procedure when RICO was processed, *id.* at 1009, and was one of its drafters. *Id.* at 1012.

148. *Id.* at 1014.

149. *See, e.g.*, Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1 (1978); Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491 (1974).

150. Tarlow, *supra* note 12, at 294.

151. *Id.* at 298-99.

152. *Id.* at 298-300 (citing cases).

153. *See, e.g.*, United States v. Licavoli, 725 F.2d 1040, 1042 (1984) (defendants engaged in a "pattern of racketeering activities," despite the fact that the only crimes committed were murder and the conspiracy to commit that murder). Despite what appears to be intrusion into a local concern, courts have consistently rejected claims that RICO violates the ninth and tenth amendments. *See, e.g.*, United States v. Martino, 648 F.2d 367 (5th Cir. 1981), *rev'd on other grounds on rehearing*, 681 F.2d 952 (5th Cir. 1982) (en banc), *rev'd sub nom.* Rusello v. United States, 459 U.S. 1101 (1985).

154. *See, e.g.*, United States v. Elliott, 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439

At the same time, some courts have urged moderation. Even in *United States v. Elliott,* widely criticized for abandoning traditional restraints applied in conspiracy cases, the Fifth Circuit cautioned that "[t]he Act does not authorize that individuals 'be tried *en masse* for the conglomeration of distinct and separate offenses committed by others.' "[155] Because of the statute's perceived ambiguity,[156] and because of the vast scope of many RICO prosecutions,[157] courts have cautioned restraint by the government.[158] Some courts have begun to narrow RICO by interpreting imprecisely defined elements stringently.[159]

RICO was intended "to provide a blueprint for federal action against organized crime."[160] Congress did not intend to criminalize sporadic crime committed by two or more individuals.[161] Instead, Congress envisioned an ongoing entity run by a crime "family" like a business.[162] Traditional prosecutorial tools failed to defeat organized crime because the structure remained even if individual criminals were convicted and incarcerated.[163]

RICO's provisions reflect Congress's concern with the crime family model. A defendant may violate RICO in four ways: (1) "by investing funds 'derived . . . from a pattern of racketeering activity' in an enterprise," (2) "by 'muscling' into the ownership of an

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U.S. 953 (1979). *Elliott* has been followed by some courts. *See, e.g.,* United States v. Barton, 647 F.2d 224, 237 (2d Cir.), *cert. denied,* 454 U.S. 857 (1981). *But see* United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981).

155. 571 F.2d at 903.

156. The Fifth Circuit has characterized RICO as "less than pellucid." United States v. Rubin, 559 F.2d 975, 990 (5th Cir. 1977), *vacated and remanded on other grounds,* 439 U.S. 810 (1978).

157. *See, e.g.,* United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978), *aff'd on rehearing,* 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied,* 444 U.S. 846 (1979).

158. *See, e.g.,* United States v. Thordarson, 646 F.2d 1323, 1328-29 n.10 (9th Cir.), *cert. denied,* 454 U.S. 1055 (1981) (cautioning against "undue prosecutorial zeal in invoking RICO"); United States v. Anderson, 626 F.2d 1358, 1364 n.8 (8th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981) (among federal prosecutors, "RICO has grown in popularity . . . beyond the intentions of Congress by bringing within the sphere of RICO minor offenses and by intruding on state power.").

159. *See, e.g.,* United States v. Turkette, 452 U.S. 576 (1981) (requiring an "enterprise" to function as a continuing unit); United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981), *cert. denied,* 455 U.S. 949 (1982) (limiting the *Elliott* conspiracy doctrine by requiring proof that a defendant must have known that others were involved in the same enterprise).

160. 706 F.2d at 1330.

161. United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981). *See also* Blakey & Gettings, *supra* note 146, at 1030.

162. *See* Tarlow, *supra* note 12, at 299 n.21.

163. *See* Blakey & Gettings, *supra* note 146, at 1034-36.

enterprise through a pattern of racketeering activity;" (3) "by operating an enterprise 'through a pattern of racketeering activity' "; or (4) "by conspiring to do any of the above."[164]

A number of concepts are unique to RICO. Consistent with the popular conception of organized crime,[165] the statute requires proof of an enterprise, either financed,[166] taken over,[167] or run[168] by a pattern of racketeering. RICO's provisions and judicial interpretations of those provisions defining the enterprise[169] are broad: for example, RICO reaches both legal and entirely illegal enterprises.[170] It includes corporations and other legally created entities, but most frequently, prosecutions have involved enterprises composed of "individuals associated in fact."[171]

A second and distinct[172] element of a RICO violation is that the defendant engage in a "pattern of racketeering."[173] Under section 1962(a), it is unlawful to invest income derived from a pattern of racketeering in an enterprise.[174] Section 1962(c) makes it unlawful to conduct the affairs of an enterprise through a pattern of racketeering.[175] A pattern of racketeering, in turn, is defined as the commission of at least two enumerated offenses.[176]

On appeal, Cauble contended that the government failed to prove that Cauble Enterprise was a RICO enterprise or that there was a nexus between the enterprise and the racketeering activity.[177] Interestingly, the Fifth Circuit has held that the government need not specify in the indictment whether the charged enterprise is a legal entity or a group of individuals associated in fact.[178] But

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164. Holderman, *Reconciling RICO's Conspiracy and "Group" Enterprise Concepts with Traditional Conspiracy Doctrine*, 52 U. CIN. L. REV. 385, 388 (1983).

165. *See* Hawkins, *God and the Mafia*, in THE PURSUIT OF CRIMINAL JUSTICE (G. Hawkins & F. Zimring, eds. 1984).

166. 18 U.S.C. § 1962(a) (1982).

167. *Id.* § 1962(b) (1982).

168. *Id.* § 1962(c) (1982).

169. *Id.* § 1961(4) (1982).

170. United States v. Turkette, 452 U.S. 576 (1981).

171. *See* Tarlow, *supra* note 126, at 324-346.

172. *See Turkette*, 452 U.S. at 583: "The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages."

173. 18 U.S.C. § 1961(5) (1982).

174. *Id.* § 1962(a) (1982).

175. *Id.* § 1962(c) (1982).

176. *Id.* § 1961(5) (1982).

177. 706 F.2d at 1342.

178. United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981).

if the indictment charges a specific enterprise, the government must prove the existence of that enterprise.[179] Thus in *Cauble*, because the government charged that the relevant enterprise was the partnership, it could not rely on the existence of the "Cowboy-Mafia," individuals associated in fact.[180]

In one sense, the government may more easily prove the existence of a legal entity than an enterprise composed of individuals associated in fact. The Supreme Court has held that an enterprise must have an "ongoing organization, formal or informal, and . . . various associates [who] function as a continuing unit."[181] Thus, evidence that Cauble Enterprises was an enterprise was straightforward: "[P]roof that the entity has a legal existence satisfies the enterprise element. This is because, by definition, a legal organization such as a partnership has an ascertainable structure, operates as a continuing unit, and has a purpose common to its members and employees."[182]

However, membership in an enterprise, alone, is insufficient to prove that a person who has committed two predicate acts has violated RICO. For example, the fact that an employee of a large corporation may make collections of unlawful debts during working hours is insufficient to prove a section 1962(c) offense.[183] It is also insufficient to prove that a defendant worked for a RICO enterprise: she must be personally engaged in racketeering activity.[184] That is, the defendant must not only conduct the affairs of the enterprise but must do so by committing the predicate offenses. Thus courts have found that the government must prove a "nexus between the enterprise, the defendant, and the pattern of racketeering activity."[185]

The nexus between Cauble and the enterprise was obvious; he was its general partner. The nexus between Cauble and the racketeering activity was less direct: he did not smuggle or distribute the marijuana. The court found sufficient circumstantial evidence that

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179. United States v. Lemm, 680 F.2d 1193 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983).

180. 706 F.2d at 1340-41.

181. *Turkette*, 452 U.S. at 583.

182. 706 F.2d at 1340.

183. *See, e.g.*, United States v. Dennis, 458 F. Supp. 197 (E.D. Mo. 1978), *aff'd*, 625 F.2d 782 (8th Cir. 1980).

184. *See* 706 F.2d at 1332 n.21.

185. *Id.* at 1332.

Cauble aided and abetted importation of marijuana.[186] The nexus between the racketeering activity and Cauble Enterprises presented little difficulty for the court: Cauble used his position in the enterprise to commit the racketeering activity.[187] That would have been insufficient if Cauble had merely pocketed the proceeds of the drug transactions. The statute specifies that one must conduct the affairs of the enterprise through criminal acts.[188] Cauble's downfall was depositing the cash proceeds in the enterprise's bank account. Thus, the racketeering activity affected the enterprise.[189]

C. RICO: Section 1962(a)

Most RICO prosecutions involve section 1962(c), making it unlawful to conduct the affairs of an enterprise through a pattern of racketeering.[190] A number of liberal statutory construction cases have, in effect, made section 1962(c) available whenever a group of individuals associate with some regularity and agree to commit two predicate offenses.[191] As a result, reliance on sections (a) and (b) has been limited.

Cauble is especially important because the government proved a section 1962(a) violation as well as a section 1962(c) violation.[192] That is, the Fifth Circuit found the government's evidence sufficient in that Cauble had invested "income . . . derived from a pattern of racketeering activity" that "flowed into the enterprise . . . ."[193]

Commentators have suggested that section 1962(a) prosecutions would be infrequent "because of the extreme difficulty of proving that income invested in an enterprise had as its origin racketeering practices."[194] One of RICO's primary draftsmen summarized the problem:

> Direct proof linking the invested income to racketeering activity is

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186. *Id.* at 1341.
187. *Id.*
188. 18 U.S.C. § 1962(c) (1982).
189. 706 F.2d at 1341.
190. *See* Tarlow, *supra* note 12, at 316, 324.
191. *See, e.g.*, United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); United States v. Boylan, 620 F.2d 359 (2d Cir. 1980).
192. 706 F.2d at 1330-31.
193. *Id.* at 1342.
194. Blakey & Goldstock, *"On the Waterfront": RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 356 (1980). *See also* Note, *supra* note 149.

available only on rare occasions, because of money's fungible nature . . . .

> Therefore, the government is generally forced to rely on inferences drawn from the circumstances surrounding investments. *An inference that income invested in a business was attained through racketeering would be valid only if it could be proven that the defendant had insufficient legitimate funds for the investment [for example where] defendants' legitimate net worth was computed and found to be significantly lower than the amount of money invested in the business.*[195]

That is, according to commentators, it was insufficient to show merely that a defendant invested income in an enterprise. It was also essential to prove that the invested income was derived from racketeering. The government must "trace" the income from the illegal transaction to the investment in the enterprise.[196]

Cauble contended that the government failed to do so and "that RICO's legislative history demonstrates that Congress intended to require the government to 'trace' illicitly-derived funds from a particular unlawful act to the enterprise."[197]

The Fifth Circuit's response requires examination:

> The government presented evidence of large cash deposits to Cauble Enterprises' account and of marijuana smuggling in which Cauble and Cauble Enterprises' employees played a role. The jury might reasonably have inferred that there was a sufficient nexus between the money and the enterprise to satisfy the "investment" requirement of § 1962(a).[198]

This writer has not had the opportunity to examine the record in *Cauble*: the record may contain additional evidence concerning Cauble Enterprises' finances.[199] For example, the government may have introduced evidence to show that other Cauble Enterprises' ventures could not have been the source of cash deposits in 1977 and 1978. But the Court relied only on the facts cited: Cauble made about $400,000 from illegal drug smuggling and Cauble Enterprises' cash deposits increased dramatically at about the same time.

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195. Blakey & Goldstock, *supra* note 194, at 356-57 (emphasis added).

196. *See* McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?* 46 NOTRE DAME LAW. 55, 145 (1970).

197. 706 F.2d at 1342.

198. *Id.* at 1342-43 (footnote omitted).

199. *See, e.g., id.* at 1339 n.55.

The court's reasoning does not withstand critical analysis. If reported accounts are credible, Cauble was a multi-millionaire. His assets included "large stock interests in three banks, a steel fabricating plant, a horse trailer company, a welding supply company, and six ranches in five counties."[200] One might reasonably inquire whether Cauble Enterprises' cash deposits were not increased by income derived from some of Cauble's legitimate business activities.

A layman might answer that Cauble could easily have opened his books to explain the source of the cash deposits. That, of course, is not responsive in the context of the *Cauble* case. Section 1962(a) requires that the government prove several essential elements, including the fact that the invested income was derived from specified criminal activity.[201] Requiring Cauble to explain the source of the funds would be unconstitutional because it would shift the burden of proof of an essential element of the offense to the defendant.[202]

Cauble's conviction for a violation of section 1962(a) must rest on the strength of the court's inference: it follows from the facts that Cauble earned $400,000 from illegal activity and contemporaneously deposited in excess of $690,000 in the bank where the illegal funds were placed in the enterprise's account.

While this inference may be permissible, it does not meet the applicable test. The Supreme Court has held that when a prosecutor relies on an inference, the inferred fact need not follow from the proven fact beyond a reasonable doubt.[203] Like any other case, a case based on circumstantial evidence can be built on a series of relevant and probative pieces of evidence. A single piece of evidence, whether direct or circumstantial, need not prove the case beyond a reasonable doubt. That rule changes, however, if there is only one piece of evidence from which the jury may find the defendant guilty. In such a case, the fact to be inferred must follow beyond a reasonable doubt from the fact in evidence.[204]

Thus, it is difficult to accept the Fifth Circuit's conclusion that

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200. *See, e.g.*, Tarlow, *supra* note 12, at 321 n.128.

201. *See, e.g.*, United States v. McNary, 620 F.2d 621 (7th Cir. 1980).

202. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684 (1975).

203. Ulster County Court v. Allen, 442 U.S. 140 (1979) (holding that permissive presumptions are to be judged by rational connection between proven fact and fact to be presumed). *See also* Sandstrom v. Montana, 442 U.S. 510 (1979).

204. *Id.*

the government's evidence was sufficient to sustain Cauble's conviction for violation of section 1962(a). The following example offers a stark contrast to the court's approach in *Cauble*: "For example, in *United States v. McPartland,* Internal Revenue Service agents could trace the channeling of funds derived from narcotics sales into a restaurant business. The defendants' legitimate net worth was computed and found to be significantly lower than the amount of money invested in the business."[205] By contrast, the Fifth Circuit allowed Cauble's section 1962(a) conviction to stand despite a net worth far in excess of the cash deposits.[206] Indeed, Cauble's reported net worth would have yielded income far in excess of the deposited funds, thereby creating at least a plausible inference that the contested deposits came from income derived from entirely legitimate sources.

D. Forfeiture RICO Style

Criminal forfeiture in American law is an anomoly. In personam forfeiture, authorized by RICO,[207] was known at English common law: a person convicted of a felony lost his chattel to the king, his land to his lord.[208] Americans' repugnance to such forfeiture was demonstrated both by article III, section 3 of the Constitution[209] and by a statute adopted by the First Congress prohibiting forfeiture.[210]

By contrast, American jurisdictions have traditionally recognized civil or in rem forfeitures.[211] Civil forfeiture "stems from a fiction that ascribes guilt to the property, and the rights of the

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205. Blakey & Goldstock, *supra* note 194, at 357.

206. *See* Tarlow, *supra* note 126, at 321 n.128: "The Government succeeded in forfeiting between $40,000,000 and $80,000,000 in assets, which included bank accounts and a number of businesses and ranches."

207. 18 U.S.C. § 1963 (1982).

208. *Tarlow, supra* note 11, at 277-78.

209. U.S. CONST. art. III, § 3, cl. 2 provides that: "[T]he Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person Attainted."

210. 18 U.S.C. § 3563 (1982), Act of April 30, 1790, ch. 9 § 24, 1 Stat. 112, 117. See Tarlow, *supra* note 11, at 278, suggesting that RICO "probably repeals section 3563 by implication."

211. Several cases decided during the survey period demonstrate that civil forfeiture can be a potent sanction even though it is limited to the res. *See, e.g.,* United States v. "MONKEY", 725 F.2d 1007 (5th Cir. 1984); United States v. $64,000.00 in United States Currency, 722 F.2d 239 (5th Cir. 1984); United States v. $23,407.69 in United States Currency, 715 F.2d 162 (5th Cir. 1983).

government derive from an in rem judgment against the offending articles."[212]

Congress provided for in personam forfeiture in RICO.[213] Section 1963 may be RICO's most innovative provision. RICO has been described by one of its primary draftsmen as a remedial statute.[214] The forfeiture provisions can be a potent weapon.

Unlike civil forfeiture,[215] RICO forfeiture is a penalty imposed at the trial of the defendant.[216] The government must give notice to the defendant that it will seek forfeiture,[217] but the indictment may be very general about the nature of the interest to be forfeited.[218] The jury decides whether a defendant's interest is to be

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212. Blakey & Gettings, *supra* note 146, at 1036.

213. 18 U.S.C. § 1963 (1982) provides:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

. . . .

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

214. Blakey & Goldstock, *supra* note 194, at 349-50.

215. *See, e.g.*, 19 U.S.C. § 1595(a) (1982); 21 U.S.C. § 881 (1982); 28 U.S.C. § 2463 (1982); 49 U.S.C. § 782 (1982).

216. 18 U.S.C. § 1936(a)(c) (1982).

217. FED. R. CRIM. P. 7(c)(2).

218. *See, e.g.*, United States v. Smaldone, 583 F.2d 1129 (10th Cir. 1978).

forfeited by way of answers to special interrogatories.[219] Preferably, the district court should bifurcate the forfeiture question from the determination of guilt.[220]

RICO forfeiture is also distinguishable from common law forfeiture. A person convicted under RICO does not lose his entire estate. Instead, upon conviction, a defendant:

> shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.[221]

RICO was intended "to break the economic power of organized crime . . ."[222] Congress was concerned that, short of draconian measures, organized crime could retain its influence and power if individuals were merely incarcerated. Others could take their place, or a mob leader could continue to run his crime enterprise from within prison.[223]

The government has been slow to employ RICO forfeiture. Both its novelty and its complexity undoubtedly deterred prosecutors from its use.[224] More recently, the government has urged its prosecutors to seek RICO forfeiture vigorously.[225] As a result, it is being sought in increasingly novel cases.[226]

RICO forfeiture has created some difficult questions on which courts have divided. *Cauble* is illustrative and also demonstrative of the Fifth Circuit's willingness to support the government's liberal use of RICO.

Apparently, Cauble placed ownership of virtually all of his

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219. United States v. L'Hoste, 609 F.2d 796, 813-14 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

220. *Id. But see Cauble*, 706 F.2d at 1348. (failure to raise bifurcation issue not plain error).

221. 18 U.S.C. § 1963(a) (1982). There is some authority that § 1963(a)(2) applies to violations of §§ 1962(a) and (b), while § 1963(a)(2) applies to § 1962(c). *See* Tarlow, *supra* note 11, at 276.

222. Blakey & Gettings, *supra* note 146, at 1036.

223. 706 F.2d at 1350.

224. *See* Webb & Turow, *RICO Forfeiture in Practice: A Prosecutorial Perspective*, 52 U. CIN. L. REV. 404, 406 (1983).

225. *Id.* at 406-07.

226. Tarlow, *supra* note 12, at 307.

personal fortune in Cauble Enterprises.[227] According to one commentator, those assets exceeded $150,000,000 and the government succeeded in forfeiting between $40,000,000 and $80,000,000 in assets.[228] The government proved that Cauble received about $400,000 from illegal drug transactions[229] and the jury found that Cauble deposited that money in Cauble Enterprises' bank account.[230]

Cauble raised a number of challenges to the order of forfeiture.[231] Not surprisingly, Cauble tried to cut his losses:

> Cauble . . . claims that the charge made it impossible for the jurors to render anything but a blanket verdict of forfeiture because they were not furnished a list of Cauble Enterprises' assets so that they might forfeit only those that were the basis for Cauble's control and were not asked to determine what "manner of forfeiture" would deprive him of his influence over the enterprise.[232]

That is, Cauble argued that only assets used to violate RICO were subject to forfeiture.

The court rejected that argument: "The RICO forfeiture is *in personam*: a punishment imposed on a guilty defendant. It deprives that defendant of all of the assets that allow him to maintain an interest in a RICO enterprise, regardless whether those assets are themselves 'tainted' by use in connection with the racketeering activity."[233]

The Fifth Circuit has held that a jury may not mitigate the amount to be forfeited.[234] The jury is to determine "whether the defendant violated RICO and what interest the defendant held in the enterprise."[235] This decision was based on the apparently explicit language of section 1963.[236]

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227. 706 F.2d at 1349 n.100.

228. Tarlow, *supra* note 12, at 321 n.128.

229. *Id.*

230. *See supra* text accompanying notes 200-08.

231. 706 F.2d at 1345-50.

232. *Id.* at 1349.

233. *Id.*

234. United States v. L'Hoste, 609 F.2d 796, 811 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980). *See also* United States v. Hess, 691 F.2d 188 (4th Cir. 1982). *But see* United States v. Huber, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

235. 706 F.2d at 1349.

236. 18 U.S.C. § 1963(a) provides in relevant part that "[w]hoever violates any provision of § 1962 . . . shall forfeit to the United States (1) any interest . . . ." *But see* Tarlow, *supra* note 11, at 280-81; Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Power-*

The Second Circuit has rejected that view, in part because of its concern that mandatory forfeiture may violate the eighth amendment prohibition against cruel and unusual punishment.[237] By interpreting the statute as permitting jury discretion, the court avoided the constitutional question.[238] Its result is supported by section 1963(c) which provides that "the Attorney General [may] seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper."[239]

Cauble demonstrates how draconian the Fifth Circuit's approach can be. The government proved that Cauble received less than a half a million dollars from the illegal drug trade; as a result, it was able to forfeit between $40,000,000 and $80,000,000 in assets. If that was Congress's intent,[240] RICO forfeiture in such a case violates the eighth amendment.

It is now well-settled that the eighth amendment prohibits disproportionate punishment.[241] While it did not decide the question, the Ninth Circuit noted that section 1963(a) penalties might be "shockingly disproportionate."[242] The court offered the example of "a shopkeeper who over many years and with much honest labor establishes a valuable business could forfeit it all if, in the course of his business, he is mixed up in a single fraudulent scheme."[243] A claim of disproportionality was certainly arguable in *Cauble*, a case in which assets forfeited were one-to-two hundred times the illegal funds invested in the enterprise.

Cauble evinces the Fifth Circuit's continued willingness to apply RICO provisions with little restraint.[244] Although it has retrenched somewhat on the issue of RICO conspiracies,[245] the court

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ful Weapon, 17 AM. CRIM. L. REV. 379, 390-91 (1980).

237. United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

238. *Id.* at 397.

239. 18 U.S.C. § 1963(c) (1982). *See* Tarlow, *supra* note 11, at 280-81.

240. *See* Taylor, *supra* note 236, at 383-85.

241. *See* Solem v. Helm, 103 S. Ct. 3001 (1983); Weems v. United States, 217 U.S. 349 (1910).

242. United States v. Marubeni Am. Corp., 611 F.2d 763, 769 n.12 (9th Cir. 1980).

243. *Id.*

244. *See, e.g.*, United States v. Elliott, 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1979).

245. *See, e.g.*, United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982) (limiting *Elliott* conspiracy doctrine by requiring proof that a defendant must have known that others were involved in the same enterprise). *See* Holderman, *supra*

in *Cauble* has taken the course of least resistance on two important questions: (1) it has refused to require detailed tracing of funds from the illegal activity to the enterprise,[246] and (2) it has sanctioned forfeiture even though forfeited assets and the tainted investment are grossly disproportionate.[247] *Cauble* also demonstrates some of the hard questions that are raised by RICO's complex, novel provisions and the bona fide disagreements in interpretation of the statute, evincing a need for a more active role of the Supreme Court to educate lower federal courts.[248]

III. THE DEATH PENALTY: ARE THE FLOODGATES OPENING?

For a brief period in our history, it appeared that abolitionists had won the battle in their opposition to the death penalty.[249] *Furman v. Georgia*[250] struck down as unconstitutional the administration of death penalty laws in every state, primarily because of the arbitrary and unpredictable way in which those laws were carried out.[251]

The battle lines have been redrawn. Although abolitionists have won occasional skirmishes,[252] the Supreme Court has upheld statutes authorizing the death penalty in a wide range of cases.[253]

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note 164 (finding a judicial trend to impose traditional conspiracy limitations on RICO conspiracies).

246. *See supra* text accompanying notes 193-207.

247. *See supra* text accompanying notes 228-244.

248. To date, the Supreme Court has decided only two RICO cases. Rusello v. United States, 104 S. Ct. 296 (1983) (insurance proceeds received as result of arson activities are an "interest" subject to RICO forfeiture); United States v. Turkette, 452 U.S. 576 (1981) (RICO "enterprise" includes entirely illegal as well as legitimate businesses).

249. *See* THE BURGER COURT, *supra* note 5, at 213.

250. 408 U.S. 238 (1972).

251. "Because the Court majority was fractured five separate ways . . . it was no small exercise in interpretation to determine on precisely which issues the Justices agreed. Undoubtedly uppermost in their minds was the belief that the evidence clearly showed the death penalty had been for some time inflicted in a 'wanton' and 'freakish' manner. . . ."

THE DEATH PENALTY IN AMERICA 249 (H. Bedau, ed. 1982) (footnote omitted).

252. *See, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982) (eighth amendment prohibits imposing death penalty for a person who did not take life, attempt to do so, or intend to do so); Coker v. Georgia, 433 U.S. 584 (1977) (eighth amendment prevents death penalty where it is disproportionate with the crime); Roberts v. Louisiana, 431 U.S. 633 (1977) (eighth amendment prohibits mandatory death sentence for specific class of offenses); Woodson v. North Carolina, 428 U.S. 280 (1976) (eighth amendment prohibits mandatory death penalty).

253. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976). *See also* THE BURGER COURT,

While *Furman* emphasized the evil of the unpredictable use of the death penalty, the Court has forbidden use of mandatory death sentences for specified crimes.[254] It has upheld statutes which allow consideration of various aggravating and mitigating factors.[255]

Abolitionists have not been idle. Each new Supreme Court decision has produced new, more refined arguments.[256] Abolitionists have used technical ingenuity to keep many death row inmates alive long past their originally scheduled execution dates.[257] This procedural maneuvering has led to a backlash. Partly out of concern that counsel might "sandbag," courts have developed stringent rules to deter repeated habeas corpus petitions.[258]

Recently, the Supreme Court developed general guidelines "for the handling of applications for stays of executions . . . that allow a decision on the merits of an appeal accompanying the denial of a stay."[259] Most importantly, from the death row inmate's perspective, *Barefoot v. Estelle* held that "a court of appeals may adopt expedited procedures in resolving the merits of habeas appeals, notwithstanding the issuance of a certificate of probable cause."[260] Even if an appeal is non-frivolous, "a court of appeals may still choose to expedite briefing and hearing the merits of all or of selected cases in which a stay of a death sentence has been requested . . ."[261] The majority opinion reflects impatience with the delay caused, in effect, by its own precedent.

Justice Marshall disagreed vigorously with the majority's guidelines permitting truncated procedures:

> This is a truly perverse suggestion [that the truncated procedures are appropriate "*solely because the State has announced its intention to execute the appellant before the ordinary appellate process has run its course*"]. If full briefing and argument are generally regarded as necessary to fair and careful review of a nonfrivolous ap-

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supra note 5, at 214: "the decision for death remains largely a discretionary matter."

254. Woodson v. North Carolina, 428 U.S. 280 (1976).

255. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976). *See* THE BURGER COURT *supra* note 5, at 214 (suggesting the Burger Court has developed "a jurisprudence of death that is largely ad hoc in nature.")

256. *See* THE DEATH PENALTY IN AMERICA, *supra* note 251, at 247-53.

257. *See, e.g.*, Gray v. Lucas, 710 F.2d 1048 (1983) (Post-trial procedures consumed almost eight years between imposition of the death sentence and Gray's execution).

258. *See, e.g.*, Barefoot v. Estelle, 103 S. Ct. 3383, 3391 (1983).

259. *Id.* at 3393.

260. *Id.* at 3394.

261. *Id.* at 3395. *See, e.g.*, Williams v. King, 722 F.2d 104 (5th Cir. 1983).

> peal—and they are—there is absolutely no justification for providing fewer procedural protections solely because a man's life is at stake. Given the irreversible nature of the death penalty, it would be hard to think of any class of cases for which summary procedures would be less appropriate than capital cases presenting a substantial constitutional issue.[262]

Justice Marshall expressed hope that the courts of appeal would, in effect, resist a rush to judgment invited by the majority opinion.[263]

An examination of death penalty cases decided by the Fifth Circuit during the survey period is disquieting. In the recent past, federal appeals courts have been sympathetic to claims raised by death row inmates.[264] But, like the Supreme Court, the Fifth Circuit appears to have retrenched, capitulating to popular pressure to get on with the job of executing condemned inmates.[265]

Death Penalty Cases: A Double Standard?

A. Background

A litigant is not entitled to an error-free trial.[266] While it is easy to second-guess unsuccessful decisions made by trial counsel after the fact, it would be unreasonable to judge trial performance through the "finely ground lens of 20/20 hindsight."[267] Making a claim of "ineffective assistance of counsel" which is easy to win would erode the finality of the criminal process because it would allow the unscrupulous attorney to assure post-trial relief by failing to file an arguable motion or by failing to raise a clear objection.[268]

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262. 103 S. Ct. at 3404 (Marshall, J., dissenting.)

263. *Id.* at 3406.

264. As reported by Justice Marshall in his *Barefoot* dissent:

> Of the 34 capital cases decided on the merits by courts of appeals since 1976 in which a prisoner appealed from the denial of habeas relief, the prisoner has prevailed in no fewer than 23 cases, or approximately 70% of the time. In the Fifth Circuit, of the 21 capital cases in which the prisoner was the appellant, the prisoner has prevailed in 15 cases.

Id. at 3405.

265. For example, Bill Allain, now the governor of Mississippi, campaigned for that job in part on his role in securing the death penalty in the *Gray* case, Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983).

266. Hayes v. Maggio, 699 F.2d 198, 201 (5th Cir. 1983).

267. Williams v. Maggio, 695 F.2d 119, 123 (5th Cir. 1983).

268. Conversely, by adherence to strict waiver standards and to strict rules governing

The Fifth Circuit has adhered strictly to its rules governing ineffective assistance of counsel in death penalty cases.[269] It has done so because "[t]he standard of competence required of trial counsel 'is no higher in capital cases than in noncapital cases.' "[270]

Supreme Court decisions belie that assertion of parity. Ironically, *Barefoot* suggests that capital defendants may be afforded more summary proceedings than other litigants.[271] But apart from that aberration, the Court has traditionally erected greater safeguards in capital cases than in noncapital cases:

> This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake. Long before the Court established the right to counsel in all felony cases, . . . it recognized that right in capital cases . . . . Time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case . . . ."[272]

The reason seems obvious: the death penalty is "qualitatively different from a sentence of imprisonment . . . ."[273] The death penalty reflects society's most awesome moral judgment. It would seem to follow that it ought to be carried out only in clear cases.

Concern about attorneys intentionally failing to raise a meritorious claim to harbor an issue for appeal is probably ill-founded in death penalty cases. The risk is too high that restrictive doctrines like waiver will prevent subsequent review of that issue.[274] Instead, there is a very real concern that the death penalty is most frequently reserved for those defendants who have not had good representation at trial.[275]

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ineffective assistance of counsel makes it incongruous to suggest that competent counsel would fail to raise a meritorious claim. The chances against review of the claim are simply too great. *See, e.g.*, Jones v. Estelle, 699 F.2d 793 (5th Cir. 1983) (en banc).

269. *See, e.g.*, Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983).

270. *Id.* at 1279-80 (citing Bell v. Watkins, 692 F.2d 999, 1008 (5th Cir. 1982)).

271. 103 S. Ct. at 3393-95.

272. *Id.* at 3404 (Marshall, J. dissenting).

273. *Id.* at 3405 (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

274. *See supra* text accompanying note 269.

275. *See* THE DEATH PENALTY IN AMERICA, *supra* note 251, at 189-90 (footnote omitted):

> Modern defenders of the death penalty scoff at the idea of defendants (guilty or innocent) being 'railroaded to the chair,' and point to the widespread use of public defenders, dedicated trial counsel such as Team Defense, and the skillful advocacy at the appellate and post-appellate levels such as the NAACP Legal Defense Fund attorneys provide. Overlooked are the many other death penalty cases where 'ineffective assistance of trial counsel' is cited by the courts as so extensive and damaging to

Some recent decisions in the Fifth Circuit appear to visit counsel's failure upon the accused.[276] This may be a necessary evil in an efficient criminal justice system: not everyone can have the best trial attorney.[277] But the willingness to allow a defendant to pay with his life for counsel's imprecision will almost guarantee miscarriages of justice.

B. Martin v. Maggio

David Dene Martin lived in the Houma area where he was active in work sponsored by the Seventh Day Adventist Church.[278] That work included counselling runaway children and people with drug problems. Martin married Gloria Pitre in 1976. Martin's wife gave birth in December, 1976. Assisted by two members of his church, Martin delivered his daughter by natural child birth. Because they were unassisted by experienced medical personnel, the infant received brain damage when she ceased breathing during her birth.[279]

On August 11, 1977, Martin's wife became a waitress at a restaurant owned by Bobby Todd. On August 13, she told Martin that she had engaged in sexual intercourse with Todd and that she refused to quit her job.[280] Subsequently, Martin stole a .357 magnum pistol from a friend. He also told two friends that he was going to kill Todd. In a subsequent account, Martin admitted that he entered Todd's trailer, shot Todd, Todd's bodyguard and two nude women also present. He attempted to make the killings look like a robbery by taking money that was in the trailer.[281]

During the same evening, Martin confessed to five people that he had committed the murders. Not surprisingly, Martin was sub-

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the defendant's chances before the jury as to warrant a new trial . . . . Experienced criminal trial attorneys will say that 'no really capable defense lawyer should ever lose a capital case.' Perhaps; there is no doubt that inexperienced, overworked, and understaffed defense lawyers often do lose them.

276. *See, e.g.*, O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1015 (1984); Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983); Gray v. Lucas, 710 F.2d 1048 (5th Cir.), *cert. denied*, 104 S. Ct. 211 (1983).

277. Morris v. Slappy, 461 U.S. 1 (1983) (defendant was not denied right to counsel despite fact that a different member of the public defender office represented defendant at trial than had done so at the preliminary hearing).

278. Martin v. Maggio, 711 F.2d 1278 (5th Cir. 1983).

279. *Id.* at 1279.

280. *Id.* at 1276-77.

281. *Id.* at 1277.

sequently arrested. A sheriff who arrested Martin stated that Martin "appeared 'strung out on dope' at the time."[282]

It would be educational for the reader to reflect on those facts and to ask herself what defense she might pursue. There are relatively few reasonable alternatives in a case like Martin's, once it is clear that the state intends to seek the death penalty. Obviously, a defendant would like to force the state to prove that he committed the murders, with the hope that he might be acquitted.[283] But that was unrealistic in Martin's case because he had advertised his intention to kill his victim before the crime[284] and broadcast his success after the fact.[285] Discussing the case with any of those witnesses would evidence the extent to which Martin had implicated himself.

Almost certainly, the reasonable alternatives would be to explore an insanity defense or a defense of mitigation to avoid the death penalty. The sheriff's statement suggested a drug intoxication defense as did a statement made by one of Martin's friends.[286] His behavior after the crime was consistent with the defense of diminished capacity.[287]

Apparently, either the drug or the insanity defense suggested itself to Martin's counsel.[288] Lead counsel arranged for an examination by a psychiatrist after Martin told his attorney that he had taken drugs before he went to Todd's trailer.[289] Martin told the psychiatrist that he had taken PCP prior to the killings. The psychiatrist discussed with counsel a defense based on Martin's drug usage.[290]

Without discussing their decision with Martin, his trial attorneys rejected the drug defense.[291] They attempted to exonerate Martin and relied on lead counsel's belief that "the physical evidence showed the victims 'could not have been shot in that small

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282. *Id.*

283. According to lead counsel, Martin insisted that counsel "walk me or fry me." *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. Martin had two attorneys: lead counsel, "a Texas attorney with ten years' criminal trial experience and some experience with capital cases," and a Louisiana attorney "with limited criminal experience and no experience in capital offenses." *Id.* at 1277.

289. *Id.*

290. *Id.*

291. *Id.* at 1278.

trailer.' "[292] This argument might prevail, counsel believed, "because the state's case would be 'straight out circumstantial.' "[293]

Martin was convicted of four counts of first degree murder.[294] Counsel presented witnesses at the sentencing phase to present facts about Martin's church work, the brain damage to his child for which Martin blamed himself, and his generosity. Despite that evidence, the jury unanimously recommended the death penalty on each count.[295]

A closely divided Louisiana Supreme Court affirmed the judgment of sentence.[296] The United States Supreme Court denied a petition for certiorari over three dissents.[297] Martin then exhausted his state post-conviction remedies.[298] On February 10, 1981, Martin filed a petition for a writ of habeas corpus in the district court.[299] He appealed the denial of relief to the Fifth Circuit.[300]

The panel indicated its disapproval of the manner in which trial counsel conducted themselves.[301] After observing that the sixth amendment requires counsel to " 'conduct a reasonable amount of pretrial investigation,' "[302] the court found that "Martin's counsel failed to conduct a reasonable investigation into the intoxication defense."[303] Counsel failed to pursue the psychiatrist's suggestion that an insanity defense was available; insofar as coun-

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292. *Id.*

293. *Id.* Counsel was wrong in its characterization of the government's case: "Martin's five confessions were each direct evidence of his guilt" *Id.* n.4.

294. *Id.*

295. *Id.* at 1279.

296. State v. Martin, 376 So. 2d 300 (La. 1979) (the court affirmed by a vote of 4 to 3).

297. Martin v. Louisiana, 449 U.S. 998 (1980) (Stewart, Brennan, and Marshall, JJ., dissenting).

298. State *ex rel.* Martin v. Blackburn, 392 So. 2d 648 (La. 1981).

299. Martin v. Blackburn, 521 F. Supp. 685 (E.D. La. 1981).

300. 711 F.2d at 1279.

301. Martin's lead attorney did no research to determine whether voluntary intoxication was a defense to first degree murder in Louisiana. Local counsel, who has since ceased to handle criminal cases, testified that he "got into" the question "real heavy," but his testimony exhibits substantial confusion about the legal questions involved. He testified that, to the best of his recollection, voluntary intoxication was not a defense.

Id. at 1278. In a footnote the court observed that "[i]n fact, Louisiana law provides that voluntary intoxication that 'preclude[s] the presence of [the] specific criminal intent . . . required' for conviction of first degree murder does provide a defense to that charge". *Id.* at n.3.

302. *Id.* at 1280 (citing Washington v. Strickland, 693 F.2d 1243, 1251 (5th Cir. 1982) (en banc)).

303. *Id.*

sel researched the question at all, they failed to understand whether an intoxication defense was available; they failed to discuss the options with Martin.[304]

The court did not find that counsel was ineffective. The court did not decide whether counsel relied on "unreasonable assumptions or strategies in deciding"[305] to forego the drug defense:

> We need not decide whether counsel was ineffective, however, for that finding alone would not entitle Martin to relief. In addition to proving his counsels' shortcomings, a defendant asserting an ineffective assistance claim must demonstrate that his counsels' failings "worked to his *actual* and substantial disadvantage."[306]

The court held that Martin was not entitled to relief because he "failed to show that a reasonable investigation would have produced evidence that he lacked the specific intent to kill."[307]

The court found that Martin did not show "*actual* and substantial disadvantage" because his two medical experts established only a possibility "that a reasonable investigation would have produced evidence that he lacked the specific intent to kill."[308] There are two problems with the court's assertion.

The requirement that a litigant show actual disadvantage was adopted by the Fifth Circuit *after* Martin's habeas corpus hearing.[309] Prior to that the law was unsettled. As the panel noted, a litigant always had to show "*some* degree of prejudice."[310] Arguably, Martin presented evidence of prejudice.

In addition, a close reading of the panel's decision does not support its conclusion that Dr. Byrd, the psychiatrist who examined Martin, testified that an intoxication defense was only a mere possibility.[311] According to the court, Martin told the doctor that he had taken PCP.[312] Byrd testified concerning the effect of PCP: use of the drug "would raise substantive and serious questions about [Martin's] ability to formulate logical thoughts" on the night of the murder. He also stated that "the murders were 'incon-

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304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 1281.
308. *Id.*
309. *Id.* n.7.
310. *Id.*
311. *Id.*
312. *Id.* at 1277.

sistent with [Martin's] past history, except in the presence of a toxin such as LCD [sic] or PCP.' "[313] There appears to be impressive evidence to establish a drug-intoxication defense: if the jury were to credit Martin's testimony that he took PCP, it might not have credited the doctor's testimony that Martin "possibly" lacked specific intent, but rather that use of PCP raised substantive serious questions about his ability to form the specific intent to kill.

The court's quibble with Byrd's testimony was based on his additional observation that "an intelligent decision about such a defense . . . required additional evaluation of Martin and further investigation of the drugs Martin had taken that night."[314] It is unclear why Dr. Byrd's caution eroded his earlier statements. His observation that further investigation of Martin was necessary is legally irrelevant if his earlier testimony would have been competent evidence on the mens rea element. It might have been good medical practice to conduct a further investigation, but that would not be controlling at trial. The purpose of the additional investigation of the drugs is baffling. Presumably, the drugs used by Martin were no longer available for inspection and the doctor already testified concerning the effect of PCP.

Similarly, the court asserted that Martin's expert on the effect of drugs also created only a possibility that the intoxication defense had merit.[315] Dr. Richard Garey testified concerning various effects of PCP.[316] Apparently, the effects varied from complete amnesia to fragmented memory. The quoted testimony seems irrelevant to the mens rea issue: whether, at the time of the crime, Martin was able to form the requisite intent to kill.[317]

The court found, alternatively, that even if Martin's evidence were adequate to establish availability of an insanity defense, the state could demonstrate that "the outcome of his trial would have been the same notwithstanding that evidence."[318] Martin "carefully" planned to kill Todd for two days; he "posed as a hitchhiker" to disguise his approach to the trailer; subsequent conversations demonstrate that he was aware of his motive for killing Todd even as he committed the crime; Martin's conduct in taking money

313. *Id.*
314. *Id.*
315. *Id.* at 1281.
316. *Id.* at 1278.
317. *Id.*
318. *Id.* at 1281.

to make the motive appear to be robbery and in disposing of the gun demonstrate "lucidity."[319] Finally, contrary to the doctors' testimony about common symptoms of PCP, Martin experienced no amnesia immediately following the murders. The court concluded that "no jury would have accepted the intoxication defense."[320]

That the state may have prevailed at trial is not the issue. The question was whether a reasonable jury would necessarily find the defendant guilty. In reciting the state's evidence, the court ignored evidence supportive of the intoxication defense: one witness thought that Martin "looked pretty drug out" prior to the killings. After the killings, Martin was excited and loquacious, symptoms consistent with drug abuse. Perhaps most telling, the sheriff who arrested Martin thought that Martin was "strung out on dope" at the time of the arrest, shortly after the crime.[321] It should also be observed that Dr. Garey did not testify that amnesia was universal in users of PCP. Instead, the extent of amnesia varied from user to user.[322]

On January 3, 1985 the State Pardon Board rejected Martin's appeal for clemency.[323] The board rejected Martin's claim that "temporary insanity induced by drugs and family problems led to his acts."[324] On January 4, 1985, Martin was executed.[325] The members of the Pardon Board said "Martin's behavior on the day of the crime appeared too rational for him to be under a drug-induced psychosis."[326]

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319. *Id.* at 1281-82.

320. *Id.* at 1282.

321. *Id.* at 1277.

322. *Id.* at 1278. According to the court, Dr. Garey testified that "[i]t is possible for an individual who is under the influence of PCP to remember an event for a short time, then forget about it, but 'it's not common.' It happens 'in approximately 10 percent of the cases.'" *Id.* Later in its opinion the Court asserted that "[b]oth doctors testified at the federal habeas hearing that amnesia is a common symptom of PCP intoxication." *Id.* at 1282. Thus Martin's ability to recount details of the crime shortly after the crime made it impossible for a jury to accept the intoxication defense. *Id.* While the court's recitation is technically correct, it is misleading: amnesia is common but not universal. It is conceivable that a reasonable jury may have believed that Martin was one of those users of PCP who did not experience complete amnesia.

323. *See* The Times Picayune/States Item, Jan. 4, 1985, at 1, col. 7.

324. *Id.*

325. *Id.*

326. *Id.* at 4.

C. *Gray v. Lucas*

Jimmy Lee Gray raped and murdered a three-year-old-girl.[327] He was indicted by a Jackson County, Mississippi, grand jury in October 1976.[328] The Mississippi Supreme Court reversed the judgment of sentence in Gray's original trial.[329] Following a second conviction and imposition of the death penalty, that court affirmed the judgment.[330] The United States Supreme Court denied his petition for the writ of certiorari.[331]

After exhausting state remedies, he filed an unsuccessful petition for the writ of habeas corpus. The Fifth Circuit affirmed the district court's order.[332] The Supreme Court again denied Gray's petition for the writ of certiorari.[333]

Gray filed a second application for post-trial relief with the state supreme court, two weeks prior to the July 6, 1983 execution date set by that court.[334] On June 29, 1983, after the Mississippi Supreme Court denied relief, Gray filed a second petition for habeas corpus in the federal district court.[335] He appealed the court's denial of a stay of execution.[336]

On July 2, 1983, the Fifth Circuit ordered of a stay of execution.[337] After the United States Supreme Court decided *Barefoot v. Estelle,*[338] the Fifth Circuit consolidated Gray's request for a stay and the merits of his habeas corpus claims.[339] That appeal was heard after the district court's dismissal of Gray's petition on July 8, 1983. The Fifth Circuit affirmed.[340] Thereafter, Gray was executed.[341]

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327. Gray v. State, 351 So. 2d 1342 (Miss. 1977).
328. *See* Gray v. Lucas, 710 F.2d 1048, 1050 (5th Cir. 1983).
329. Gray v. State, 351 So. 2d 1342 (Miss. 1977).
330. Gray v. State, 375 So. 2d 994 (Miss. 1979).
331. Gray v. Mississippi, 446 U.S. 988 (1980).
332. Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), *panel reh'g and reh'g en banc denied,* 685 F.2d 139 (5th Cir. 1982).
333. Gray v. Lucas, 461 U.S. 910 (1983).
334. 710 F.2d at 1050.
335. *Id.* at 1051.
336. *Id.* at 1052.
337. *Id.*
338. 103 S. Ct. 3383 (1983).
339. 710 F.2d at 1052.
340. *Id.* at 1062.
341. *See* Granelli, *Justice Delayed,* 70 A.B.A. J 51, 51 (1984).

One issue raised by Gray is of particular interest.[342] Gray contended that he was presently insane and that "the eighth and fourteenth amendments prohibit the execution of an insane person . . . ."[343]

Counsel amassed impressive evidence of Gray's insanity. He presented multiple affidavits of people who knew Gray at various times in his life, of his attorneys, and of witnesses who related that his pre-trial mental examinations were inadequate.[344] The substance of those affidavits, supported by the affidavit of a psychiatrist who examined Gray and his hospital records,[345] was "that Gray, due to severe child abuse when young, psychiatrically disturbed parentage, and head injuries while a child, has a deep-seated and serious mental impairment."[346] The psychiatrist's assessment includes the following conclusions: Gray was "chronically psychotic," "manifested by delusions, auditory hallucinations, and bizarre beliefs." She found "evidence of some central nervous system damage manifested by lapses of attention, dizziness and nausea periodically . . . ." She also found him "extremely paranoid" and concluded that both the murder for which he faced execution and a prior homicide were "committed while he was under the influence of extreme mental or emotional disturbance . . . ."[347]

The Fifth Circuit held that the petition for habeas corpus and supporting affidavits did not require an evidentiary hearing.[348] It is blackletter law that the "law . . . does not permit the execution of

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342. Gray raised seven issues. 710 F.2d at 1050-51. But for the Supreme Court's decision in Pulley v. Harris, 104 S. Ct. 871 (1984) (holding that statewide proportionality review of death sentences is not required by the eighth amendment), a second issue would have been ripe for discussion. On Gray's first federal habeas petition, he challenged the form of proportionality review employed by Mississippi. The Fifth Circuit rejected that claim. Subsequently the Supreme Court granted certiorari in *Pulley*, 460 U.S. 1036 (1983), to decide a similar issue, Gray v. Lucas, 710 F.2d at 1057. Gray, therefore, moved the Court to stay his execution pending the Supreme Court's decision in *Pulley*. The Fifth Circuit refused because its earlier decision "represents the law of the case and we decline to reconsider it." *Id.* It is doubtful that the doctrine of law of the case is so inflexible that it requires such a result. Death penalty abolitionists would have rightly been up in arms had the Fifth Circuit allowed Gray to die, only to have the Supreme Court rule the other way in *Pulley* that statewide proportionality review was necessary.

343. 710 F.2d at 1050.

344. *Id.* at 1054.

345. *Id.* at 1055.

346. *Id.* at 1054-55.

347. *Id.* at 1055.

348. *Id.* at 1056.

a person who is presently insane."[349] But Gray's first problem was whether that right was protected by the eighth amendment: "it has at most been intimated, but never held, that a person sentenced to die has a right protected by the federal constitution that protects him against execution because of present insanity . . . ."[350]

The Fifth Circuit did not resolve that issue. It assumed for purposes of Gray's appeal that such a right existed.[351] It also found that Gray had suffered "serious psychotic impairments."[352] Nonetheless, the Court found that Gray had "not made a showing sufficient to justify an evidentiary hearing on the issue . . . ."[353]

The Court reasoned as follows: the test for insanity in execution cases varies among states.[354] That division results from various reasons underlying the rule:

> [E]xecution of the mentally incompetent offends notions of a civilized society, . . . execution of the mentally incompetent serves little deterrent purpose . . . the insane prisoner [is unable] to reflect intelligently upon his crime so as to assist in efforts to avert execution, to make his peace with God, or to fully appreciate the reasons why he is being punished.[355]

The court acknowledged that Gray was insane or at least that he was psychotic. But in effect, the court found that he was not insane for purposes of post-trial relief. Relying on a dissenting opinion by Justice Frankfurter, the court held that a person could escape execution if he suffered:

> from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court.[356]

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349. *Id.* at 1053 (citing Solesbee v. Balkcom, 339 U.S. 9, 14-24 (1950) (Frankfurter, J. dissenting)). *See also* W. LAFAVE & A. SCOTT, *supra* note 75, at 302-04.

350. 710 F.2d at 1053. The right has been widely accepted by the states. However, the states have applied different tests for insanity in this context. Comment, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 (1980).

351. 710 F.2d at 1056.

352. *Id.*

353. *Id.*

354. *Id.* at 1053.

355. *Id.* at 1054 (citing Comment, *Insanity of the Condemned*, 88 YALE L.J. 533, 535-36 (1979)).

356. 710 F.2d at 1054 (citing Solesbee v. Balkcome, 339 U.S. at 9, 20 n.3).

After articulating that test, the court found that Gray's affidavits showed sufficient intelligence and understanding to warrant his execution. It did not explain its conclusion that "as we view it, these mental deficiencies . . . would . . . not be of a nature to deprive him of 'sufficient intelligence' " and understanding.[357] The court reached this conclusion despite allegations in Dr. Lewis' affidavit that Gray was "not competent to assist counsel . . . in demonstrating a defense of his rights" and that "he does not understand the crime for which he was tried."[358] A more appropriate and less hasty remedy would have been to remand the case for an evidentiary hearing because the affidavit did allege, at least in conclusory terms, that Gray was insane under the test relied upon by the court.

It was also unfortunate for Gray that counsel accepted the above-cited test for post-conviction insanity.[359] That test is premised on some, but not all, of the reasons why society has been hesitant to execute the insane.[360] The test is not broad enough if the purpose of the rule, for example "is that execution of the mentally incompetent serves little deterrent purpose . . . ."[361] Insofar as general deterrence underlies the rule, an appropriate test for insanity would include those who could not be deterred.[362]

D. O'Bryan v. Estelle

Ronald Clark O'Bryan, an optician for Texas State Optical Company, experienced serious financial difficulties.[363] At some point during 1974, he substantially increased life insurance coverage on his children. He retained minimal coverage for himself and his wife.[364]

During August and September, 1974, O'Bryan made repeated inquiries about securing cyanide. Cyanide was also apparently a frequent topic of O'Bryan's conversation with fellow employees.[365]

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357. *Id.* at 1056.
358. *Id.* at 1055.
359. *Id.* at 1054 n.4.
360. *See*, Comment, *supra* note 351, at 535-36.
361. 710 F.2d at 1054.
362. *See, e.g.*, W. LaFave & A. Scott, *supra* note 75, at 286 (citing A. Goldstein, Insanity Defense (1967)).
363. O'Bryan v. Estelle, 714 F.2d 365, 369 (5th Cir. 1983).
364. *Id.*
365. *Id.*

On Halloween evening, 1974, O'Bryan gave his children candy laced with cyanide. O'Bryan poorly disguised his crime, making an easily refuted effort to implicate a neighbor.[366] That night, his son ate the poisoned candy and died shortly thereafter.[367]

O'Bryan was convicted of capital murder and sentenced to death.[368] Following an unsuccessful appeal to the Texas Court of Criminal Appeals,[369] the United States Supreme Court denied his petition for the writ of certiorari.[370] After several unsuccessful petitions for state post-conviction relief, O'Bryan filed a petition for a writ of habeas corpus.[371] The district court denied the petition on October 20, 1982.[372] After initially granting a stay of execution, a divided panel of the Fifth Circuit affirmed the order of the district court denying his habeas corpus petition.[373]

In several cases during the survey period, death row inmates challenged their convictions based on the United States Supreme Court's decision in *Witherspoon v. Illinois*.[374] *O'Bryan* is the most interesting of those cases.

Witherspoon held that it was unconstitutional to exclude a member of a venire only upon a showing that the venireman had conscientious scruples against capital punishment. A juror could be dismissed for cause only if he were "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings."[375]

Subsequent decisions have set aside the death sentence "even if only one potential juror has been excluded for opposing the death penalty . . . regardless of whether the state has any peremptory challenges remaining at the close of voir dire."[376] O'Bryan at-

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366. *Id.* at 369-70.
367. *Id.* at 370.
368. *Id.*
369. O'Bryan v. State, 591 S.W.2d 464 (Tex. Crim. App. 1979) (en banc).
370. O'Bryan v. Texas, 446 U.S. 988 (1980).
371. 714 F.2d at 370.
372. *Id.*
373. *Id.* at 370, 389. The lead opinion was by Randall, J., with Higginbotham, J. filing a concurring opinion. *Id.* at 389. District Judge Buchmeyer, sitting by designation, dissented. *Id.* at 400.
374. 391 U.S. 510 (1968). *See, e.g.*, Martin v. Maggio, 739 F.2d 184 (5th Cir. 1984); Sonnier v. Maggio, 720 F.2d 401 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1331 (1984); Porter v. Estelle, 709 F.2d 944 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2367 (1984).
375. 391 U.S. at 522 n.21.
376. 714 F.2d at 371. *See, e.g.*, Davis v. Georgia, 429 U.S. 122 (1976); Marion v. Beto,

tacked exclusion of three of seventeen prospective jurors who were excused for cause and who expressed opposition to the death penalty.[377]

The court's discussion of the exclusion of one particular venireman is unsettling.[378] Reverend Charles D. Wells demonstrated some uncertainty about imposing the death penalty. He stated first that "morally . . . I don't think that I am capable of issuing a penalty of death to any man."[379] But he also responded that "I can imagine [a case where I could vote for the death penalty], but I can't see myself doing it."[380] Moments later he seemed to retrench when he answered "no, I can't [imagine such a case]," and that "yes, I would [automatically vote against imposition of the death penalty.]"[381]

The trial court went further, however. In Texas, the jury responds to questions concerning aggravating circumstances posed to them by the court.[382] The court must then impose the death sentence.[383] In response to a series of questions on that procedure, Wells answered: "Yes, I possibly could answer [the] question [that a defendant represented a continuing threat to society],"[384] and that "yes" he could find that a person had the specific intent to kill.[385] Despite Wells' affirmative responses to the court's questions, the trial court excused Wells for cause.[386]

There are cases interpreting *Witherspoon* which have held exclusion of a venireman improper even after she indicates objection to the death penalty.[387] That is, the prospective juror may be rehabilitated. For example, in *Cuevas v. State*,[388] cited with approval

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434 F.2d 29 (5th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

377. 714 F.2d at 370.

378. Similar problems might also be raised concerning venireman Pfeffer, who stated that he had "mixed feelings" about the death sentence. He equivocated until the judge insisted that he give definitive answers to questions concerning his views on the death penalty. *Id.* at 378-79.

379. *Id.* at 373.

380. *Id.*

381. *Id.* at 374.

382. *Id.*

383. *Id.* at 375.

384. *Id.*

385. *Id.* at 374.

386. *Id.* at 375.

387. *See, e.g.*, Adams v. Texas, 448 U.S. 38 (1980); Cuevas v. State, 641 S.W.2d 558 (Tex. Crim. App. 1982) (en banc).

388. 641 S.W.2d 558 (Tex. Crim. App. 1982) (en banc).

by the Fifth Circuit,[389] a venireman first said he could not return a verdict requiring the death penalty. The Texas court held that he was improperly excluded for cause because he stated that he could answer the questions propounded by the court under Texas' bifucated procedure.[390]

O'Bryan would appear to be such a case. Like the venireman in *Cuevas,* Wells answered affirmatively when asked whether he could find that a defendant had specific intent and represented a future danger.[391] But the Fifth Circuit found the record inconclusive:

> He stated that he could and would answer the statutory questions truthfully. But in view of the fact that the record does not contain an explanation to Wells of the effect of "yes" answers to those questions by the jury, we do not know from the record whether Wells . . . could put aside his opposition to the death penalty and obey the law, i.e., answer the statutory questions truthfully, knowing the possible effect of his answers to those questions. We can only speculate.[392]

The court showed remarkable literalism in its reading of the transcript. It is true that there was no express statement of the effect of answering the specific intent and future dangerousness questions. But read in context, it is almost inconceivable that Wells did not understand the effect of answering those questions affirmatively. Wells was asked no fewer than eight questions concerning his ability to vote in favor of the death penalty.[393] The trial court also explained that Wells would be asked the critical questions in a case in which the state was seeking the death penalty.[394] As if to underscore the point, the trial court made the following statement immediately after Wells said that he could answer the critical questions affirmatively: "And if you answered those questions, of course, it wouldn't be up to you to do anything to this defendant. Those are merely questions that you answer to the Court. Isn't that correct?"[395] The point would seem inescapable to

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389. 714 F.2d at 375.
390. 641 S.W.2d at 563.
391. 714 F.2d at 374-75.
392. *Id.* at 376.
393. *Id.* at 373-74.
394. *Id.* at 374.
395. *Id.* at 375. The majority ignores the fact that under Texas law, the court is not obligated to tell the jury the effect of their vote on the questions propounded by the court. See Judge Buchmeyer's dissenting opinion, *id.* at 400, 413.

a mentally competent venireman: you answer the questions, the judge imposes the penalty.

It should be pointed out that based on the state of the record, the trial court may have had an entirely proper basis for excusing the venireman without making further inquiry. In a well reasoned dissent, District Court Judge Buchmeyer, sitting by designation, argued that the trial court might have found as follows: "It is clear to me that this juror is not being truthful when he says he can set aside his deep feelings against the death penalty. His demeanor, his tone of voice . . . all make it unmistakably clear that he could never vote to impose the death penalty."[396] But the trial court judge made no finding at all; he merely granted the state's motion to disqualify Wells for cause.[397]

In either case, the record was ambiguous. At this juncture, the court needed to make further inquiry: in effect, who should bear the burden of ambiguity. The state argued

> that if the petitioner wished to rehabilitate Wells as a juror successfully, it was incumbent upon defense counsel to take his inquiry into Wells' ability to answer the statutory questions one step further by clarifying, on the record, whether Wells understood the possible effect of his answers to those questions.[398]

The court agreed.[399]

That result is unsettling. It was argued above that the record is not ambiguous. But even if one accepts the court's view, the defendant must pay dearly for counsel's failure to ask those follow-up questions. The court had a less drastic alternative than affirming the district court's denial of O'Bryan's petition for the writ of habeas corpus. As argued by Judge Buchmeyer:

> Since it is not clear from the record whether Juror Wells was, or was not, improperly excluded under *Witherspoon*, the case should be reversed and remanded for an evidentiary hearing . . . . If the federal district court finds that Reverend Wells was unequivocally opposed to the death penalty at the time of voir dire in 1974, there would be no error in his exclusion for cause. However, if it is determined that

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396. *Id.* at 412-13.

397. *Id.* at 375.

398. *Id.* at 376.

399. *Id.* The Court cited its recent decision in Porter v. Estelle, 709 F.2d 944 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2367 (1984) as controlling precedent. 714 F.2d at 378. A review of Porter's claim characterized by the court as "not unforceful" demonstrates that its facts were far less compelling than those in *O'Bryan*.

> Reverend Wells could have served as an impartial juror not withstanding his views about the death penalty, then the case must be reversed and remanded to the state courts for a new punishment trial.[400]

Conclusions

Death row inmates faired poorly during the survey period. Few won relief.[401] The Supreme Court has invited the courts of appeal to develop expeditious procedures for cases involving death row inmates.[402] The three cases discussed above evidence a lack of sympathy for claims raised by death row inmates. Both *Barefoot* and the Fifth Circuit decisions reflect impatience with delay caused by litigious death row inmates.

Three cases do not prove the existence of a trend. But obviously guilty defendants engender little sympathy, as reflected by some result-oriented "reasoning." *Barefoot* has established a state interest in meeting its execution date.[403] Matters do not bode well for the death row population.

One need not be absolutely opposed to the death penalty to feel trepidation. If, as this writer believes, there is a rush to judgment in death penalty cases, mistakes will be made. The benefit from the snail's pace between trial and execution is the opportunity it offers for a full airing of a case before the sentence is carried out.[404] Proponents of the death penalty may applaud the pendulum swing back and the courts' willingness to "get on with it." But one senses that we have learned little from history: wide use of the death penalty will produce unjust results and abolitionists will be able to collect new evidence that the death penalty is a defective remedy.[405]

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400. *Id.* at 413.

401. In addition to the cases reviewed, see, e.g., Autry v. McKaskle, 727 F.2d 358 (5th Cir. 1984); Taylor v. Maggio, 727 F.2d 341 (5th Cir. 1984); Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983); Sonnier v. Maggio, 720 F.2d 401 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1331 (1984); Baldwin v. Maggio, 715 F.2d 152 (5th Cir. 1983); Porter v. Estelle, 709 F.2d 944 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2367 (1984).

402. Barefoot v. Estelle, 103 S. Ct. 3383 (1983).

403. *Id.* at 3391.

404. As the cases discussed above indicate, courts err not only when innocent people are executed, but more commonly when time reveals that the sentence did not fit the crime or that procedural fairness was not observed. *See, e.g.*, R. RADOSH & J. MILTON, THE ROSENBERG FILE (1983).

405. *See, e.g.*, THE DEATH PENALTY IN AMERICA, *supra* note 251, at 234-41.

IV. INSANITY: *UNITED STATES V. LYONS*

In the recent past, "judicial activism" has been a term of opprobrium generally directed at liberal judges by conservative critics.[406] The debate over activism is characterized by imprecision over the meaning of activism.[407] But it is often associated with judges' willingness to address issues broader than those necessary to decide the case before the court and to "reach out"[408] to decide questions not raised by the parties. For many, the telltale sign of activism is encroachment by the judiciary into the prerogative of the legislature.[409] *United States v. Lyons*[410] evinces that conservatives can play the activist role as well as their liberal colleagues.

Robert Lyons was charged with twelve counts of knowingly and intentionally securing controlled narcotics by misrepresentation, fraud, deception, and subterfuge.[411] Consistent with rule 12.2(d),[412] Lyons gave notice to the government that he would rely on the insanity defense at trial.[413] The government's motion to exclude that evidence was granted by the district court. It held that drug addiction is not a mental disease or defect as required by the Model Penal Code definition of insanity,[414] adopted by the Fifth Circuit in 1969.[415]

A panel of the Fifth Circuit reversed, holding, in effect, that the district court had invaded the province of the jury to decide whether drug addiction deprived Lyons of sufficient mental capacity.[416] The Fifth Circuit en banc vacated the decision of the panel and remanded the case to the district court to allow Lyons the op-

406. *See,* Cannon, *Defining the Dimensions of Judicial Activism,* 66 JUDICATURE 237, 238 (1983).

407. *Id.*

408. Mapp v. Ohio, 367 U.S. 643 (1961) (Harlan, J. dissenting).

409. *See, e.g.,* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604 (1980) (Rehnquist, J., dissenting); *see also* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

410. 731 F.2d 243 (5th Cir. 1984).

411. *Id.* at 244. He was charged with a violation of 21 U.S.C. § 843(a)(3) (1976) and 18 U.S.C. § 2 (1976).

412. FED. R. CRIM. P. 12.2(a).

413. 731 F.2d at 244.

414. *Id.* at 244-45. MODEL PENAL CODE § 4.01, provides in relevant part: "(1) 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 either to appreciate the criminality [wrongfulness] of his conduct or to the requirements of law."

415. *See* Blake v. United States, 407 F.2d 908 (5th Cir. 1969) (en banc).

416. United States v. Lyons, 704 F.2d 743 (5th Cir. 1983).

portunity to conform his proffer of evidence to the en banc decision.[417]

The issue litigated by the parties was the extent to which drug addiction is relevant to the issue of insanity.[418] The court en banc observed that "the great weight of legal authority clearly supports the view that evidence of mere narcotics addiction, standing alone and without other physiological or psychological involvement, raises no issue of such a mental defect or disease as can serve as a basis for the insanity defense."[419] The court was forthright in acknowledging that such a rule is based foremost on policy, not medical judgment.[420] Even though addiction might be viewed for diagnostic and treatment purposes, recognition of addiction as a mental disease would erode concepts of responsibility and freedom of choice underlying the criminal law.

After rejecting the panel's suggestion that mere narcotics addiction may be a mental disease, the court en banc discussed the relevance that addiction may have to a proffered insanity defense. The court saw little relevance of addiction as evidence of an underlying mental disease.[421] That is, a defendant claiming insanity ought to prove his mental disease or defect by resort to expert testimony, rather than by reference to his addiction. The exception to a general rule of irrelevance is when the defendant proves "[a]n actual drug-induced or drug-aggravated psychosis, or physical damage to the brain or nervous system. . . ."[422]

The court en banc remanded the case to the district court because Lyons' proffer of evidence alleged "that his drug addiction caused physiological damage to his brain and that this damage caused him to lack substantial capacity to conform his conduct to the requirements of the law."[423] The panel also held that Lyons was entitled to present the insanity defense to the jury. But in addition, it held that *involuntary* drug addiction could constitute a mental disease.[424]

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417. 731 F.2d at 249-50.

418. *Id.* at 250. (Rubin & Williams, JJ. concurring and dissenting).

419. *Id.* at 245.

420. *Id.* at 246.

421. *Id.* at 247.

422. *Id.* Despite the majority's equivocation on this point, it appears that Lyons in fact alleged such physiological damage. *See id.* at 253-54 (Johnson, J. dissenting).

423. *Id.* at 247.

424. *Id.* at 246.

Dissenting Judge Johnson asserted that "Lyons offered to present two expert witnesses . . . that would testify that Lyons' addiction had damaged his brain, both physiologically and psychologically."[425] Thus, urged Judge Johnson, "he was entitled to submit his insanity defense to the jury under existing precedent."[426] As observed above,[427] Lyons will be able to present his insanity defense. Under the new en banc approach, his experts will be able to testify (a) that drug addiction has caused physiological damage, or (b) that drugs caused psychosis, and (c) that apart from any link between addiction and a mental disease or defect, Lyons suffers from a mental disease or defect.[428] Only a defendant who would have relied on addiction as "involving 'psychological damage' to the addict"[429] is affected by section I of the en banc decision. Hence, the decision is extremely narrow in its effect.

Lyons and the government initially confined their arguments to that issue.[430] But when the court granted a hearing en banc, it invited interested parties to submit briefs in amicus curiae.[431] That is, the court reached out to decide an issue not before it: whether it should retain the Model Penal Code definition of insanity.

The Model Penal Code provides "that a person is not responsible for criminal conduct if, at the time of such conduct and as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."[432]

That rule, of course, was not created out of whole cloth. The draftsmen for the American Law Institute attempted to incorporate the best features of the two predominate tests for insanity, the M'Naghten rule[433] and the irresistible impulse test,[434] while it sought to avoid some of the pitfalls of both:

[T]hese two tests combined were seen as properly focusing upon im-

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425. *Id.* at 253-54.
426. *Id.* at 254.
427. *See supra* note 419.
428. 731 F.2d at 247-48.
429. *Id.* at 247.
430. *Id.* at 252 (Rubin & Williams, JJ., concurring and dissenting).
431. *Id.* n.2.
432. MODEL PENAL CODE § 4.01(1).
433. M'Naghten's Case, 8 Eng. Rep. 718 (1843). *See also* W. LAFAVE & A. SCOTT, *supra* note 75, § 37.
434. *See, e.g.*, Parsons v. State, 81 Ala 577, 2 So. 854 (1887). *See also* W. LAFAVE & A. SCOTT, *supra* n.75 at 283-86.

> pairment of cognition and impairment of volitional capacity—conditions which must be taken into account in an effort to exclude nondeterrables from penal sanctions. The result, therefore, was a broader statement of the concepts basic to the M'Naghten and irresistible impulse tests."[435]

The A.L.I. draftsmen intentionally left some of its terms imprecise, probably an inherent difficulty in defining insanity. But the A.L.I. definition has been praised as "(1) giving expression to an intelligible principle; and (2) fully disclosing that principle to the jury."[436] The A.L.I.'s final draft was greeted enthusiastically, quickly being adopted by almost all of the federal courts of appeal[437] as well as by numerous states.[438]

The insanity defense has high visibility within the criminal justice system. Despite its relatively infrequent use,[439] it is used often in highly publicized cases.[440] Due to competing values within the criminal justice system,[441] acutely reflected in the insanity defense, it is the frequent subject of debate.[442] That debate has intensified since John Hinckley's attempted assassination of President Reagan and his successful insanity defense.[443]

Hinckley did not rely primarily on an inability to appreciate the "wrongfulness" of his conduct. Instead, his defense established that he lacked the ability to conform his conduct to the requirements of the law.[444]

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435. W. LaFave & A. Scott, *supra* note 75, at 293, n.430; *see also* Note, *supra* note 17.

436. *Id.* at 294.

437. *See, e.g.*, Wade v. United States, 426 F.2d 64 (9th Cir. 1970); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967).

438. *See, e.g.*, Commonwealth v. McHoul, 352 Mass. 544, 226 N.E.2d 556 (1967); State v. Shoffner, 31 Wis 2d 412, 143 N.W.2d 458 (1966); Conn. Gen. Stat. Ann. § 53A-13 (West Supp. 1984); Md. Code Ann. art. 59 § 9(a); Mont Code Ann. § 95-501.

439. *See, e.g.*, Caplan, *supra* note 17, at 51.

440. *Id.* (discussing John Hinckley's successful invocation of the insanity defense in his trial for attempting to assassinate President Reagan); *see also* Note, *supra* note 17.

441. *See, e.g.*, Morris, *The Brothel Boy: A Fragment of a Manuscript, reprinted in* The Pursuit of Criminal Justice (G. Hawkins & F. Zimring, eds. 1984).

442. *See, e.g.*, Goldstein & Katz, *Abolish the 'Insanity Defense'—Why Not?*, 72 Yale L.J. 853 (1963); *see generally*, W. LaFave & A. Scott, *supra* note 75, at 272-74.

443. *See, e.g., American Psychiatric Association Statement on the Insanity Defense* [hereinafter cited as *APA statement*] (1982); Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194 (1983); Johnson, Book Review, 50 U. Chi. L. Rev. 1534 (1983).

444. *See* Caplan, *supra* note 17; *see also* Note, *supra* note 17. It is obvious that the Fifth Circuit was concerned about the Hinckley case when it decided *Lyons*. *See* 731 F.2d at 249 n.13.

Interestingly, recent studies have attacked that prong of the insanity offense. One study, for example, has concluded that "[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than between twilight and dusk."[445] A majority of psychiatrists believe themselves incapable of making a "scientific" measurement of "a person's capacity for self-control."[446] One writer has concluded that there is "no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment."[447]

The Fifth Circuit used *Lyons* as a vehicle to modify the Model Penal Code definition of insanity. It observed that rules governing criminal responsibility are judge-made, subject to reexamination "in the light of new policy considerations."[448]

The court cited several reasons for abandoning the volitional prong[449] of the insanity defense. First, it found that medical and scientific knowledge cannot distinguish between the defendant incapable of conforming his conduct to the requirements of the law and the defendant merely not conforming his conduct with the law.[450] Second, the court found that a defendant can fabricate most easily thevolitional prong of the insanity defense.[451] Third, the court observed that "psychiatric testimony about volition is more likely to produce confusion for jurors than is psychiatric testimony concerning a defendant's appreciation of the wrongfulness of his act."[452] Fourth, the court believed that most defendants who fail the volitional prong would also fail the cognitive prong, rendering the volitional prong redundant.[453] Finally, it argued that because sanity must be proved beyond a reasonable doubt, the federal prosecutor has "an all but impossible task in view of the present murky state of medical knowledge."[454]

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445. *APA statement, supra* note 443, at 11.
446. Bonnie, *supra* note 439, at 196.
447. *Id.*
448. 731 F.2d at 248.
449. The volitional prong refers to that part of the defense derived from the "irresistible impulse" test, that a defendant is insane if he is unable to conform his conduct to the requirements of the law.
450. 731 F.2d at 248.
451. *Id.* at 249.
452. *Id.*
453. *Id.*
454. *Id.*

Those reasons do not inexorably lead to the court's conclusion. A study based on psychiatrists' opinions, taken after the adverse publicity of the Hinckley decision, is hardly conclusive on the profession's ability to offer relevant information on a person's ability to conform his conduct to the requirements of the law.[455] Further, courts have often observed that the legal questions of culpability are distinguishable from medical concepts. Thus, the law has continued to frame the issue in terms of insanity despite protests from the medical profession that insanity is not a medical concept.[456] In fact, in part one of *Lyons,* the Court observed quite correctly that "what definition of 'mental disease or defect' is to be employed by courts enforcing the criminal law is, in the final analysis, a question of legal, moral and policy—not of medical—judgment."[457] In addition, the court's criticism is not new. It was considered and rejected in the original irresistible impulse decision.[458] As observed by the court in *Parsons,* "[i]t is no satisfactory objection to say that the rule . . . is of difficult application. The rule in *M'Naghten's Case* is equally obnoxious to a like criticism. The dif-

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455. Interestingly, neither the Supreme Court nor the Fifth Circuit was impressed by a similar argument. See Barefoot v. Estelle, 103 S. Ct. 3383, 3397-98 (1983), affirming the decision of the Fifth Circuit at 697 F.2d 593. There the defendant challenged Texas' reliance on psychiatric testimony concerning a defendant's future dangerousness as a basis for imposing the death penalty. The defendant objected, as did the APA in its amicus curiae brief that " '[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession' . . . . The APA's best estimate is that *two out of three* predictions of long-term future violence made by psychiatrists are wrong." 103 S. Ct. at 3408 (Blackmun, J., dissenting) (emphasis in original). The Supreme Court rejected that argument for a number of reasons. One argument by the Court would seem particularly apropos in *Lyons*:

> Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time. Yet the submission is that this category of testimony should be excised entirely from all trials. We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.

103 S. Ct. at 3398.

456. *See, e.g.,* Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954), where Judge Bazelon criticized the M'Naghten rule because of its failure to take account of "psychic realities and scientific knowledge." *See also* United States v. Lyons, 731 F.2d at 246 n.4; W. LaFave & A. Scott, *supra* note 75, at 280-82.

457. 731 F.2d at 246. The court observed further that purposes of the criminal law "are not necessarily served by an uncritical application of definitions developed with medical considerations of diagnosis and treatment foremost in mind . . . . Indeed, it would be coincidental . . . should concepts deriving from such disparate sources correspond closely, one to the other." *Id.*

458. Parsons v. State, 81 Ala. 577, 2 So. 854 (1887).

ficulty does not lie in the rule, but is inherent in the subject of insanity itself."[459] The second and third considerations, fabrication of the defense and jury confusion, are conclusions expressed in relative terms: the volitional test is more easily fabricated than the existence of a mental disease or the cognitive test;[460] and jurors are more confused about the volitional test than the cognitive test.[461] Even if conceded, those facts are not conclusive: it does not follow that the volitional prong is frequently fabricated or that jury confusion is rife. To the contrary, there is evidence that the insanity defense is used infrequently and succeeds infrequently.[462]

The fourth reason to abandon the volitional prong, overlap between the two prongs,[463] similarly is unpersuasive. If we assume that there are some individuals who cannot conform their conduct to the law, but who can tell right from wrong, the question ought to be whether the purposes of the criminal law are served by retaining the defense. There is considerable force that "the most compelling reason for recognizing the test is that it comports better with the objectives of the criminal law; it describes 'persons who could not respond to the threat of sanction and who would readily be perceived by others as incapable of responding.' "[464]

The final reason—the impossibility of the prosecutors' task—is belied by experience.[465] The court cites no statistical evidence in support for this view. To the contrary, statistics have shown that the insanity defense is not a bonanza for defendants.[466]

Apart from lack of force to the court's reasoning, there is another reason why *Lyons* is questionable. In a concurring and dissenting opinion, Judges Rubin and Williams summarized the current political debate surrounding the insanity defense:

> Congress is evaluating proposals for change as it considers comprehensive legislation to revise the United States Criminal Code . . . . The American Bar Association House of Delegates, at its meeting in February 1983, established an official American Bar Association pol-

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459. *Id.* at 593, 2 So. at 864.

460. 731 F.2d at 249.

461. *Id.*

462. See Caplan, *supra* note 436, at 51, citing a 1978 study indicating that one-tenth of one percent of all defendants who stood trial successfully pleaded the insanity defense.

463. 731 F.2d at 249.

464. W. LaFave & A. Scott, *supra* note 75, at 286, (citing A. Goldstein, The Insanity Defense 67-68 (1967)).

465. 731 F.2d at 249.

466. *See* Caplan, *supra* note 17, at 51.

> icy recommending a change in the standards and burden of proof with respect to the insanity defense . . . . A further change in American Bar Association policy is anticipated to be on the House of Delegates agenda at the annual meeting of the Association in August 1984. This proposal would revise or define the words "mental disease or defect."[467]

Particularly in light of possible congressional action, *Lyons* demonstrates abandonment of a fundamental tenet of the conservative jurist's faith. Not only did the court reach out to decide an issue not raised by the parties, but also the court entered an area where the legislature apparently intended to act.[468] Depending on the action taken by Congress, *Lyons* may quickly become an obsolete piece of judicial legislation.[469]

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467. 731 F.2d at 252-53. *See also id.* at 253 (Johnson, J., dissenting). *See also* Note, *supra* note 17.

468. That the court was acting like a legislature is evidenced by the court's disposition in *Lyons*: "As for other cases, today's holding shall have prospective application only, commencing thirty days from the date of its publication." 731 F.2d at 250.

469. Although the Senate voted favorably on a bill which would have the same effect as the *Lyons* decision along with additional procedural reforms, the House of Representatives deferred action on the bill. *See* Caplan, *supra* note 17, at 78.