Developments in Mental Health Law

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A Survey of Statutes Allowing Involuntary Commitment for Drug and Alcohol Dependent Persons

by John H. Kitzmann

Several years have passed since a thorough survey of statutes allowing involuntary commitment for drug and alcohol dependent (DAD) persons has been published. The aim of this article is to provide a current overview of that body of law. Although laws from all fifty states were reviewed, this article concentrates on statutes that provide for involuntary detention and treatment of DAD persons apart from general civil commitment regimens for the mentally ill.

The article addresses the substantive criteria and procedures for commitment as well as protections afforded the drug or alcohol dependent person. Special emphasis is placed on the lack of procedural safeguards limiting the immediate, short term detention of persons where the basis for detention is an observation by fellow citizens or police officers.

Historical Perspective on Civil Commitment of Alcohol and Drug Users

Statutes allowing the commitment of alcohol and drug users are not a recent invention. In 1914, New York law allowed that "upon complaint to a magistrate and after due notice and hearing, the magistrate shall, if the person is found to be addicted to the use of a habit-forming drug, commit such person to a state, county or city hospital."[1] *People v. City of Buffalo,* a case that discussed the 1914 law, outlined the variety of laws existing at the time in New York providing some form of commitment for drug or alcohol users. The laws included a General Municipal Law that established a hospital and colony for inebriates, an Insanity

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Law that allowed inebriates to be committed to any private licensed institution for the insane, and a State Charities Law that allowed inebriate females to be committed to a sanitarium or institution.[2] Similar laws existed in many other jurisdictions from the turn of the century until after World War II.

In the 1950s and 1960s a substantial number of states and the federal government passed laws allowing the commitment of addicts.[3] Commentators[4] have suggested that the surge in commitment statutes aimed at drug users can be linked to the Supreme Court decision in *Robinson v. California.*[5] In *Robinson*, the Court stated,

> a state might establish a program of compulsory treatment for those addicted to narcotics. Such a program might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures.[6]

The Current State of the Law

Currently thirty-one states and the District of Columbia have statutes specifically allowing involuntary treatment or commitment for DAD persons.[7] These states are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Mexico, North Carolina, North Dakota, New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and the District of Columbia. Of these, eight states specifically exclude DAD from their statute's definition of mental illness.[8] Other states have general civil commitment statutes that allow commitment for a number of conditions, including DAD. A final group of states allow civil commitment for mental illness but either do not include DAD in their definition of mental illness, or do not refer to DAD at all.

Protective or Emergency Custody

Many states allow the detention of a DAD person without a formal hearing. Two schemes exist for doing so. The first allows a police officer or other official to take a person into custody if the officer feels the person meets the statutory requirements for emergency custody. The second approach requires that a person who wishes for someone else to be taken into custody file an application with a judge or magistrate. The judge or magistrate will then issue a custody order.

Twelve states allow detention of drug or alcohol dependent persons without a pre-detention application or hearing before a court, without a right to counsel, and without any court order. Generally a police officer or specified health official, based on his or her observation, is given the power to take a DAD person into immediate custody if he or she believes the person is dangerous to him or herself or another.[9] Georgia's statute provides that any physician who has examined a person within forty-eight hours and found the person to be DAD and in need of treatment can execute a certificate so stating. Any peace officer who receives the certificate may take the DAD individual into immediate custody.[10] Delaware, Connecticut, and New Mexico provide that an administrator of a treatment facility may commit a drug or alcohol dependent person if the administrator receives a written application for emergency commitment from a physician, spouse, relative, guardian or any other responsible person.[11]

Nine states allow emergency or protective custody following an application to a judge or magistrate.[12] In almost all of these statutes, the criteria for emergency custody are the same as or similar to the criteria for involuntary commitment. In several statutes, the criteria for emergency custody are stricter than those for involuntary commitment.[13] For example, in West Virginia, the criteria for involun-

tary commitment require only that a person be found to be an addict. Thus a magistrate may, for the protection of the individual or others, detain any person that the magistrate has determined to be DAD.[14] Minnesota's statute is particularly complex and allows for the pre-commitment detention of a proposed patient if a petition for commitment contains a particularized showing that serious imminent physical harm to the proposed patient or others is likely.[15] Minnesota, however, offers an array of pre-detention procedural protections including a complex screening that must be completed before a petition for commitment is even reviewed by the court.

Almost all statutes state that protective or emergency custody is limited to a short term unless the custody is reviewed by a court or formal commitment procedures are initiated. Virginia has a four-hour limit, another state limits to twenty-four hours, but seventy-two hour and five-day limits are the most common. Colorado provides up to five days of detention in a jail if no other facilities are available ("detention limited to a period only long enough to prevent injury to person or others or to prevent a breach of the peace").[16] Several statutes provide longer periods of detention provided an application for involuntary commitment is initiated. Under Colorado's statute, a person can be involuntarily detained without a hearing for up to ten days.[17]

Many of the other statutes provide for similar extended detentions if a petition for involuntary commitment is filed. These extended periods of detention without a hearing range from twenty-four hours to ten days. Instead of a formal hearing to guarantee that the person meets any criteria for detention, many of these statutes provide that the person be examined or evaluated immediately or as soon as possible after detention, and require release if the person no longer presents an immediate threat to him or herself or another. The absolute time in which an examination must be done varies. In Georgia, for example, the examination following de-

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In the Federal Courts

Supreme Court Sets Ceiling on Proof for Competency to Stand Trial

Cooper v. Oklahoma —U.S.—, 116 S.Ct. 1373 (1996)

Justice Stevens, writing for a unanimous Supreme Court, firmly rejected Oklahoma's statutory requirement that criminal defendants prove their own incompetence to stand trial by clear and convincing evidence. At issue in *Cooper* was the question of what standard of proof the state can require from defendants who are attempting to prove they are incompetent to stand trial. The Court decided that the appropriate standard for defendants who are attempting to rebut the presumption of competency to stand trial should be "preponderance of the evidence."

The competence of the defendant in *Cooper* was called into question several times both before and during the trial. Ultimately, the trial judge, while recognizing that the defendant's behavior was unusual, concluded that the defendant failed to carry the burden of proving his incompetency by "clear and convincing evidence" as the state law required. The defendant then proceeded to trial, was found guilty of capital murder and was sentenced to death.

The crux of the Court's decision in *Cooper* was the choice between Oklahoma's use of the "clear and convincing evidence" standard of proof, and the use of the less strict "preponderance of the evidence" standard. Standards of proof can be thought of in terms of a continuum, with the highest standard being "beyond a reasonable doubt," the lowest standard being "by a preponderance of the evidence," and the standard of "clear and convincing evidence" falling somewhere between the two.

In criminal proceedings, the State is generally required to prove the elements of its case "beyond a reasonable doubt." Requiring the state to prove guilt for a crime at this level comports with the belief that defendants are innocent until proven guilty. Since the State's burden is quite high, the defendant's burden to disprove is considerably lower. "Preponderance of the evidence," the lowest standard of proof, is often construed as establishing that something is true "more likely than not." The intermediate standard of proof is designated as "clear and convincing evidence."

The Court analyzed Oklahoma's use of "clear and convincing" from two perspectives, both of which led it to reject the standard as a violation of due process. First, the Court looked at the "clear and convincing" standard to see if it was the standard most rooted in the history and tradition of the common law for use with competency determination. The Court briefly traced the development of the competency requirement in England and ascertained that the historical standard was closer to a "preponderance" than to "clear and convincing." The Court strengthened its conclusion by looking to modern court practices throughout the United States. Only four states use the higher standard of "clear and convincing evidence." The Court concluded there was little support for the Oklahoma standard either from historical or modern use in the United States.

Forcing incompetent defendants to go to trial would place at risk the fundamental component of fairness in the criminal justice system.

The Court then analyzed the rule in terms of fundamental fairness, balancing the potential injury to the defendant against potential injury to the state. If the defendant is forced to go to trial while incompetent, then the defendant loses several rights. Incompetency may interfere with defendants' abilities to communicate with coun-

sel, participate in their own defense, and make a myriad of decisions directly affecting the course of their defense. The Court characterized the risk to the defendant rights as "dire" and stated that the risk was not only to defendants, but also to the fundamental component of fairness in the criminal justice system.

In comparison, the Court considered the risk to the State interests in prosecution to be "modest." While finding a defendant incompetent may impose some financial costs of mental health treatment on the state, competency issues will typically only delay the eventual adjudication of a case until the defendant's competency is restored.

The Court noted that there is some risk of malingering, or falsely pretending to be incompetent, on the part of a defendant. However, the Court pointed out that a heightened standard of proof for competency does not decrease the risk of malingering, but merely assigns a larger part of the risk to the defendant. This allocation of risk, according to the Court, rests on "no sound basis."

Oklahoma also argued that the Court's holding in *Addington v. Texas*, 441 U.S. 418 (1979) supported the use of Oklahoma's procedural rule. The Court rejected this argument, stating that while the *Addington* Court had announced "clear and convincing evidence" as the appropriate evidentiary standard for a civil commitment hearing, the Court did not address standards for competency to stand trial in *Addington*. The Court emphasized that the holdings in *Addington* and *Cooper* are complementary, in that both "concern the proper protection of fundamental rights in circumstances in which the State proposes to take drastic action against an individual:" the right to personal freedom in *Addington*, and the right to be tried only while competent in *Cooper*.

The Supreme Court decision only sets a ceiling on the level that the State can burden criminal defendants to prove their own incompetence to stand trial. States remain free to hold the defendant to a lower standard by placing the burden of proof of competence on the prosecution. Some states, such as Virginia, have already statutorily specified both that the party alleging incompetence to stand trial bears the burden of proof and that the standard of proof is a "preponderance of the evidence."

North Carolina Imposes No Duty on Mental Health Professionals to Seek Involuntary Commitment of Dangerous Persons

Dunk v. United States, 77 F.3d 468 (4th Cir. (N.C.) 1996)

The United States Fourth Circuit Court of Appeals recently affirmed a decision of the district court for the Eastern District of North Carolina concluding that two mental health professionals, both non-psychiatrists, had no duty to seek a U.S. Marine's involuntary commitment. The Appellate Court also held that no member of the Marine Corps was obligated to warn the man's wife of his recent violent behavior because the wife was already aware of his violent propensities.

Robert Z. Dunk, a corporal in the U.S. Marine Corps, had a history of spousal abuse and received routine counseling regarding domestic violence against his wife Kelly. In June of 1990, Kelly Dunk decided to leave her husband and was granted a protective order that prevented her husband from communicating with her, going to her residence, or harassing her. Dunk subsequently moved out of the couple's residence and into the Marine barracks. On July 2, 1990, Dunk told his colleague Jim Dabney of his intent to kill Mrs. Dunk. That same day, Dunk picked up his wife after work, threatened to kill her, and drove off the military base with her. Mrs. Dunk was able to convince her husband that she would return to him, and they returned to Camp Lejeune. Upon their arrival, Dunk was arrested at the main gate.

Dunk's commanding officer took him to the emergency room for an evaluation of his mental status. Dunk discussed his depression and marital problems with a psychologist and a physician's assistant. Based on their evaluation, Dunk was allowed to return to full duty. Subsequently, on July 17, 1990, Dunk purchased a .44 caliber pistol from a Marine Corps Major, went to the family residence, fatally shot his wife Kelly, and then took his own life.

Representatives of Kelly Dunk's estate filed a claim with the Navy Legal Services Office for her wrongful death. After the Department of the Navy denied the claim, the administrators of the estate brought a wrongful death action against the Navy under the Federal Tort Claims Act. The administrators of the estate argued that the government was responsible for Kelly Dunk's death because the Marine Corps medical personnel were negligent in not committing Corporal Dunk and because Kelly Dunk was not warned of her husband's threats by the marines who heard them. The district court dismissed the case in favor of the government. The estate administrators appealed.

The Appellate Court affirmed the district court's decision because the plaintiff could not show that the government or any member of the Marine Corps had an affirmative duty to take any action that would have prevented the tragedy. The court noted that under North Carolina law, a plaintiff must show "an actionable duty, a breach of the duty, actual and proximate causation, and damages." North Carolina law poses no duty for psychiatrists to involuntarily commit patients they believe to be dangerous. With regard to the Marine Corps medical personnel who examined Dunk before the murder, the court judged that if a trained psychiatrist believing a patient to be dangerous has no duty to seek the involuntary commitment of that patient, then a non-psychiatrist who is unaware of a patient's impending dangerousness should likewise bear no such obligation. Neither of the people who examined Dunk were psychiatrists, and neither suspected that Dunk harbored suicidal or homicidal intentions. The court then concluded that because neither of the therapists had a duty to seek Dunk's involuntary commitment, Kelly Dunk's estate could not hold the government liable for their failure to hospitalize Dunk.

The court considered the duty of Marine Corps members to offer warnings and ruled that no member of the Marine Corps had an obligation to warn Kelly Dunk of her husband's threats or recent violent behavior because she was already well aware of his dangerousness. Mrs. Dunk was familiar with her husband's violent tendencies, having suffered his physical and verbal abuse shortly before her death. Therefore, the court held, the Marine Corps had no duty to warn her about her husband.

North Carolina Psychiatrist Immune from Suit for Emergency Medication of Prison Inmate

Hogan v. Carter, —F.3d—, 1996 WL 292031 (4th Cir.(N.C.))

The Fourth Circuit Court of Appeals recently held that a psychiatrist, acting in accordance with sound medical judgment and with a prisoner's best interests in mind, may order the administration of a single, emergency dose of a psychotropic drug without incurring civil liability. In granting the psychiatrist qualified immunity, the court stressed that relevant caselaw has not clearly established what procedures are required to lawfully administer psychotropic drugs in emergency situations and that the psychiatrist's actions satisfied the court's professional medical judgment standard.

Michael Hogan was admitted to the Mental Health Facility of North Carolina's Central Prison following an attempted suicide in which he swallowed razor blades and unidentified medications. Hogan was diagnosed by Dr. James Carter and Dr. James Smith, both board certified psychiatrists, as having a severe Bor-

derline Personality Disorder with antisocial features and bipolar disorder. Although Hogan was treated primarily by Dr. Smith, Dr. Carter was kept apprised of the course and results of Hogan's treatment.

Several weeks after Hogan's hospitalization, the nursing supervisor on duty advised Dr. Carter by telephone that for the previous three hours Hogan had been "talking loudly and beating on his cell door" in such a way that "he could injure himself." Dr. Carter ordered that Hogan be placed in restraints and given a single fifty milligram dose of the antipsychotic drug Thorazine. Hogan himself had requested Thorazine on prior occasions and the drug had been tolerated without side effects. Hogan was medicated and regained composure uneventfully.

Following this incident, Hogan filed an action against Dr. Carter under U.S. Code Title 42, §1983, alleging that administration of the drug without first conducting a full evidentiary hearing violated his constitutional liberty interest. In response, Dr. Carter asked that the case be dismissed because he had not violated clearly established law in ordering medication, and thus had qualified immunity from liability. The district court denied Dr. Carter's motion, deciding, on the basis of the Supreme Court's decision in *Washington v. Harper* (see 10 **Developments in Mental Health Law** 15), that Hogan "had a clearly established constitutional right to a hearing, notice of the hearing, the right to present and cross-examine witnesses, and judicial review of the decision to medicate prior to administration of the single emergency dose of Thorazine."

According to the Court of Appeals, the sole question was whether Dr. Carter violated clearly established law when, in response to the nurse's call, he ordered that emergency medication be administered to Hogan. The court then noted the well established principle that government officials are protected by the doctrine of qualified immunity from damage liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

The court reasoned that *Harper* does not constitute clearly established law for emergency situations because that case involved prolonged, long-term treatment. The *Harper* Court held that an inmate does have a constitutionally protected liberty interest in avoiding the involuntary administration of antipsychotic drugs, but that a state may nonetheless involuntarily treat an inmate who has a serious mental illness with antipsychotic drugs if that inmate is a danger to himself or to others and the treatment is in the inmate's medical interest.

The *Harper* decision does not constitute clearly established law for emergency situations because that case involved prolonged treatment.

The court found that Dr. Carter acted in a medically reasonable manner consistent with Hogan's constitutional rights when he decided to authorize antipsychotic medication in order to protect Hogan from imminent, self-inflicted harm. At least in emergency situations, due process is satisfied when the decision to medicate an involuntarily committed inmate is based upon a doctor's reasonable "professional judgment."

Finally, the court remarked on the hypothetical possibility of Hogan suing Dr. Carter for failing to prescribe medication. If the doctor had not ordered the single dose of the drug as he did, and instead delayed taking action until after Hogan had been afforded the predeprivation hearing, it is not unlikely that Hogan would have sued claiming that Dr. Carter was deliberately indifferent to his serious medical needs. The court concluded that Dr. Carter should not be liable for taking the very action which may have prevented his exposure to a different lawsuit.

Tuggle Update

Tuggle v. Netherland, 79 F.3d 1386 (4th Cir. 1996)

The death penalty appeals in Lem Tuggle's capital murder case continue. A jury convicted him of murder and sentenced him to death in 1984 following expert testimony offered by prosecutors declaring that Tuggle presented a future danger to the community. Tuggle's own request for an independent psychiatrist at trial was denied. The following year, the United States Supreme Court ruled in *Ake v. Oklahoma* (see 5 ***Developments in Mental Health Law*** 1) that due process requires that defendants be provided with independent experts whenever the prosecution employs its own. The Tuggle case has circulated through the court system since then, and in 1995 the U.S. Supreme Court ruled that the *Ake* error in Tuggle's trial may have prevented him from developing his own psychiatric evidence to support his case (see 15 ***Developments in Mental Health Law*** 28). The Court returned the matter to the Fourth Circuit Court of Appeals for another review. The Fourth Circuit determined that the *Ake* error was not harmful to Tuggle's defense during the death penalty phase of his trial. The Commonwealth of Virginia set an execution date for early June, but Tuggle has again appealed, and the execution date has again been delayed pending further review.

Confession to Mental Health Caregivers Inadmissible in Federal Court

United States v. D.F., 63 F.3d 671 (7th Cir. (Wis.)1995)

In December of 1992, thirteen-year-old D.F. was admitted to a county mental health facility and was confined in a locked ward. She had a history of assaultive behavior and drug and alcohol abuse, and she was a victim of both physical and sexual assault. D.F. was placed under the care of a treatment team, and her treatment plan included a point system by which she was rewarded for good behavior. D.F. could earn points and graduate to less restrictive levels for having conversations with staff members; she could lose points for refusing to answer questions or to write in her journal.

D.F. had previously lived with her aunt and was the suspect in the deaths of her two cousins. In January of 1992, her one-year-old cousin was found dead; only six days later her two-year-old cousin died unexpectedly. First diagnosed as victims of Sudden Infant Death Syndrome and influenza, respectively, the infants were later deemed to have died as the result of suffocation.

Aware that D.F. was suspected of having killed her cousins, the staff at the mental health center advised the patient of mandatory state reporting requirements and reminded her of the consequences of any statements or admissions. While the records reflecting her use of alcohol were confidential, any information about child abuse was not protected, and if D.F. were to make any such disclosures, they would have to be reported to the state department of Protective Services. Nonetheless, her treatment was designed to develop trust, and she was encouraged to speak openly about any physical harm she had caused other children. She was specifically asked if she had ever murdered anyone.

Some staff members thought that D.F. should take responsibility for her conduct; others tried to protect her from making dangerous confessions by encouraging her to speak with a local minister, anticipating that communications with him would be kept private. In January of 1993, D.F. admitted to staff that she had been assaultive in the past. When this information was reported to social service authorities, D.F. was promised that no harm would come to her, provided that she continue to make progress and follow the expectations of her treatment plan. Meanwhile, without D.F.'s knowledge, some staff members were conferring with the

Federal Bureau of Investigation (FBI) while concurrently urging the patient to talk.

Shortly thereafter, while attending a group therapy session, D.F., now fourteen years old, spontaneously admitted to killing her cousins. The admission was reported to Protective Services. That agency in turn notified the FBI, which launched an investigation.

A magistrate judge suppressed the confession based upon the privilege protecting the confidentiality of communications between psychotherapists and patients. The federal district court agreed that the confession was inadmissible, but based its ruling on the Supreme Court's decision in *Colorado v. Connelly*, 479 U.S. 157 (1986), in which the Court ruled that a statement can be suppressed as involuntary when impermissible pressure has been brought by individuals working on behalf of the state. The district court considered evidence that the staff at the mental health center knew of D.F.'s suspected involvement and encouraged her to talk. The court noted the close relationship that the staff seemed to have with Protective Services, the juvenile court and the FBI, and it was convinced that staff members viewed themselves as an arm of law enforcement. In addition, the center had provided D.F. with minimal warnings and failed to mention her Fifth Amendment privilege against self-incrimination. The court determined that D.F.'s confession was the product not of free will, but of psychological coercion. A reasonable person in D.F.'s position would have felt coerced, and so the court held that her confession was involuntary.

The appeals court suggested that D.F.'s mental health caregivers had psychologically coerced her to confess to murder.

The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision. It commented that the admission of an involuntary confession violates the Due Process Clause of the 14th Amendment of Constitution. A confession is voluntary only if the government can show, beyond a preponderance of the evidence, that under the totality of the circumstances it was not secured through psychological or physical intimidation, but was instead the product of rational intellect and free will.

Suppression based on involuntariness also requires that the coercion be induced by a state actor. The definition of a state actor is not broad enough to include any government employee, but neither is it confined only to law enforcement personnel. The court clarified the role of "state actors" by noting that

The definition of a "state actor" does not include all government employees, but is not limited to law enforcement personnel.

> It is not the particular job title that determines whether the government employee's questioning implicates the Fifth Amendment, but whether the prosecution of the defendant being questioned is among the purposes, definite or contingent, for which the information is being elicited.

The questioning of a government employee must be of a nature that reasonably contemplates the possibility of prosecution.

The court then remarked that the dual roles of caregivers who are employed by the government often complicates the inquiry. But the court resolved that

> if it can be reasonably concluded that the caregiver goes beyond accepted medical roles and affirmatively takes on the role of delivering someone who is in his care and custody to the prosecutor, the district court is entitled to determine that the caregiver has changed his role substantially.

The Court of Appeals refused to disturb the district court's ruling that this case involved unacceptable coercion by government officials and that it was inadmissible in court.

In the Virginia Courts

Social Worker Providing Court-Ordered Therapy not Immune from Malpractice Suit

Tomlin v. McKenzie, 251 Va. 478, 468 S.E.2d 882 (1996)

A Virginia Licensed Clinical Social Worker who received a court referral is not absolutely immune from a malpractice action, according to the Virginia Supreme Court. Patsye D. McKenzie provided family therapy to J. Warren Tomlin, his daughter Alexandria A. Tomlin, and her mother Darlene K. Giffin, as ordered by the Juvenile and Domestic Relations District Court of Chesapeake. According to a malpractice and defamation claim filed by father, daughter, and stepmother Carolyn D. Hope-Tomlin, McKenzie conspired with Giffin to violate court orders and interfere with Tomlin's visitation with his daughter. The family seeks compensatory damages of $11 million and punitive damages of $350,000.

McKenzie claimed "sovereign immunity" from the claim, arguing that therapists who provide court-ordered services are agents of the state, and therefore immune from civil lawsuits for their actions. The district court ruled in McKenzie's favor. Tomlin appealed to the Virginia Supreme Court.

Virginia Code § 63.1-248.5 provides that professionals acting on order of the court "shall be immune from any civil or criminal liability in connection therewith, unless it is proven that such person acted in bad faith or with malicious intention." Though McKenzie argued that this statute granted her "absolute" immunity, the Virginia Supreme Court ruled that the qualifying final clause of the statute limited her protection. Anyone acting maliciously is not acting within the scope of employment by the court, and is therefore subject to lawsuit for the unprotected behavior.

Because McKenzie made her plea for dismissal prior to the presentation of any evidence that would contradict Tomlin's claims, Virginia court rules required the lower court to rely solely on the papers and filings produced by both parties. In such a case, Tomlin's allegations of "acts of professional malpractice and defamation... entirely inconsistent with the proper conduct of a family practitioner," had to be considered as true for the purpose of deciding whether to let the case proceed. The Supreme Court therefore reversed the ruling and returned the case to the lower court to take evidence on the question of McKenzie's professional conduct.

A court-employed mental health worker who acts maliciously is not acting within the scope of employment, and is therefore liable for such action.

State Agency May Require Suspended Employee to Submit to Mental Health Evaluation

Virginia Department of Taxation v. Daughtry, 250 Va. 542, 463 S.E.2d 847 (1995)

The Virginia Supreme Court recently ruled that the Virginia Department of Taxation (VDT) was justified in requiring an employee suspended in part for psychiatric reasons to establish her mental fitness before returning to work. The court found the requirement within the agency's management responsibilities and consistent with its duty to provide a safe working environment for all employees.

Maurie L. Daughtry was dismissed from her

position as a field representative by the VDT for alleged unsatisfactory job performance after the Department received information from Daughtry's psychiatrist and another VDT employee that Daughtry had threatened to kill herself and one of her supervisors if she were terminated. A grievance panel reviewed Daughtry's termination and recommended unconditional reinstatement to the same or similar position with the VDT.

The VDT agreed to reinstate Daughtry, but only on the condition that she undergo a mental health evaluation to certify her "readiness for duty" prior to reporting for work. Daughtry reported for work without the required certificate and the Department advised her that if she failed to present the certification within a week she would not be allowed to return. The VDT asserted that the mental health examination requirement was justified by the serious nature of Daughtry's threats to kill her supervisor, by evidence of her unstable mental condition, and by the Department's responsibility to provide a safe working environment for all employees.

Daughtry filed a petition in the circuit court to implement the grievance panel's decision and secured a temporary injunction restraining the VDT from terminating her employment. The VDT appealed the ruling to the state supreme court.

The Supreme Court determined that an employer can require employees to submit to psychological examination if its unwritten policy is applied reasonably.

The Virginia Supreme Court reversed the decision, agreeing that the VDT was justified in requiring that Daughtry submit to and pay for a mental examination prior to resuming work. The court focused on the Department's responsibility for the safety of its employees, the seriousness of Daughtry's threats, and Daughtry's unstable mental condition in light of the stresses of her position. The court also rejected Daughtry's contention that the VDT must have a written policy giving it power to require mental evaluations. The court determined that an employer can require an employee to submit to a psychological examination if an unwritten policy is reasonably applied.

Workers Compensation Claimants May not Rely on Doctor-Patient Privilege

Wiggins v. Fairfax Park Limited Partnership, 22 Va. App. 432, 470 S.E. 2d 591(1996)

The Virginia Court of Appeals recently affirmed the decision of the Workers' Compensation Commission (WCC) allowing an employer to require a claimant to change treating physicians when the current physician fails to perform the statutory duty to provide timely and complete medical reports. The Court of Appeals also decided that the statutory waiver of physician-patient privilege in workers' compensation proceedings is not limited to independent medical evaluations, but applies to all physicians who have attended or examined a claimant.

Larry Wiggins sustained a compensable back injury while working for his employer. The WCC entered an award for temporary total disability and medical benefits based upon results. Wiggins then sought and received medical treatment from a physician employed by Kaiser Permanente Medical Center (Kaiser) and subsequently from another physician employed by the Georgetown University Medical Center (Georgetown).

The employer's insurance adjusters sent a letter to Kaiser requesting an updated medical report concerning Wiggins' condition. The insurer also requested that the Georgetown physician send it all medical reports concerning Wiggins' treatment. Neither of these requests were answered sufficiently by the physicians.

The insurer then sent a letter to the Kaiser physician, who was again treating Wiggins, enclosing a physical capabilities form and requesting that the physician return the completed form. But the Kaiser physician did not complete the portion of the form indicating whether Wiggins could work full or part-time and the number of hours he could work. The Kaiser physician also failed to respond to the insurer's later inquiry concerning whether Wiggins would benefit from work hardening.

The insurer then wrote to Wiggins' counsel, offering Wiggins a panel of physicians from which to choose and eventually advising him that "unless Kaiser Permanente provides our office with progress reports on a timely basis regarding any treatment to Mr. Wiggins, we will not place their bills in line for payment." The insurer explained that it was refusing to pay for medical treatment only because the physician failed to provide current medical reports and respond to questions regarding Wiggins' ability to work. Wiggins responded by refusing to select a physician from the panel.

The WCC ruled that the employer was justified in seeking to change Wiggins' treating physicians in light of the doctors' refusals to supply the requested medical records. The WCC specifically found that the physicians failed to perform their statutory duty to provide timely and complete medical reports under Virginia Code § 65.2-604(A). The Commission also held that Virginia Code § 65.2-607(A) waives the physician-patient privilege as to all physicians and in all proceedings under the Workers' Compensation Act.

Wiggins appealed both of these rulings, but the Appellate Court affirmed them. First, the court found evidence of numerous instances where the physicians did not promptly or thoroughly respond to the insurer's requests for medical records and information. Moreover, the physicians and their counsel made it clear to Wiggins' employer that they would not voluntarily produce copies of their medical records related to Wiggins without a signed patient authorization, a subpoena, or intervention by counsel. This policy is contrary to the statutory duty imposed upon these health care providers by the code. Therefore, the Commission was justified in requiring the claimant to select a new treating physician from a panel offered by his employer.

The Virginia Code dictates that any facts learned by "any" physician who may have "attended or examined" the Workers' Compensation claimant are not privileged.

Second, the court agreed that the physician-patient privilege is statutorily waived as to any physician and for any action brought under the Act. The court noted that the literal construction of Virginia Code § 65.2-607(a) does not limit the waiver to facts communicated or learned by a physician only during an independent medical evaluation, as Wiggins had argued. The plain language of the Code dictates that any facts communicated to or learned by "any" physician who may have "attended or examined" the claimant are not privileged. This result is also consistent with the rule that medical reports of a plaintiff in a civil action are not protected if the plaintiff's physical or mental condition is in issue. Thus, the WCC was correct in applying the physician-patient waiver to physicians who treated Wiggins.

In Other State Courts

Arizona Statute for Tort Actions Tolled Only If Plaintiff of "Unsound Mind"

Florez v. Gomez and Duncan v. Moonshadow, 917 P.2d 250 (Ariz. 1996)

The Arizona Supreme Court recently held that Arizona's two year statute of limitations on tort claims bars more distant claims unless the plaintiff was of "unsound mind." The court defined a person of unsound mind as "an individual unable to manage his ordinary daily affairs or to understand his legal rights or liabilities," and thereby excluded many claims of "recovered memories" of childhood sexual abuse.

Ramon Gomez claims that eighteen years ago when he was twelve years old, Laurence Florez, then a priest, sexually molested him. In 1990, Gomez claims to have remembered these incidents and reported the abuse to a priest, who then informed the Diocese of Phoenix. In 1991 the Diocese wrote a letter to Gomez and his lawyer expressing its belief that Gomez's claim was without merit and that the two year statute of limitations had expired.

Gomez filed an action against Florez on in 1993. He argued that the statutory limitation period should be held in abeyance or "tolled" because (1) he was of unsound mind within the meaning of Arizona law; (2) he was under duress; (3) his memory was repressed, and (4) he did not connect the sexual abuse to his injuries until within two years of filing the action. In support of his assertions, Gomez submitted the affidavits of two expert psychologists indicating that he suffered from post-traumatic stress disorder, depression, and other problems indicating an unsound mind.

The companion case of *Duncan v. Moonshadow* presented similar legal issues, based on Melissa Moonshadow's allegations that her father sexually abused her from the age of six until seventeen. Moonshadow alleges that she was last abused by her father in June of 1989, but she did not file her action until July 16, 1993. She presented an affidavit from her counselor that she suffered from post-traumatic stress disorder, which prevented her from confronting her father through litigation. However, the counselor admitted at her deposition that Moonshadow was fully capable of managing her own personal affairs upon reaching majority, was fully aware that her father sexually abused her, and even discussed with her the possibility of bringing a civil action against her father in 1989.

The Arizona Supreme Court began its analysis of both these cases by noting that unless tolling occurred, the claims of both plaintiffs were barred by the statute of limitations. The court then considered the Arizona legislature's approach to the role of the mind on the tolling of the statute of limitations. A.R.S. §12-502(A) provides for a tolling of the statute of limitations if the person bringing the action is of "unsound mind." In *Vega v. Morris*, the court had described the disability for "unsound mind" as one for "incompetents" and "persons who are insane." The Court of Appeals directly addressed the issue in another case *(Allen v. Powell's Int'l, Inc.)* and concluded that a person of "unsound mind," in this context, refers to a person who is unable to manage his affairs or to understand his legal rights or liabilities. The Arizona Supreme Court accepted the *Allen* formulation and concluded that the focus of the unsound inquiry is on a plaintiff's ability to manage his ordinary daily affairs, not on his ability to pursue the subject matter of the litigation.

Neither Gomez nor Moonshadow claimed to be insane or incompetent. Instead, each plaintiff argued that their post-traumatic stress disorder was sufficient to toll the statute of limitations. However, the court ruled that a diagnosis of post-traumatic stress disorder alone is

insufficient to constitute insanity or unsound mind within the meaning of the relevant statute. The court then applied the *Allen* test to each case and found that neither plaintiff was of unsound mind within the statute of limitations period.

As part of its analysis, the court noted that the affidavits of the plaintiffs' treating psychologists were insufficient to prove unsound mind, despite explicit language in the affidavits to that effect. The court explained that the affidavits offered expert opinion, but failed to set forth required specific facts in support of the opinion and confused an inability to bring a lawsuit with the inability to perform the basic functions of adult life.

A dissenting judge argued that the majority incorrectly characterized the evidence and usurped the role of the jury. First, the dissent asserted that the plaintiffs' affidavits presented sufficiently detailed facts to support the psychologists' ultimate conclusions and that the majority opinion simply neglected to describe those details. Second, the dissent claimed that, viewing the facts in favor of the non-moving party, the plaintiffs might well have been disabled by an unsound mind following the horrible abuse they described. Therefore, there was no valid reason for the court to accept jurisdiction and play juror to decide contested facts.

Kansas Supreme Court Overturns Sexually Violent Predator Act

In the Matter of the Care and Treatment of Leroy Hendricks, 259 Kan. 246, 912 P.2d.129 , cert. granted, —U.S.—, 64 USLW 3830 (1996)

The Kansas Supreme Court has declared unconstitutional a law known as the Sexually Violent Predator Act. The statute was largely based on Washington state's Community Protection Act of 1990, which was upheld by the Washington Supreme Court, only to be later struck down by a U.S. District Court (see 13 ***Developments in Mental Health Law*** 35 and 15 ***Developments in Mental Health Law*** 30). The Kansas Court followed the federal court's guidance in striking down the law, but also extensively discussed legal uses of psychiatric terminology.

In 1984 Hendricks pled guilty to two counts of Indecent Liberties with a Child. He had been convicted of similar charges in 1960, 1963 and 1967 in Washington. His 1984 plea bargain resulted in minimum sentences for the offenses and in the dismissal of a third count of Indecent Liberties. The prosecuting attorney chose not to pursue a conviction under the Kansas Habitual Criminals Act, which could have resulted in a longer sentence.

The Kansas Sexually Violent Predator Act of 1994 states that "a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons . . . . [S]exually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior." (K.S.A. 59-29a01). The Act defines a "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." The term "mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."

The Act states that existing commitment procedures for the mentally ill are insufficient to negate the risks posed by sexually violent predators. The law outlines a procedure for involuntarily committing sexually violent offenders, after their prison sentences had been completed, for long-term care and treatment.

In 1994 a Kansas district attorney sought commitment of then sixty-two year old Leroy Hendricks under the law, in anticipation of his release from prison. A trial court determined that Hendricks was a sexually violent predator, and ordered him committed to Larned State Security Hospital. Hendricks appealed to the state Supreme Court.

In his opinion for the majority on the Kansas court, Justice Allegrucci wrote that though the State has a compelling interest in protecting the public, the interest cannot be served "in a constitutionally impermissible manner. . . .[T]he legislature has provided the State with other options to achieve that objective and, in addition, has the authority to increase the penalty for sex crimes committed against children."

The U.S. Supreme Court declared in *Foucha v. Louisiana* that indefinite confinement is justifiable only when a patient or criminal is both mentally ill and dangerous (see 13 ***Developments in Mental Health Law*** 21). A dangerous person who is not mentally ill cannot be detained without evidence of a crime after he or she has completed a prison sentence. The *Foucha* court specifically noted that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible.

The court found that neither the language of the Act nor the State's evidence supported a finding that mental abnormality or personality disorder is a mental illness. Of particular significance to the court was the legislature's own recognition that sexually violent predators are not mentally ill but, rather, have a "mental abnormality." The court also focused on the almost nonexistent treatment for sexually violent predators and concluded that the overriding concern of the legislature was to continue the segregation of sexually violent offenders from the public.

In a dissenting opinion, Justice Larson argued that the courts and legislatures need not follow *DSM* in writing statutes or determining case law. Instead, "mental illness," "mental abnormality," "personality disorder" and "antisocial personality" are legal terms, which each state is free to define for itself. Even in *Foucha*, the Supreme Court did not establish a strict definition of "mental illness" for the courts to follow:

> For constitutional purposes, "mental illness" is not a psychiatric diagnosis to be made in accordance with the *DSM-IV*, but a legal determination to be made with reference to some standard that establishes that the person suffers from a condition that is an ailment of the mind, rather than mere 'idiosyncratic behavior' within a range of conduct that is generally acceptable. . . . [T]he [Supreme] Court recognized that 'mental illness' was not a diagnostic term of art but rather a descriptive term which could be satisfied by various standards.

The dissent argued that Kansas defines mental illness in its involuntary commitment statutes, but is not barred from using similar but different concepts, such as "mental abnormality," in other contexts. Furthermore, *DSM-IV* should not be taken as the final word on psychiatric matters, but as a compendium of thought subject to change: "There is no justification for linking constitutional standards to the shifting sands of academic thought reflected in the *DSM-IV* and its frequent revisions," wrote Larson. Hendricks' commitment should be upheld, he concluded, because the statute is narrowly drawn to limit the liberty of a small, well-defined class of persons who constitute a public threat.

Kansas has petitioned the United States Supreme Court to hear this case, and it has been accepted for review during the Court's next term.

. . . *A Survey of Statutes*

—continued from page 3—

tention needs only to be conducted as soon after detention as possible, but may be given up to forty-eight hours after admission.[18]

Several statutes allow for a person to be detained in a jail or other correctional facility if no other treatment facilities are available. Some of these statutes provide that if a person is so placed, he or she must be kept separate from the criminally convicted and offered separate treatment.[19] In addition, these statutes may impose a time limitation for detention in a jail or other correctional facility. In North Dakota, for example, detention in a correctional setting may not be ordered except in cases of actual emergency when no other secure facility is accessible, and then only for a period of not more than twenty-four hours.[20]

Involuntary Commitment

The involuntary commitment process is usually initiated by a petition or application to a magistrate or judge. Depending on the statute, the application may be filed by any person, the administrator of a health facility, a police officer, family members, guardians, or even the drug or alcohol dependent person.[21] As an initial matter, the judge or magistrate must find that the application asserts that the person to be committed meets the statutory criteria for involuntary commitment.

A number of the statutes require that the application be accompanied by certification by a health official who has examined the alleged drug or alcohol dependent person near the time of the petition. Arizona's statute is typical and provides that "the petition shall include . . . a signed statement by a physician . . . stating that the physician has examined the person within the twenty-four hour period before the petition is submitted."[22] These certifications are said to serve as a mechanism to screen out unwarranted or malicious petitions for commitment.[23] A number of statutes, however, do not require a medical certification in order to file the petition or provide that if the drug or alcohol user refuses examination, a physician must only file a certificate stating this. Other statutes require that the petition be accompanied by affidavits corroborating the allegations contained in the petition.[24]

As part of the involuntary commitment process, a number of statutes require the proposed patient to be examined either by his or her physician or by a court-appointed physician. If the proposed patient refuses to be examined, many statutes provide for the person to be taken into custody in order to conduct the examination. West Virginia removes this additional step and merely orders the person taken into custody for the purposes of the hearing and examination.[25] Because the formal hearing has not yet been conducted, the court must base its decision only on the application for commitment or its own observation. The discussion below of right to counsel makes it clear that the statutes do not provide an explicit right to counsel and courts have held that no counsel is required at a medical examination.

Statutes do not provide an explicit right to counsel and courts have held that no counsel is required at medical exams to determine DAD status.

The criteria for involuntary commitment for DAD persons are similar to the criteria necessary for involuntary commitment for mental illness. Instead of mentally ill, the statutes generally require that a court must find that a person is drug or alcohol dependent. And, like commitment for mental illness, involuntary commitment for drug or alcohol dependency generally requires that a person must be dangerous to themselves or another person.

Several states' criteria do not mimic the mental illness commitment statutes, however, because they do not contain explicit dangerousness requirements. In California, for instance, a person can either be a narcotic addict or only in imminent danger of addiction and in need of care, supervision, and treatment.[26] In Rhode Island the court must merely find that the person is a narcotic addict in order for commitment to be valid.[27] In the District of Columbia, "whenever the Mayor has probable cause to believe that . . . any person is a drug user, he . . . shall order . . . a preliminary investigation [and] shall cause that person to be placed in an institution."[28] For purposes of the District of Columbia's statute, implicit in "drug user" is the notion that the public safety is endangered or that the person is incapacitated.

Other states offer substitutes for dangerousness and may require the person be: "substantially unable to care for himself,"[29] "incapable of or unfit to look after and conduct his affairs,"[30] or "incapacitated by alcohol or drug addiction."[31] Regardless of the explicit language of the statutes or the assumptions the statutes are based upon, some courts have found implicit requirements that dangerousness be proved before commitment is allowed.[32]

Several states specify that a drug or alcohol dependent person cannot be committed unless treatment is available and likely to be beneficial.[33] Other states, however, provide for commitment even where no treatment facilities are available. In the absence of adequate treatment facilities, Massachusetts allows commitment at the "Massachusetts correctional institution at Bridgewater . . . provided that there are not suitable facilities available . . . and provided further, that the person so committed shall be housed and treated separately from convicted criminals."[34]

Regardless of explicit statutory language, some courts have found implicit requirements that dangerousness be proved before commitment is allowed.

All states require a notice of rights. All require that the person be given notice of the time and place of commitment hearings. However, they differ as to who receives notice when the drug or alcohol dependent person is detained through emergency commitment or protective custody. Several courts have found that a commitment order may be subject to collateral attack if the person committed was not provided adequate notice.[35]

Other Procedural Protections

Only California, Tennessee, Virginia, and Wisconsin allow a proposed patient to have a hearing before a jury if the person demands a jury. Texas makes a jury mandatory unless waived.

All statutes provide a right to counsel for the probable cause or formal hearing required for involuntary commitment. Many states, however, have no explicit right to counsel for a person subjected to protective custody or emergency commitment. Several courts have held that a person has no right to counsel during the medical examination. Courts have offered various reasons for this conclusion, such as assertions that a physical examination is not a critical stage of the predetention process, the physician is "not acting as an agent of the prosecution," or the examination is part of the state's parens patriae power.[36]

Most statutes provide for an initial limited period of commitment. Thirty and ninety-day initial limits are common. Several states provide for much longer periods. Rhode Island, for example, provides for an indefinite initial commitment of up to three years, West Virginia allows for two years, while the District of Columbia provides no specific limit.[37] If the physicians treating the DAD person decide there is a need to receive additional treatment, the statutes provide recommitment procedures. Likewise, if the physicians feel that the person no longer needs treatment, most statutes allow physicians to discharge the patient.

Conclusion

The legal literature analyzing detention for drug and alcohol dependency is relatively limited. Furthermore, even though the statutes governing involuntary commitment of DAD persons are often complicated and provide for a variety of procedural protections, it is likely that actual practice is far from statutory models.

Most states provide what seem to be adequate procedural safeguards, at least for long term commitment. But the safeguards limiting emergency commitment and protective custody gives rise to other concerns. Is the law being used to provide police officers a convenient means to detain a troublesome person for a limited time, or do the laws come into play only in true medical emergencies, as an analogue to emergency custody of the mentally ill? How often do the dual problems of substance abuse and active mental illness converge to confound the choices of police, clinicians or the legal system charged with maintaining public order and protecting vulnerable citizens? Is using the law enforcement system to detain, transport and house the substance abuser an appropriate and cost-effective application of public safety resources? Additional research on the practical application of statutes that allow for involuntary custody and treatment of drug and alcohol dependent persons is warranted.

A complete table of specific provisions of laws from the fifty states and the District of Columbia concerning detention and/or civil commitment of drug dependent persons is available from the editor and may be downloaded from the Institute Home Page on the Internet at **http://www.ilppp.virginia.edu/ilppp/developments/kitzmann_table.html.**

Notes

1. Public Health Law, ch. 363, 1914 N.Y.Laws art. XI-A, quoted in *People v. City of Buffalo*, 26 N.Y.S. 468, 470 (Sup.Ct.1926); see also Thomas L. Hafemeister and Ali John Amirshahi, "Civil Commitment For Drug Dependency: The Judicial Response," 26 Loy. L.A. L. Rev. 39, 41 (1992).
2. See *People v. City of Buffalo*, supra note 1, at 472.
3. See, e.g., ALA. CODE tit. 22, §§ 249-250 (1958); ARK. STAT. ANN. §§ 82-1, -1061 (Supp. 1965); DEL. CODE ANN. tit. 16 § 4714 (1953); D.C. CODE ANN. §§ 24-601, -615 (1961); FLA. STAT. ANN. § 394.22 (1960); GA. CODE ANN. § 42-818 (1957); IOWA CODE ANN. §§ 224.1-.5 (1949); LA. REV. STAT. ANN. § 28:53 (Supp. 1966); MD. ANN. CODE art. 16, § 43 (1966); MASS. ANN. LAWS ch. 123, § 62 (1965); MICH. STAT. ANN. § 14.808 (1956); MINN. STAT. ANN. §§ 254.09-.10 (1959); MO. REV. STAT. §§ 202.360-.390 (1962); NEB. REV. STAT. §§ 83-701, -707 (1966); NEV. REV. STAT. §§ 433.250-.280 (Supp. 1961); N.J. STAT. ANN. §§ 30:4-177.14, - -177.16 (1964); N.M. STAT. ANN. § 54-7-35, -36 (1953); N.C. GEN. STAT. §§ 122-36 (c)122-60, -65.5 (1964); PA. STAT. ANN. tit. 50, §§ 2061-69 (1954); R.I. GEN. LAWS ANN. §§ 21-28-57, -58 (1956); VT. STAT. ANN. tit. 18 §§ 2901-02 (1959); WASH. REV. CODE ANN. §§ 69.32.070, 72.48.030 (1962); WIS. STAT. ANN. § 51.09 (Supp. 1967); Narcotic Addict Rehabilitation Act (NARA), Pub. L. No. 89-793, 80 Stat. 1438 (Nov. 8, 1966); see also, Dennis S. Aronowitz, "Civil Commitment of Narcotic Addicts," 67 Col. L. Rev. 404, 405 (1967).
4. See, e.g., Hafemeister, supra note 1, at 43.
5. *Robinson v. California*, 370 U.S. 660, 664, reh'g denied, 371 U.S. 905 (1962).
6. Id. at 665 n. 7.
7. For the purposes of this paper, I include in this group of thirty-one states any state with an emergency treatment, protective custody, involuntary evaluation, or involuntary commitment statute that is aimed specifically at drug or alcohol dependent persons or provides explicitly that the same commitment procedures are to be used for mentally ill and drug or alcohol dependent persons.
8. Arizona, Connecticut, Louisiana, Minnesota, Missouri, North Dakota, New York, and Wisconsin.
9. Colorado (peace officer or emergency squad); Connecticut (application to administrator of a treatment facility by physician); Georgia (police officer who is given certificate); Kansas (any law enforcement officer);

Maryland (police officer); Minnesota (police officer receives statement of examiner, or police officer directly observes); New Mexico (application to administrator of health facility); New York (by peace officer); North Dakota (peace officer, physician, psychiatrist, psychologist, or mental health professional); Tennessee (by police officer); Texas (by police officer) and Virginia (law-enforcement official based on his observations or another's).

10. GA. CODE ANN. § 37-7-41 (West 1996).
11. CONN. GEN. STAT. ANN. § 19a-126d (West 1996); DEL. CODE ANN. tit. 16, § 2212 (West 1996); N.M. STAT. ANN. § 43-2-8 (West 1996). These statutes are nearly identical and neither provides a definition for "responsible person." In comparison to the statutes allowing a police officer to bring a person in, at least if a family member or spouse brings the person in, a possible assumption is that they would wait and see what the results of the evaluation were.
12. Arkansas (petition to judge), Iowa (application to court), Kansas (petition to district court), Louisiana (statement to parish coroner or judge), Mississippi (application to chancery court), Missouri (application to court), Virginia (petition to magistrate), West Virginia (application to circuit court or mental hygiene commissioner for the county).
13. Iowa (additional requirement that a person is likely to harm himself or others); Mississippi (additional requirement that unless immediately committed the person is likely to inflict physical harm upon himself or others).
14. W.VA. CODE § 27-5-2 (West 1996).
15. MINN. STAT. ANN. § 253B.07 (West 1996).
16. The entire detention under the emergency statute is limited to five days. COLO. REV. STAT. ANN. § 25-1-310(3) (West 1996).
17. The statute allows a person to be detained initially for up to five days. If during that five day period a petition for involuntary commitment is filed, the statute allows an additional ten days of detention after the date of the filing of the petition. COLO. REV. STAT. ANN. § 25-1-310 (West 1996).
18. GA. CODE ANN. § 47-7-43 (West 1996).
19. See, e.g. KAN. STAT. ANN. § 65-5206(d)(g) (West 1996).
20. N.D. CENT. CODE § 25-03.1-25-3b. (West 1996).
21. See, e.g., CAL. WELF. & INST. CODE div. 3 § 3100 (West 1996).
22. ARIZ. REV. STAT. ANN. § 36-2026.01 (West 1996).
23. Hafemeister, supra note 1 at 58.
24. Iowa's statute requires that the petition be accompanied by any of the following: a written statement of a licensed physician, one or more supporting affidavits, or corroborative information reduced to writing by the clerk. IOWA CODE ANN. § 125.75 (West 1996).
25. West Virginia provides for automatic detention for both a probable cause hearing and an examination.
26. CAL. WELF. & INST. CODE div. 3 § 3100 (West 1996).
27. R.I. GEN. LAWS § 21-28.2-3 (West 1996). See also, Georgia (alcoholic, a drug dependent individual, or a drug abuser requiring involuntary treatment); Arizona (chronic alcoholic); North Dakota (a person needing treatment); South Carolina (chemically dependent and in need of involuntary commitment); Washington (chemically dependent and incapacitated by alcohol or drug addiction); West Virginia (person is an addict).
28. D.C. CODE ANN. § 24-603 (West 1996). For purposes of this statute, "drug addict" means any person, including a person under 18 years of age . . . who uses any habit-forming drugs so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of such habit-forming narcotic drugs as to have lost the power of self-control with reference to his addiction. Id. at § 24-602.
29. VA. CODE ANN. § § 37.1-67.01 (West 1996).
30. MISS. CODE ANN. 41-31-3 (West 1996).
31. WASH. REV. CODE ANN. § 70.96A.140 (West 1996).
32. See Hafemeister, supra note 1, at 51-53.
33. See, e.g., New Mexico, Texas, and Washington.
34. MASS. GEN. LAWS ANN. ch. 123 § 35 (West 1996).
35. Hafemeister, supra note 1, at 61.
36. Hafemeister, supra note 1, at 72.
37. A person may remain committed until rehabilitated.

Book Review

A Revolution Reconsidered

by Jeffrey Kovnick, M.D.

Almost a Revolution: Mental Health Law and the Limits of Change by Paul Appelbaum, M.D. (New York: Oxford University Press, 1994) 233 pages.

Dr. Paul Appelbaum of the University of Massachusetts was the recipient of the 1990 Isaac Ray Award conferred by the American Psychiatric Association for "outstanding contributions to forensic psychiatry and the psychiatric aspects of jurisprudence." Winners of this prestigious award present one or more public lectures and prepare them for publication. *Almost a Revolution* presents Appelbaum's contribution to this series. In a fitting tribute to this book's excellence, the APA honored Appelbaum once again by bestowing on this book its 1995 Guttmacher Award for the best publication in forensic psychiatry. Those who are familiar with Appelbaum's work will not be surprised at this recognition. For nearly two decades, his scholarly writing has been at the forefront of the field of mental health law.

Almost a Revolution examines specific reforms in mental health law and analyzes the practical consequences that have followed. Appelbaum begins by discussing the re-examination of societal attitudes toward the mentally ill and toward psychiatry in general during the 1960s. During that decade, the legal system was particularly concerned with the rights of the disenfranchised, which helped to create an environment for a libertarian interpretation of specific laws and the revision of existing statutes. Appelbaum examines four reforms in mental health law in the 1970s and early 1980s that have had a major impact on current practices. First, changes in involuntary civil commitment laws, where treatment-based standards for confinement were refocused to emphasize the patient's potential for dangerousness and where strict procedural protections of patients were instituted; second, the Tarasoff rule with its accompanying duty to warn and/or protect the likely victims of a patient's violent behavior; third, the rights of voluntary and involuntary patients to refuse medication; and lastly the changes in the insanity defense that followed the acquittal of John Hinckley, Jr. Critics predicted these changes would have "revolutionary" and disastrous implications for the mental health care system. Despite such predictions of doom, Appelbaum maintains that the law has been applied in a way that has allowed mental health care to be reasonably administered.

Appelbaum maintains that reforms have allowed mental health care to be reasonably administered.

For each of the four subjects of inquiry, the author explores the history of psychiatric practice and the developing body of cases that lead to reform of an area of mental health law. Each section is built around a groundbreaking legal case which critics predicted would have cataclysmic effects upon the delivery of mental health care. Appelbaum appraises the case's true impact, providing a lucid analysis of empirical data to illustrate how unwarranted psychiatrists' presumptions were. Along the way, he answers the following questions: "What drove the reforms? How were they crafted? What outcomes were anticipated? Were the desired changes realized? And if they were not, what factors prevented achievement of the goals of reform?" He follows by discussing those factors which mitigated the effects these changes in law have had on the mental health system. Each section concludes with a discussion of what Appelbaum anticipates for the future in each area.

Dr. Jeffrey Kovnick held the 1995-96 Forensic Psychiatry Fellowship at the Institute of Law, Psychiatry and Public Policy.

In the chapter on involuntary civil commitment of the mentally ill, Appelbaum discusses *Lessard v. Schmidt*. In this 1972 case, Ms. Lessard, a schizophrenic woman, was held by two police officers for "emergency detention and observation," and was subsequently re-committed on the basis of "mental illness." She was committed under the legal standard of "mentally ill. . .and a proper subject for custody and treatment." Civil committees at this time were not afforded the procedural protections that are now standard in most states. In deciding Lessard, the court ruled that "the state must bear the burden of proving that there is an extreme likelihood that if the person is not confined he will do immediate harm to himself or others." The court also ruled that a variety of procedures must attend the commitment process. Appelbaum notes that

> *Lessard* dispensed with the historic standard for civil commitment and, in a stroke, substituted a vastly constricted dangerousness requirement. Simultaneously, it imported a rigorous set of procedures from the criminal law that went far beyond those imposed during any previous period of reform. Although most clinicians were in favor of the procedural reforms, they feared that as a result of strict enforcement of a patient's civil liberty interests, persons in need of civil commitment would not get the treatment they deserved. Indeed, the author demonstrates that "statutes have had less impact than expected (and in some cases minimal effect) on overall rates of commitment and on the nature of committed populations.

According to Appelbaum, this occurred because of informal adherence to a "commonplace model" of civil commitment wherein judges, mental health professionals, family members, and attorneys have silently collaborated to ensure that the patient is treated fairly and receives the best available care.

In the next chapter, Appelbaum examines *Tarasoff v. Regents of the University of California* (Tarasoff I and II). In these cases, the Supreme Court of California decided that due to the "special relationship" that exists between patient and therapist,

> a therapist who 'determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another' has a duty to take whatever steps are 'reasonably necessary' to protect the intended victim.

When *Tarasoff* was decided, clinicians had begun to recognize that they were unable to predict accurately a person's propensity for violence, and most feared the potential liability they would incur if a patient harmed someone. More importantly, mental health therapists worried that the psychotherapeutic process would be irrevocably harmed if patients feared a potential intrusion into the confidential relationship—such as warning a victim who is threatened during a supposedly secret conversation with a therapist.

In Memorium

Garr Drabek
1963-1995

Psychologist, Woodburn Center

Psychology Resident, 1990-1991
Institute of Law, Psychiatry and Public Poicy

However, *Tarasoff* did not have the far-reaching implications that some initially feared. Clinicians were, for the most part, already assuming the responsibilities outlined in Tarasoff. Furthermore, confidentiality was apparently less an issue for patients than it was for therapists. In similar cases, subsequent court decisions have been more narrowly defined and less liberal in finding clinicians liable.

The third area Appelbaum surveys is the right to refuse medication. Prior to 1979, people in psychiatric hospitals were assumed to be incompetent to make decisions regarding their care, even if that hospitalization was voluntary. Involuntary commitment alone was ample justification for treatment of psychiatric patients and psychiatrists did not need to obtain consent, (simple or informed) when medicating their patients. Appelbaum explains that this all changed when, in the case of *Rogers v. Okin*, a federal court in Massachusetts concluded that voluntary and involuntarily committed patients' rights to privacy and freedom of speech (specifically, freedom to generate ideas and thoughts) meant that patients, if competent, had the right to refuse treatment with medication.

The court decided that if patients were found incompetent, they must have a guardian appointed to make treatment decisions. Psychiatrists feared this ruling would lead to the disintegration of psychiatric hospitals and the public mental health system, that hospitals would become unsafe places where unmediated patients ran amok, and most importantly, that they would not be allowed to care for the patients entrusted to them. Appelbaum quotes Thomas Gutheil, who in the aftermath of *Rogers* wrote:

Appelbaum's empirical data show that hospitals are somewhat less safe now, but that there is no epidemic of treatment refusal.

> [A] psychosis is *itself* involuntary mind control of the most extensive kind and itself represents the most severe 'intrusion on the integrity of a human being.' The physician seeks to liberate the patient from the chains of illness; the judge from the chains of treatment.

Appelbaum examines empirical data to show that although hospitals are somewhat less safe than before *Rogers*, treatment refusal is not the epidemic problem anticipated by critics. That case, and the principle that it announced, has had a lasting impact by protecting patients from being treated against their will in non-emergency situations. Obtaining judicial or administrative approval for treatment-refusers undoubtedly adds to the length of hospital stay and its costs for many patients, but few patients remain permanently untreated.

Appelbaum's final area of inquiry is the insanity defense. When John Hinckley, Jr. was found not guilty by reason of insanity (NGRI) after shooting President Reagan, citizens and professionals alike were furious. Some critics suggested narrowing the standard for the insanity defense or abolishing it altogether. Others proposed shifting the burden of proof from that of the prosecution (who needed to prove sanity beyond a reasonable doubt) to the defense. There was also pressure to restrict experts from commenting on the "ultimate issue" of the defendant's culpability.

In the wake of the verdict, Congress passed legislation shifting the burden of proof to the defendant and eliminating the volitional prong of the defense, which had allowed defendants to claim an 'irresistible impulse' to control behavior. Many states also amended their laws to restrict the use of an insanity defense. Appelbaum notes that these reforms were not as far-reaching as many had wished or expected. In states that have abolished the insanity defense, there has been no decrease in the number of mentally ill defendants who avoid incarceration. Similarly, changing the legal standard has had little impact on the

The enduring impact of reform has been the attitude of both professional and laypersons that the mentally ill have the right to the least intrusive treatment possible.

outcome of trials based on the insanity defense. As before, relatively few defendants who invoke the defense are successful.

On the other hand, shifting the burden of proof to the defense has reduced the rate of insanity pleas and NGRI findings. The major reason why relatively little has changed in the wake of reforms of the insanity defense, according to Appelbaum, is that a NGRI finding is an expression

> of commonly held notions of morality....As such, although it is susceptible to some degree of modification by the law, the extent to which it can be 'reformed' successfully is limited by the reluctance of participants to violate their own moral intuitions.

Summarizing his discussion of all four areas of reform, Appelbaum concludes that "the consequences of reform were much more limited than partisans on either side anticipated." He also highlights the very real changes the reforms effected. However, he believes the most enduring impact of the reforms is the changed attitude of lawyers, judges, clinicians, and society as a whole that mentally ill persons have the right to the least intrusive treatment possible and to an independent review if their rights are threatened. Decision makers and ordinary citizens alike will neither allow patients' rights to be trampled nor will they "facilitate legal initiatives" which undermine necessary care.

Almost a Revolution is a book written with an exceptional analytic clarity that will be of equal interest to mental health law experts and novices. Appelbaum's extensive use of footnotes serve twin functions. For those unfamiliar with mental health law they provide the necessary background to understand the broader issues, while for those who already have a background in this field the footnotes provide rich details of relevant empirical studies and intricacies of legal, social policy, and historical issues. This book will provide fascinating reading for specialists in mental health, social sciences or law, as well as the interested but otherwise uninformed layperson.

Training Opportunities in Mental Health and the Law

The Institute of Law, Psychiatry & Public Policy, 1996-1997

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Ocotober 23-25 & 28-29, 1996
March 17-21, 1997

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December 12 & 13, 1996
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March 3, 1997

Confidentiality
October 28, 1996
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All training programs are subsidized by the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services. Most programs are held at the Institute of Law, Psychiatry & Public Policy in Charlottesville, Virginia. For further information about this schedule, see the Institute's World Wide Web site (*http://www.ilppp.virginia.edu/ilppp*), e-mail *ilppp@virginia.edu*, or call the offices at (804) 924-5136.

Developments in Mental Health Law
INSTITUTE OF LAW, PSYCHIATRY AND PUBLIC POLICY
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
NORTH GROUNDS
CHARLOTTESVILLE, VA 22903

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The Institute of Law, Psychiatry and Public Policy--The University of Virginia

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The Newest Federal Privilege: Jaffee v. Redmond and the Protection of Psychotherapeutic Confidentiality

by Paul A. Lombardo

"The public has a right to every man's evidence." This axiom has been repeated for at least two hundred fifty years as a dominant principle of the law of evidence, where the legal compulsion to testify during trials operates to favor full disclosure as a means to ascertain the truth. [1] The notion of "privilege" stands as an exception to the expectation of disclosure. It insulates the content of some communications from public scrutiny, even when the substance of those communications might be critical to a just outcome in a trial.

The rules of evidence for courts of the U.S. federal system reflect this traditional reluctance to create barriers to the truth, and judges are hesitant to identify new privileges. However, the United States Supreme Court recently chose to honor the ethic of psychotherapeutic confidentiality by creating a new federal privilege to protect the content of mental health therapy from courtroom disclosure. The result in the case of *Jaffee v. Redmond* places the psychotherapist' s office alongside the confessional and the family home as a precinct where communication is protected from the intrusive view of litigants. It is a tribute to the acceptance of mental health therapies that the Supreme Court has given legal recognition to this setting.

Paul A. Lombardo, Ph.D., J.D., is Associate Professor and Director of the Center for Mental Health Law

The Ancient Privileges: Clergy, Spouses, Gentlemen

In contrast to the novelty of psychotherapeutic privilege other privileges existed as part of the common law for centuries. The clergy-penitent privilege, a relic of medieval Christianity dating from at least the fifth century, was recognized in English law for over a thousand years. It was abandoned by the Anglican Church and English courts [2] following the Protestant Reformation.

Of similar ancient pedigree are the spousal privileges, protecting confidential disclosures between husband and wife. The common law protected private marital communications from compelled disclosure and also prohibited spouses from testifying against one another. [3]

Other less known privileges were also part of the common law tradition. The code of honor in 17th Century England counted a gentleman's word as good as a vow, and promises to keep secrets were considered so sacred among the gentry that the common law explicitly recognized them with a legal privilege. Gentlemen could and did invoke the privilege--the right to refuse to testify in court--concerning confidences revealed in exchange for such promises. [4]

A related policy argument was voiced in favor of all these privileges: confidential communications arising out of relationships of trust should not be the subject of coerced testimony in court.[5] The rule of privilege is meant to protect trusting relationships from destructive invasions, thereby fostering certain socially-valued intimacies that are often defined by the exchange of secrets.

Common Law Privileges in American Courts

Many vestiges of the common law were left behind in England at the time of American Independence. Codes of honor reminiscent of the aristocratic hierarchy did not survive, nor did the "gentleman's privilege" they recognized. The clergy/penitent privilege was discarded in England even before 1776, and was therefore not available for incorporation into American law. Nevertheless, from the early years of the Republic, American courts within both the state and federal systems have recognized this privilege, in some cases granting explicit endorsement to it.

Despite abandonment of the clergy/penitent privilege in English courts, an American state court recognized it as early as 1813.[6] The first explicit endorsement in a federal court occurred in *Mullen v. U.S.*[7] when a conviction for child abuse was overturned, partially because evidence of the abuse was solicited from a Lutheran minister to whom the defendant had confessed. The Supreme Court implicitly acknowledged the existence of a clergy/penitent privilege (and

several others) in a 1875 decision. *Totten v. U.S.*[8] involved an action in the U.S. Court of Claims by a man who had been hired by Abraham Lincoln to spy on military operations in the South during the Civil War. When payment was not forthcoming, he sued for his fee. In an opinion by Justice Field, the Court disallowed the claim, stating that

> public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose.[9]

The privilege to refuse to testify concerning the communications of a spouse, once described as "essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life " [10] also remains intact under

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In the Virginia Courts

No Absolute Right to State Paid Psychological Expert

Hoverter v. Commonwealth of Virginia, 23Va.App. 454, 477 S.E.2d 771(1996)

According to an opinion of the Virginia Court of Appeals, an indigent defendant's constitutional right to the appointment of an expert at state expense is not absolute. Defendants must show both the need for such experts and the potential relevance of their testimony before a court is required to provide expert assistance.

Norman Hoverter was indicted for abduction and first degree murder following the death of Valerie Smelser. Hoverter entered into an agreement with the Commonwealth in which he plead guilty to both charges. The plea agreement granted Hoverter a ten year suspended sentence for the abduction charge, but stated that the sentence for murder would be determined by the Court after preparation of a pre-sentence report. Hoverter then sought the appointment, at the Commonwealth's expense, of a mental health expert to conduct a psychological evaluation of him for his sentencing hearing.

According to Hoverter's attorney, the purpose of the evaluation was to determine if any mental health mitigation evidence existed, and, if so, to assist Hoverter in the development and presentation of such evidence. The trial court denied Hoverter's request, ruling that no need for an expert had been demonstrated nor had there been a showing that such evidence would likely be a significant factor in determining the appropriate sentence.

The appellate court affirmed the trial court's ruling and Hoverter's convictions. The Court of Appeals began its analysis by noting that whether to provide a defendant with expert assistance at state expense lies within the discretion of the trial court, and that the defendant bears the burden of showing that this discretion has been abused. There is no absolute right to expert assistance at state expense. A defendant seeking the appointment of an expert witness must demonstrate that the subject on which the expert will present evidence is "likely to be a significant factor in the defense," and that the defendant will be prejudiced by the absence of the expert's assistance.

> To qualify for a state-paid expert, defendants must prove their defense will be prejudiced without one.

Hoverter alleged no existing mental illness and failed to demonstrate that an expert's services might constitute a significant factor in his defense. He could show no prejudice resulting from the lack of expert assistance. Finally, Hoverter did not explain why the detailed presentence investigation would not adequately illustrate any "mitigation evidence." At most, the court surmised, Hoverter hoped that a psychological examination would support a decision for leniency at the sentencing hearing. A mere hope or suspicion that favorable evidence may result from an expert's services does not create a constitutional mandate, the court stated. Absent a showing of particularized need for an expert's services and a showing of likely prejudice from a lack of expert assistance, a trial court's refusal to appoint an expert at state expense does not constitute an abuse of discretion.

State Must Prove Victim's Incapacity In Prosecution for Rape

White v. Commonwealth of Virginia, 23Va.App. 593, 478 S.E.2d 713, (1996)

The Virginia Court of Appeals recently held that in order to convict a defendant of raping a person "through the use of the person's mental incapacity or physical helplessness," the prosecution must prove beyond a reasonable doubt that: (1) the victim was mentally incapacitated at the time of the offense; (2) her condition prevented the victim from understanding the nature and consequences of the sexual act; and (3) at the time of the offense the defendant knew or should have known of the victim's condition.

Rudolph Nathaniel White was convicted in a circuit court bench trial of raping a 14 and one-half-year-old girl through the use of the girl's mental infirmity. White admitted having sexual intercourse with the girl, but contended that it was consensual. The court found that the sexual act occurred without force and therefore sought to determine whether it occurred "through the use of the victim's mental incapacity." Testimony was admitted from a school psychologist that two years prior to the incident the complainant was rated "at the upper end of the educable mentally retarded range." The judge relied upon this evidence and his own observations in court in ruling that the girl was mentally incapacitated. White was convicted of rape under Virginia Code § 18.2-61.

That section of the law defines rape to include sexual intercourse with a person who is not the defendant's spouse if such an act is accomplished through the use of the complainant's mental incapacity or physical helplessness. The Virginia General Assembly has defined "mental incapacity" as a condition of the complaining witness existing at the time of an offense which prevents the complainant from understanding the nature or consequences of the sexual act involved in the

offense and about which the accused knew or should have known. [Virginia Code § 18.2-67.10(3)]

The Court of Appeals reversed the conviction, holding that the prosecution failed to prove beyond a reasonable doubt that, at the time of the alleged rape, the complainant suffered from a "mental incapacity" and that the defendant knew or should have known of the incapacity. Specifically, the appellate court remarked that the trial judge's observations were not sufficient to prove beyond a reasonable doubt that the defendant was guilty of rape. Moreover, the court found that the Commonwealth's evidence regarding the victim's mental status two years before the offense was not evidence of the victim's mental status on or about the date of the offense.

The record indicated that the girl's communication, daily living and socialization skills were all above the mentally retarded range and that during the two-year period after the act she advanced with her peers from middle school to high school. Furthermore, the court concluded that a fact-finder cannot infer from proof of general mental incapacity or an IQ range that a victim is unable to understand the nature and consequences of a sexual act, unless the evidence proves that the victim lacks the ability to comprehend the sexual act or its possible effects. The Commonwealth has the burden of proving every element of the offense and as the Supreme Court of Virginia recently decided in *Atkins v. Virginia*, (See "15 **Developments in Mental Health Law** 9) evidence of diminished mental capacity by itself does not invalidate consent to sexual behavior.

UPCOMING TRAINING PROGRAMS

Risk Assessment	Feb. 28
Substance Abuse & Law Orientation	Mar. 3
Sex Offender Eval.	Mar. 7
Symposium on Mental Health & the Law	Mar. 11
Basic Forensic Evaluation Training	Mar. 17 - 21
Insanity Acquittee	April 8
Confidentiality	April 14
Alternatives to Patient Consent	April 18
Advanced Risk Assessment	April 25
Forensic Symposium	May 5
Basic Juvenile Forensic	May 8, 9, 12, 13 & 14
Capital Sentencing	June 6

In the Federal Courts

Liability for Hospital Employees Who Witness Patient Abuse

Durham v. Nu'man, 97 F. 3d 862 (6th Cir.(Ky.)1996)

A federal appellate court recently held a hospital nurse and a security guard liable under federal law for injuries sustained by a patient from beatings given by other hospital guards. The Court found that each defendant owed the patient a duty of protection, which both violated by watching the assault without interceding on the patient's behalf.

Russell Durham was a patient at Kentucky's Central State Hospital at the time of the incident. Durham approached the nurse's station and asked the nurse on duty, Becky Ahlers, if he could go to the bathroom. According to later testimony, Nurse Ahlers refused Durham's request because she had a policy that patients in seclusion could only go to the bathroom during fifteen minutes of each hour. When Durham subsequently urinated on himself and the floor in front of the Nurse's station. Ahlers' asked him to clean the floor. When he refused, he was repeatedly thrown to the floor and kicked by several hospital security guards. As a result, Durham sustained a cut over the eye and a broken arm, which was not diagnosed or treated for several days.

Durham sued three sets of defendants: (1) the nurse and the hospital security officer who witnessed the beating and did nothing to stop it; (2) the two doctors who treated him but did not diagnose his broken arm; and (3) the administrator of the hospital who allegedly failed to properly train the hospital staff and whose policies were inadequate to prevent violent altercations. The District Court dismissed the claims against all three sets of defendants.

With respect to the nurse and the security officer, the court ruled that the duty owed by police and correctional officers does not apply to state mental health workers in a hospital for the criminally insane. As to the doctors, the Court found that the plaintiff failed to establish that the doctors acted in violation of the patient's constitutional rights, or with "deliberate indifference to serious medical needs." Finally, the Court found that there was no evidence that the hospital administrator had implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the hospital's employees.

The Court of Appeals affirmed the decision in favor of the

treating physicians and the hospital administrator, but reversed the District Court's conclusion regarding Nurse Ahlers and Officer Donnie Glover, who denied participating in the beating, but admitted witnessing it. The court disagreed with the conclusion that the constitutional duty of hospital security guards and mental health nurses to try to stop patient beatings has not been "clearly established." In addressing Officer Glover's liability, the court began by noting that a police officer's conduct is protected by qualified immunity only if it does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Moreover, it is not necessary to demonstrate that the officer actively participated in striking a plaintiff in order to hold a police or corrections officer liable for a constitutional violation. The court found that Officer Glover, like a correctional officer, had a duty to protect patients from assault by other officers.

The Appellate Court also found that Nurse Ahlers breached her duty to protect the plaintiff while he was under her charge. While it was her order that caused the conflict, she remained passive and watched as Durham, in shackles at the time, was beaten. During the ten minutes the assault lasted, the nurse could have asked the officers to stop or called security from the main building of the hospital. Since she did neither, the lower court erred in dismissing the claims against her.

Employer Must Attempt to Reasonably Accommodate Mentally Ill Employee

Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir.(Ind.) 1996)

The Seventh Circuit Court of Appeals recently decided that in order for a school district to dismiss an employee or refuse to hire a job applicant suffering from a mental illness, the school authorities must make a good faith effort to accommodate the individual's mental disability. The court based its decision on the requirements of the Americans with Disabilities Act (ADA). The ADA protects disabled persons, including the mentally ill, by requiring employers to "reasonably accommodate qualified individuals with a disability."

Robert Bultemeyer was employed by the Fort Wayne Community Schools ("FWCS") as a custodian from 1978 until his termination in 1993. During this period, Bultemeyer developed serious mental illnesses, including bipolar disorder, anxiety attacks, and paranoid schizophrenia. As a result, he left work several times on disability leave, the last ending in April 1994. In May 1994, FWCS' employee relations director contacted Bultemeyer to inform him of an available position at Northrop High School and to determine if he was ready to return to work. She also told him that he must take a physical exam before returning to work and that he would not receive

any special accommodations at Northrop, as he had at other schools.

Although he had indicated readiness to return to work, after touring Northrop, Bultemeyer informed the employment office that he would be unable to work there and also declined to take the physical exam. Bultemeyer was then fired despite a letter from his psychiatrist stating that it would be in Bultemeyer's best interest to return to a "less stressful" school.

Bultemeyer sued FWCS, alleging that FWCS had violated the ADA by failing to make reasonable accommodations for his mental disability. He alleged that although FWCS knew of his illness and his need for a less stressful position, it did nothing to accommodate him. The trial court dismissed the suit, finding that Bultemeyer had not proven he was qualified for reassignment.

The Court of Appeals reversed, finding that Bultemeyer had raised factual issues as to whether (1) he possessed the ability to perform the essential functions of the job with reasonable accommodation, and (2) FWCS acted in good faith in attempting to accommodate his disability. Such factual questions must be addressed by the trial court before a pretrial dismissal is warranted.

The appellate court began by noting that under the ADA a successful plaintiff must show that (1) he was or is disabled; (2) the defendant was aware of the disability; and (3) that he is an "otherwise qualified individual" who the defendant failed to reasonably accommodate. The ADA defines an "otherwise qualified individual" as one who can perform the essential functions of the job with or without reasonable accommodation. The ADA specifically includes mental illness as a disability and FWCS was clearly aware of Bultemeyer's condition, since he was returning from a long period of disability leave related to the illness. The third issue -- whether Bultemeyer was "otherwise qualified" for work and should have been accommodated -- presented the primary point of contention.

> A request to make "reasonable accommodation" requires a great deal of communication between employer and employee.

FWCS argued that Bultemeyer was not a "qualified individual" because he could not perform the essential functions of the job, the first of which included reporting for work and taking the return-to-work physical. But although Bultemeyer was required to demonstrate that he was capable of performing essential job functions, he was also entitled to "reasonable accommodation" by his employer. The appellate court found that FWCS simply did not give Bultemeyer a chance to demonstrate his ability to perform the job because FWCS was unwilling to engage in

the interactive process that would reveal both his qualifications and his needs and allow the employer to accommodate them. "An employee's request for reasonable accommodation requires a great deal of communication between the employee and the employer," the court said. It recognized that the communication process is even more difficult when the employee in question suffers from mental illness, but noted, nevertheless:

> The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help.

The Court found that FWCS made no inquiry about what Bultemeyer found stressful at Northrop. Instead, FWCS unilaterally determined that Bultemeyer was wrong in thinking that the position at Northrop was more stressful than any other position. The employer's error was, according to the court, treating Bultmeyer as though he had a minor physical limitation rather than a serious mental illness. His fears may have been irrational but the employer had "a duty to try to find a reasonable way for him to work despite his fears."

The Court also described the process employers must follow to determine what accommodations may be appropriate.

> No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process. . . . [C]ourts should look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary.

Concluding that FWCS had demonstrated bad faith by firing Bultemeyer before engaging him in an appropriate discussion concerning accommodation , the court returned the case to the trial court for further exploration of the factual issues raised by Bultemeyer.

No Warrant Required under US Constitution for Involuntary Commitment

McCabe v. Life Line Ambulance Service, 77 F.3d 540 (1st Cir. (Mass.) 1996)

A U.S. Court of Appeals has overturned a lower federal court and ruled that warrantless entries in connection with involuntary commitment orders do not violate due process protections of the Fourth Amendment. Mary McCabe, administrator of the estate of Rose Zinger, had won the case after Zinger died while Lynn, Massachusetts police served involuntary commitment and eviction orders upon her (see 15 ***Developments in Mental Health Law*** 39). The city of Lynn appealed a jury award of $850,000 to the Zinger estate.

Zinger, a sixty-four-year-old Holocaust survivor, had a history of mental illness and psychiatric

hospitalization, as well as obesity and high blood pressure. Based upon the reports of her family and neighbors, Dr. Jakov Barden signed an application for a ten-day involuntary commitment, also known as a "pink paper," as required under Massachusetts state law. Lynn police waited until the following day to coordinate this order with an eviction notice being served by a county constable. Zinger struggled and died from cardiac arrest while police removed her from her home.

The district court found Lynn city police in violation of Zinger's Fourth Amendment protections for several reasons. The city admitted that its policies did not require police to execute a warrant to serve pink papers. According to the court, warrantless, nonconsensual searches and entries are "unreasonable," and the usual exigent circumstances that might excuse such an action were not present in Zinger's situation. Though the city claimed that Zinger was a potential danger to herself and others, the police acted as if that were not the case and waited a day to serve the orders. The court wrote that physicians such as Dr. Barden are not qualified to ascertain "probable cause" as defined by case law, and that police officers' role as agents of the state outweighed their circumstantial role as agents of the physician, thus necessitating a warrant.

The appellate court review produced very different opinions on almost all of these points. Warrant requirements are negated by exigent circumstances, for example, when life or evidence is in danger of harm or when a "special need" of the State would be undermined by the warrant or probable-cause requirement. Like the district court, the Appeals Court found no exigent circumstances in the Zinger case, even though the city argued that every pink paper presents such a circumstance. McCabe had responded that medical "emergencies" do not automatically equate with "exigent circumstances." The court did not rule on the legal distinctions between these terms, but decided that Lynn's procedures fall within the class of "special need."

> The requirement for a warrant would "appreciably increase the systematic risk" to patients subject to civil commitment.

Massachusetts allows involuntary commitment orders to be initiated under four different circumstances. One of these involves a warrant: when private citizens request that a judge in district or juvenile court initiate proceedings against another citizen. Zinger's commitment order was issued under "Category 2." In this "emergency situation," a qualified physician or practitioner signs a pink paper when "facts and circumstances" suggest the "likelihood of serious harm." Since the statute expressly requires a

warrant in some cases, it implicitly allows orders without a warrant in the others, the Court reasoned. The facts of Zinger's case presented to Dr. Barden satisfied the statutory definition of "likelihood of serious harm." Furthermore, the officers in the Zinger case entered the home solely for the purposes dictated by the pink paper, and did not engage in a general search of the premises.

Warrant requirements would inevitably interfere with these *parens patrie* interests, the Court stated. In Zinger's case, the police did not act as swiftly as they might be expected to when a potentially dangerous situation exists. Though the lower court was persuaded by this fact, the Court of Appeals refused to generalize from this specific instance to the general class of situations. Imposing a general warrant requirement

> would . . . appreciably increase the systematic risk . . . the vital protective purposes served by the State's . . . responsibilities would be frustrated in individual cases not identifiable in advance.

The additional protection afforded by a magistrate's review of the case would be minimal in comparison to these detrimental effects. Oversight by the courts might provide some additional protections--a magistrate could potentially screen unreliable information utilized by the physician assessing the risk, for instance. Yet such cases are rarely based upon insufficient or unreliable information, and magistrates cannot make the necessary expert medical-psychiatric assessments in such cases.

Physicians play a role analogous to that of the magistrate in criminal cases, according to the Court. Warrants introduce a "neutral" observer to evaluate the evidence and are necessitated by the adversarial relationship between a suspect and law enforcement. However, a "committing physician's relationship with a patient, or even a nonpatient, is in no sense adversarial." Instead, the physician occupies the role of "neutral" observer when he or she evaluates the potential patient's condition. Under Massachusetts law, commitment orders under "Category 2," such as this one involving Zinger, are initiated only upon the authorization of the physician, never by the police alone, thus eliminating the need for a warrant.

In Courts of Other States

Divorce Claim does not Mandate Full Disclosure of Psychiatric Records

Kinsella v. Kinsella 287 N.J.Super. 305, 671 A.2d 130 (1995)

Mary and John Kinsella, who have two children, had been married for fifteen years when John charged Mary with extreme cruelty in a divorce suit. He alleged that she shouted and screamed obscenities, flew into rages, and had carried on an affair with another man. Mary countersued for divorce on the same grounds, alleging that her husband had cut her with razors and beaten and kicked her to the point of breaking bones. His cruelty, she said, extended to their children. She filed a civil claim for damages on her own behalf. Before trial, a judge ordered each party to allow the other to review all of the couple's individual psychological and psychiatric records. John Kinsella appealed the ruling; Mary did not.

John based his appeal upon psychologist-patient privilege. Under New Jersey law, the confidential relations between licensed psychologists and individuals, couples or groups have the same protection from disclosure as those of attorneys and clients. The trial court excepted the Kinsellas' records from these protections because the divorce suits necessarily placed the welfare of the children in question.

Arguing against the appeal, Mary claimed that the interests of their children outweighed her husband's right of confidentiality. Because he denied abusing her, the only evidence of abuse that might be found to support her civil suit could be in the files. She also claimed that because John's suit for divorce was based on a charge of emotional cruelty, he had made his emotional and mental status an issue in the trial, which required that his records be opened for discovery.

In reviewing the case, the New Jersey Superior Court noted that one published opinion, *M. v. K.*, 186 N.J.Super. 363(Ch.Div.1982), implied that statutory patient-therapist privileges may be disregarded whenever child custody or visitation is at issue. The Fourteenth Amendment's guarantees of due process mandate that claims relating to a plaintiff's welfare be decided on the basis of "all the relevant evidence." The *M.* court reasoned that patient privilege would deny this right. However, the Superior Court now rejected this argument as too broad.

> The argument propounded in *M. v. K.* therefore leads to the conclusion that every successful assertion of a privilege violates a litigant's due process of law. But evidentiary privileges have been too firmly embedded in our statues and the common-law for too long for them now to be so freely overridden on constitutional grounds.

Exceptions to psychologist-patient privilege have fallen into three categories in New Jersey. In criminal trials, a defendant's constitutional right to confront his or her accuser may overrule the privilege, if the significance of confidential information outweighs the importance of the interests protected by confidentiality. In civil cases, an express or implied waver has resulted in disclosure of normally protected material. Such a waver usually exists when a plaintiff claims damages for emotional distress and offers his or her psychological condition as an issue for consideration. Finally, because New Jersey law grants privilege to the psychologist-patient relationship based upon an analogy to the attorney-client privilege, exceptions that apply in the latter situation may apply in the former.

However, none of Mary Kinsella's claims fell into these categories. The Court believed that Mary Kinsella's own medical records and testimony, the testimony of other witnesses, and the testimony of psychologists hired for the purpose of investigation in this case could possibly prove her claim of cruelty. Though John Kinsella had placed his own mental and emotional state at issue in his suit, this allowed only a limited waiver, and did not allow his wife unrestricted access. Files roughly contemporaneous with the alleged events could potentially be relevant, said the court, as could those which might bear upon his psychological condition before the alleged emotional abuse. However, the Superior Court dictated the trial court should first review John's records to determine which, if any, are relevant to the case before releasing them to Mary.

Americans with Disabilities Act Limits Questions Rhode Island Bar Applicants Must Answer

In re Petition and Questionnaire for Admission to the Rhode Island Bar, 683 A.2d 1333 (R.I 1996.)

The Rhode Island Supreme Court, given the responsibility of overseeing the process by which applicants seek admission to the state's bar, recently instructed the state's Committee on Character and Fitness of the Board of Bar Examiners to adopt reformulations of several bar application questions. The original questions, which inquired into applicants' past and present mental health and substance use, were found to violate the Americans with Disabilities Act (ADA).

The two questions at issue in the case, question Numbers 26 and

29, were challenged by the American Civil Liberties Union after it received a complaint from a Rhode Island Bar applicant. The committee then petitioned the Supreme Court for instructions on how to proceed with respect to the contested questions. The Supreme Court appointed a special master to gather information on the issue and submit model questions to the Court for review and approval. The master's report found both questions to violate the ADA and offered revised versions of each, which the Supreme Court approved.

The original version of question Nos. 26 and 29(a) and (b) are printed below:

26. Are you or have you within the past five (5) years been addicted to or dependent upon the use of narcotics, drugs, or intoxicating items to such an extent that your ability to practice law would be or would have been impaired?

If yes, please state the details, including dates and name and address of the individual who made the diagnosis if one was made.

29(a) Have you ever been hospitalized, institutionalized or admitted to any medical or mental health facility (either voluntarily or involuntarily) for treatment or evaluation for any emotional disturbance, nervous or mental disorder?

(b) Are you now or have you within the past five (5) years been diagnosed as having or received treatment for an emotional disturbance, nervous or mental disorder, which condition would impair your ability to practice law?

Each question was found to violate the ADA, which protects "qualified" individuals who either have a physical or a mental impairment that substantially limits a major life activity or have a record of such an impairment from discrimination. To qualify for protection, an individual must meet the essential eligibility requirements for participation in a public entity's program, activities, or services. A person who poses a "direct threat" to the health or safety of others will not be considered "qualified."

> Applicants to the Bar were asked: Have you ever been hospitalized, for any emotional disturbance, nervous or mental disorder?

Although a public entity may ask about a job applicant's ability to perform job-related functions, it may not make unnecessary inquiries into the existence of a disability. The Rhode Island Court determined that the procedures required for admittance to the state bar are the functional equivalent of a hiring process and that the committee operates as an employer does when it screens applicants. Therefore, the ADA applies to state bar admissions and the contested questions violate the ADA, absent a showing of a direct threat to public safety if persons with a mental or emotional

disability or history of substance-abuse treatment are admitted to the bar.

The burden is on those who seek to ask the questions to show an actual relationship such that (1) applicants with mental-health-and substance-abuse-treatment histories actually pose an increased risk to the public, and (2) the admission process has effectively protected the public in the past by using question Nos. 26, 29(a), and 29(b) to identify any such persons who are a danger to the public. This burden has not been satisfied with respect to psychiatric treatment, because no empirical evidence exists to demonstrate that lawyers who have had psychiatric treatment have a greater incidence of subsequent disciplinary action in comparison with those who have not had such treatment. In addition to the fact that almost half of all Americans who seek mental-health treatment do not have a diagnosable mental health problem, the inclusion of questions such as Nos. 26 and 29 is misguided because they may actually prevent future bar applicants in need of treatment from seeking assistance.

With respect to drug addiction, which can form the basis of a disability under the ADA, a public entity may deny licensing in most cases if an addict is engaged in the current and illegal use of drugs. The court agreed with the master's conclusion that to the extent that a question inquires into the current and illegal use of drugs, the ADA is not violated. Therefore, it is appropriate that the bar application inquire whether an individual is engaged in the current use of illegal drugs, which is defined as the illegal use of controlled substances that has occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use constitutes a real and ongoing problem.

The revised questions accepted by the court are substantively different in that they inquire only as to current substance use or disorders. The new questions read, in part, as follows:

26: Are you currently using narcotics, drugs, or intoxicating liquors to such an extent that your ability to practice law would be impaired?

29: Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect you ability to practice law?

Psychotherapeutic Privilege

(continued from page 27)

federal law.[11] A related but distinct privilege, the ability of one spouse to prohibit the other from giving testimony adverse to the partner's interest, survives as well. It was modified in the 1980 case of *Trammel v. U.S.*[12] *Trammel* changed the existing rule, clarifying that the witness spouse alone could invoke the privilege. That is, a spouse who did not wish to talk could refuse, but the protestations of the affected spouse would not prevent testimony.[13]

Trammel also clarified the reach of Rule 501 of the Federal Rules of Evidence, enacted by Congress as part of the 1972 revision of the federal evidence statute. During the process of revision, the Judicial Conference of the United States defined specific privileges protecting confidential communications between attorneys and clients, husbands and wives, psychotherapists and patients and members of the clergy and their congregations, among others.[14] Despite Supreme Court endorsement of this proposed rule, Congress instead adopted current Rule 501, which enumerates no particular privilege, but allows

> Current law allows the federal courts to recognize testimonial privileges on a case by case basis.

the federal courts to recognize testimonial privileges on a case-by-case basis guided "by the principles of the common law as they may be interpreted . . . in the light of reason and experience."[15] Extension of Rule 501 coverage to communications made within the context of "psychotherapy" was the issue presented to the Court in the Illinois case of *Jaffee v. Redmond.*

Jaffee v. Redmond and Psychotherapeutic Privilege

In June of 1991, Mary Lu Redmond was a police officer employed by the Village of Hoffman Estates, Illinois, a Chicago suburb. As she approached an apartment complex in response to a reported "fight in progress," Redmond encountered two women who shouted that someone had been stabbed. According to her later testimony, Redmond called an ambulance, then left her car to approach the apartment building. Several men ran out, one brandishing a pipe. She ordered the men to get on the ground, but they ignored her. As she drew her revolver, two other men ran out of the building. One of the men was Ricky Allen who, according to Redmond, was waving a butcher knife and

chasing the second man. Allen disregarded her demands that he drop the weapon, and when he was about to stab the other man, Redmond shot him. Allen died at the scene of the shooting.

Allen's family subsequently filed a wrongful death suit in federal District Court, alleging that Redmond had used excessive force in violation of Allen's constitutional rights. The family claimed damages under federal and state law. The two women Redmond had encountered as she responded to the police report were Allen's sisters and their recollections contradicted Redmond's testimony about the shooting. They testified that Allen was unarmed when he emerged from the apartment building, and that Redmond had drawn her pistol before she left her the patrol car.

Prior to trial, the plaintiffs discovered that Redmond had gone into counseling following the incident, and had completed approximately fifty sessions with Karen Beyer, a clinical social worker. The Allen family filed a subpoena for the social worker's notes, to be used at trial to challenge Redmond's testimony. Both during depositions and the trial that followed, Redmond and her counselor refused to produce notes or testify concerning the therapeutic sessions. They asserted a "psychotherapist/patient privilege" that shielded the contents of those conversations from disclosure.

The district court judge ruled that the refusal had no legal basis, and ended the trial with an instruction allowing the jury to presume the notes would have been unfavorable to Redmond's defense. The jury responded by awarding Allen's estate $45,000 on the federal claim and $500,000 on the state wrongful death claim.

The Seventh Circuit Court of Appeals reversed the trial ruling.[16] In its order for a new trial, the appellate court noted the "unique relationship" existing between patients and psychotherapists, the existence of an Illinois law that makes communications in psychotherapy privileged, and the need to recognize such a privilege in the federal courts. The court proposed a balancing test to be used, when, "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests."[17]

In this case, the need for compelled testimony about confidential conversations decreased because of the numerous eyewitnesses who could testify with firsthand knowledge about the shooting . Redmond's privacy interests were, in contrast, substantial. The court of appeals showed particular empathy for Redmond's need for counseling:

> Her ability, through counseling, to work out the pain and anguish undoubtedly caused by Allen's death in all probability depended to a great deal upon her trust and confidence in her counselor, Karen Beyer. Officer Redmond, and all those placed in her most unfortunate circumstances, are entitled to be protected in their desire to seek counseling after mortally wounding another human being in the line of

> duty. An individual who is troubled as the result of her participation in a violent and tragic event, such as this, displays a most commendable respect for human life and is a person well-suited 'to protect and to serve.' [18]

Although the Seventh Circuit upheld the privilege, other federal courts had reached contrary conclusions about its existence, and there was no uniform rule to guide all federal proceedings. When the Allen family filed a petition to reverse the Seventh Circuit decision the issue was ready for Supreme Court review and the petition was granted to explore the status of psychotherapeutic privilege.

The Court began its analysis with an explication of Rule 501 of the Federal Rules of Evidence. Justice Stevens noted that adoption of Rule 501

> did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to "continue the evolutionary development of testimonial privileges." [19]

Did the interests asserted in favor of a testimonial privilege for psychotherapy outweigh the need to produce evidence? Like the court of

> The Supreme Court stated that all testimonial privileges are founded on the "imperative need for confidence and trust."

appeals, the Supreme Court was convinced of the need for confidential exchanges in the therapeutic setting. Comparing the psychotherapist/patient privilege to the spousal and attorney/client privileges, the Court noted that all are founded on the "imperative need for confidence and trust." In such settings, patients must be

> willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[20]

Clearly, there were adequate private interests at stake to justify the privilege. But exceptions to the rule of full disclosure must also be related to important public interests. Facilitating treatment of the mental health needs of the public is such an interest, the Court stated. "The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."[21]

Not only do the policy arguments lean in favor of the privilege, said the Court, but without it "confidential conversations between psychotherapists and

their patients would surely be chilled," particularly when the events that led to the need for treatment--as in this case--are likely to result in litigation. Without the privilege, less therapeutic conversation would occur. No corresponding benefit to the truth-seeking role of courts would be served, because the evidence litigants seek would probably not come into existence.

The Court emphasized how the endorsement of a psychotherapeutic privilege would place the federal courts in concert with the states, all fifty of which have some similar type of privilege. But the state laws differ in many particulars, including what kind of therapists are covered by the privilege. Officer Redmond was in therapy with a social worker. Would the privilege, which all states extend to licensed psychiatrists or psychologists, also apply to social workers?

The Court had "no hesitation" in finding that it would. Several reasons were cited: "social workers provide a significant amount of mental health treatment; . . . their clients often include the poor and those of modest means" who might not have access to providers with other credentials; and their counseling sessions "serve the same public goals" as similar services provided by psychiatrists and psychologists.

The final issue the Court addressed was the "balancing test" announced by the court of appeals. The Supreme Court rejected the type of privilege that would make confidentiality contingent on a judge's after-the-fact evaluation of how important privacy was to the patient as compared to the need for evidence. Such a rule would "eviscerate the effectiveness of the privilege." Therapists should be able to promise confidentiality and people who enter therapy should be able to predict whether their conversations will remain confidential. "An uncertain privilege, or one that purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." [22]

Though the Court was characteristically unwilling to speculate what shape the privilege would take in future cases, it ended its opinion confirming the psychotherapeutic privilege under Rule 501 by suggesting that there may well be exceptions to the protections the privilege offers. It used the classic "*Tarasoff*"[23] warning as its example, when "a serious threat of harm to the patient or others can be averted only by means of a disclosure by the therapist."[24]

Scalia in Dissent

The *Jaffee* decision recognizing a federal psychotherapeutic privilege was written by Justice Stevens and joined by six other Justices, but a stinging dissent was issued by Justice Scalia, joined in part by Chief Justice Rhenquist. Scalia's attack on the rule announced by the majority focused on the injustices that occur when evidence is excluded from trials. Not only will the public at large suffer from such a rule, Scalia asserted, but as in this case, a victim will be prevented

from proving an arguably valid claim. Worse yet, he noted, some defendants (civil or criminal) may be prevented from establishing a defense to their actions.

Justice Scalia saved his most severe rhetoric for a critique of the "vast and ill-defined" privilege created by the majority, and the professional roles to which

> Justice Scalia noted that the absence of a legal privilege has not deterred people from talking through their problems with "parents, siblings, best friends and bartenders."

it would apply. Posing no argument to the majority's assertions about the value of therapy, Scalia nevertheless challenged the relative importance of psychotherapy as compared to other social institutions.

> When is it, one must wonder, that the psychotherapist came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends and bartenders--none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.[25]

Of the majority's claim that little useful evidence would be created absent the privilege because patients would be unwilling to talk to therapists, Scalia asks: " If that is so, how come psychotherapy got to be a thriving practice before the "psychotherapist privilege" was invented? Were the patients paying money to lie to their analysts all those years?" And of the extension of the psychotherapeutic privilege to social workers, Scalia retorted:

> It is not clear that the degree in social work requires any training in psychotherapy. . . . With due respect, it does not seem to me that any of this training is comparable in its rigor (or indeed in the precision of its subject) to the training of the other experts (lawyers) to whom this Court has accorded a privilege, or even of the experts (psychiatrists and psychologists) to whom . . . this Court proposed extension of a privilege in 1972. . . . I am not even sure there is a nationally accepted definition of "social worker," as there is of psychiatrist and psychologist. It seems to me quite irresponsible to extend the so-called "psychotherapist privilege" to all licensed social workers, nationwide, without exploring these issues.[26]

Justice Scalia noted that fourteen amicus briefs were filed in favor of the creation of a psychotherapeutic privilege,[27] with none in opposition. This is hardly surprising, he concluded, as "[t]here is no self-interested organization out there

devoted to the pursuit of truth in the federal courts." As a result of the Court's decision, he concluded,

> our federal courts will be the tools of injustice rather than unearth the truth where it is available to be found. The common law has identified a few instances where that is tolerable. Perhaps Congress may conclude that it is also tolerable for the purpose of encouraging psychotherapy by social workers. But that conclusion assuredly does not burst upon the mind with such clarity that a judgment in favor of suppressing the truth ought to be pronounced by this honorable Court.[28]

Conclusion

The vast majority of trials do not occur in federal courts. They take place in courts applying state law to determine the admissibility of evidence, the procedures for compelling testimony, and the definition of applicable privileges.[29] Even in federal courts, the *Jaffee* rule will be applied in only a fraction of all cases heard. Nevertheless, the creation of a new federal privilege by the Supreme Court signals a major victory by those who consider the promise of confidentiality in the context of mental health therapy at least as important as the public's right to evidence.

Notes

[1] According to the Supreme Court, "[t]he familiar expression "every man's evidence" was a well-known phrase as early as the mid-18th century. Both the Duke of Argyll and Lord Chancellor Hardwicke invoked the maxim during the May 25, 1742, debate in the House of Lords concerning a bill to grant immunity to witnesses who would give evidence against Sir Robert Walpole, first Earl of Orford. [Notes omitted] The bill was defeated soundly." **Jaffe v. Redmond,** 116 S.Ct. 1923, 1996 WL 315841 (U.S. Ill.), Fn. 8.

[2] See Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements versus the Clergy Privilege and the Free Exercise of Religion.* 71 **Minn. L. Rev.** 723 (1987).

[3] See Milton Regan, *Spousal Privilege and the Meanings of Marriage.* 81 **Va. L. Rev.** 2045 (1995). Regan (notes 43-44) cites numerous examples of the adverse testimony privilege from English decisions in the years between 1579 to 1684. The privilege precludes compelled testimony by one spouse that would adversely affect the interests of the other. The 1957 *MGM* film classic *Witness for the Prosecution,* starring Tyrone Power as accused murderer, Marlene Dietrich as his wife, and Charles Laughton as defense attorney, turns on the application of the spousal privilege against compelled testimony.

[4] This now abandoned common law rule (from English cases such as **Bulstrod v. Letchmere,** 2 Freem. 6, 22 Eng. Rep. 1019 (1676) and **Lord Grey's Trial,** 9 How. St. Tr. 127 (1682)) was discussed by the Supreme Court in **Branzburg v. Hayes,** 408 U.S. 665 (1972), a case that explored the duty of journalists to disclose their confidential informants.

[5] The rule against adverse spousal testimony originally found much of its rationale in the notion that women had no separate legal identity from their husbands, thus were not legally competent to testify without the husband's consent. See **Trammel v. U.S.,** 445 U.S. 40 (1980) at 913.

[6] See **People v. Phillips,** N.Y. Court of Gen. Sess., where a Catholic priest's refusal to testify concerning matter divulged under "the Seal of Confession" was upheld.(Cited in Annotation, *Matters to Which the Privilege Covering Communication to Clergymen on Spiritual Matters Extends,* 71 A.L.R. 3d 794 (1976)).

[7] 263 F.2d 275 (1958).

[8] 92 U.S. 105 (1875).

[9] Id. at 107.

[10] **Stein v. Bowman,** 38 U.S. 209 (1839).

[11] See **Blau v. U.S.,** 240 U.S. 332 (1951). Irving Blau was jailed for refusing to testify before a grand jury concerning his own affiliation with the Communist Party as well as his wife's whereabouts. The Supreme Court overturned the contempt citation, citing the rule that "marital communications are presumptively confidential." **Blau** at 333.

[12] 445 U.S. 40 (1980).

[13] In its review of the policy reasons supporting the marital privileges, the **Trammel** Court assumed that when one spouse was willing to testify against the other, "their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." **Trammel** at 913.
[14] In addition to Constitutional privileges (such as the privilege against self-incrimination contained in the 5th Amendment), the proposed rule would have protected information such as secrets of state, trade secrets and identities of informants. See Advisory Committee Notes, Federal Rules of Evidence, Rule 501, 28 U.S.C.A.
[15] Id. Rule 501. The entire rule reads as follows: "Except as otherwise required by the Constitution of the United States or provided by an Act of Congress or in the rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."
[16] **Jaffee v. Redmond**, 51 F.3d 1346 (1995).
[17] Id. at 1357.
[18] 51 F.3d, at 1358.
[19] **Jaffee v. Redmond**, 1996 WL 315841, at 4, citing **Trammel**, above at note 12.
[20] **Jaffee** at 5.
[21] Id at 6. The Court went on to say, "This case amply demonstrates the importance of allowing individuals to receive confidential counseling. Police officers engaged in the dangerous and difficult tasks associated with protecting the safety of our communities not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger. The entire community may suffer if police officers are not able to receive effective counseling and treatment after traumatic incidents, either because trained officers leave the profession prematurely or because those in need of treatment remain on the job." FN10
[22] Id at 8.
[23] **Tarasoff v. Regents of the University of California**, 17 Cal.3d 425. 551 P.2d 334 (1976); (therapist has a duty to make warnings or otherwise take steps to protect identifiable victim who is the object of threats by a patient.)
[24] **Jaffee** at 8.
[25] Id. at 11(Scalia dissent). This comment echoed part of a colloquy on the importance of confidentiality that Scalia had during oral arguments with Gregory Rogus, attorney for Ms. Redmond. Scalia: . . . I just don't see the relevance of the fact that there is a duty of confidentiality here. There are duties of confidentiality in a lot of situations which we've simply utterly ignored. Parent-child, there's no parent-child privilege, for Pete's sake. That's certainly a very confidential relationship. . . . Rogus: This arises in the context of a professional approach to psychotherapy . . . Scalia: But in principle, apart from that line drawing methodology, there's no reason to draw it there is there? I have had law clerks tell me things in confidence, and I presume they felt better after telling me. (1996 WL 88548 (U.S. Oral. Arg.)).
[26] Id. at 14.
[27] In addition to the brief filed by the Solicitor General for the Clinton Administration, briefs were filed by the National Association for Social Workers, the National Association of Police Organizations, the National Network to End Domestic Violence, the Employee Assistance Professionals Association, the American Psychoanalytic Association, the American Psychiatric Association and the Menninger Foundation, with a score of related organizations filing separate briefs or as joining others as cosignatories.
[28] Id. at 17.
[29] As Rule 501 itself makes clear (see note 15 above) many actions that arrive in federal court --such as diversity matters-- may look to state law for the rule of privilege.

SPRING SYMPOSIUM

This year's program, "Special Problems of Communication in Forensic Evaluation," will be held on Monday, May 5th at the OMNI Hotel in Charlottesville. The OMNI is located on Charlottesville's Downtown Mall.

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