Developments in Mental Health Law

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Marriage Laws and People with Mental Retardation: A Continuing History of Second Class Treatment

by Brooke Pietrzak *

Q: What does your marriage mean to you?

A: Well, we're both on the same level, I helps him and he helps me.
A: I wanted to settle down. I wanted to prove that I could maintain a home and also rear children. I didn't see why I couldn't just because I had been an in-patient.
A: I'd probably be lonely without a man.
A: I think Ern's my best friend, though he's more than that to me, more than a best friend.[1]

Although the four individuals who responded to the interviewer's question value marriage and demonstrate an understanding of the responsibilities that come with it, each would be prohibited from marrying in thirty-three states because she is a person with mental retardation. Furthermore, in eleven of the seventeen remaining states, she would still face the possibility that her marriage would be dissolved because of her "incompetence" or "incapacity."

Over the past few decades, there have been significant changes in society's perception of disability as Congress and state legislatures have actively encouraged the "normalization" of people with

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disabilities. But the reform movement has had little effect on the right of the people with mental retardation to marry. From 1978 to 1997, only five states repealed their statutes prohibiting marriages where either of the parties were a person with mental retardation.[2] The laws that remain continue to refer to people with mental retardation with anachronistic and pejorative terms such as "idiots," [3] "imbeciles," [4] "mentally incompetent," [5] or persons of "unsound mind." [6]

This article will explore the current status of laws restricting people with mental retardation from marrying. While efforts at reform were initiated in the 1970's, little progress has been made and few of the prohibitions have been repealed. I will survey the common justifications for these restrictions and evaluate their validity while suggesting several potential avenues for reform.

I. Current Status of State Marriage Laws

A survey conducted in 1978 found that forty states prohibited people with mental retardation from marrying.[7] As of 1997, thirty-three states still had laws that limited or restricted their right to marry. But marriage statutes have not remained completely static. A substantial number of statutes employ more modern terminology, and some laws have been repealed. A comparison of statutes enforced in the 1970's and those enforced today reveals some progress but also indicates much needed amendment.

A. Marriage Prohibitions

During the 1970's, laws preventing people with mental retardation from marrying reflected language that survived from the turn of the century. In California, for example, "imbeciles" and "idiots" were not permitted to marry. [8] In Massachusetts, an "insane person, idiot, or feeble-minded person under commitment" was denied the right. [9] In Minnesota the ban applied to "mental deficients." [10] In Maine, no "mentally ill, feeble-minded person, or idiot" was capable of contracting marriage, [11] while Delaware extended the prohibition to "a person of any degree of unsoundness of mind." [12]

Critics of these statutes argued that classifications such as "idiot" or "lunatic" seemed to include all degrees of mental incapacity. They made no distinction between people with mental retardation who were capable of independent living and regular employment and those who required constant supervision in an institution. There is now widespread agreement that people with mental retardation can be divided into four different broad categories--mildly, moderately, severely, and profoundly retarded. [13] The difference between a person with mild retardation and profound retardation is roughly equivalent to the difference in cognitive development between a twelve-year-old and a two-year-old.[14] The differences within each group may be as much as four

intellectual years. People with mental retardation are a diverse group, but the laws in 1978 did not take their diversity into account.

Additionally, the use today of diagnostic and/or legal categories from years past acts to stigmatize people with mental retardation. Terms such as "idiot," "moron," "lunatic" or "feebleminded" perpetuate images of people with mental retardation as "sub-human" or "defective."

Over the last twenty years, state legislatures have taken some of these criticisms into account. In Minnesota, for example, the phrase "people with mental retardation" has been substituted for "mentally deficient."[15] Maine amended its law to read:

> [n]o person who is impaired by reason of mental illness or mental retardation to the extent that he lacks sufficient understanding or capacity to make, communicate or implement responsible decisions concerning his property is capable of contracting marriage. [16]

This is by far the most specific language employed by any state. Maine is also the only state to include a definition in its marriage statute of what constitutes mental retardation.

The most obvious changes that have taken place over the last two decades in marriage laws are included in the statutory definitions. But there is room for improvement.

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In the Federal Courts

Disabled Client Creates Liability for Program When Employee is Sexually Harassed

Crist v. Focus Homes, 122 F.3d 1107 (8th Cir.(Minn.)1997)

Three employees of a residential program for the developmentally disabled sued their employer under federal law and the Minnesota Human Rights Act when their repeated complaints of sexually aggressive behavior by a resident were not addressed. The 8th Circuit Court of Appeals has decided that their suit was properly framed as a sexual harassment claim, and allowed the case to proceed to trial. This case examines the extent to which an organization serving people with disabilities must protect its employees in the course of their daily work.

Yates House, a residential care facility run by Focus Homes serves people with mental retardation and/or autism. From the day of his arrival at Yates, employees reported problems with J.L., a 16-year-old resident. Although J.L stands over six feet tall and weighs over two hundred pounds, he performs functionally at the level of a two to five-year-old child.

J.L. was physically aggressive towards staff members and other residents. In particular, he repeatedly sexually attacked three employees including the facility manager and the assistant manager. After several such incidents, the facility manager attempted to schedule physical intervention training for staff members and reported incident details to her supervisor. After reviewing the report, the supervisor canceled the training, and instead, scheduled a meeting with a behavioral consultant. The consultant suggested alternative methods for redirecting J.L.'s behavior, but appeared unsympathetic. Neither he nor the supervisor followed through with a promised written safety plan. Focus did provide intervention training specifically geared toward J.L. However, his sexually mal-adaptive behavior did not improve.

As part of a presentation meant to inform senior management of facility conditions, the facility manager was asked by Focus to participate in an observation exercise in which she would allow J.L. to grab her so that company executives could observe the problematic conduct. She resigned instead, and was followed several days later by two direct care colleagues.

The three former employees brought suit alleging Focus Homes' inadequate response to the continuing threat of sexual harassment from J.L., and claiming that Focus had a duty under Title VII and Minnesota Human Rights Act to take prompt and corrective action. Focus Homes

asked for the case to be dismissed via summary judgment and the federal district court agreed. The court found that, given J.L.'s disabilities, his conduct could not constitute sexual harassment.

On appeal to the 8th Circuit, the employees faulted both Focus' arguments and the district court's conclusion. Both had centered on J.L.'s intent and not on the employer's responsibility to its employees. Under both federal and state law, sexual harassment is defined to include "physical conduct of a sexual nature" which unreasonably interferes with an employee's work performance and/or when submission to such conduct is made a condition of an individual's employment. Despite J.L.'s inability to form the "intent" for sexual harassment, his behavior fit within this definition. The appellate court found that Focus Homes' lack of action may have also exacerbated the situation and added to the offensive work environment.

Is a person who may be incapable of standing trial entitled to escape extradition ?

However, the court also expressed its concern that a fact-intensive determination should be made and the issue of employer liability addressed during a full trial. The trial court was instructed not to inquire "whether the employer's response was the best course of action possible," but merely whether it was "appropriate in light of all the circumstances."

Mental Disability No Bar to Extradition for Murder

Lopez-Smith v.Hood, 121 F.3d 1322 (9th Cir.(Ariz.) 1997)

Is a person who may be incapable of standing trial because of mental disabilities entitled to escape extradition on a charge of murder? The 9th Circuit Court of Appeals refused to recognize such an entitlement and denied a petition for a writ of *habeas corpus* that would have deferred extradition.

Mexico sought the extradition of Aron Lopez-Smith for a murder he was charged with committing in Sonora, Mexico. Lopez-Smith was certified as subject to extradition and an arrest warrant was issued. However, Lopez-Smith countered with the claim that his debilitating organic brain damage and mental retardation should properly defer extradition, citing the constitutional guarantees of the Fifth Amendment and the Due Process Clause.

Lopez-Smith was allowed to present his position to a magistrate judge in Arizona during the extradition hearing. Substantial evidence showed that he would be considered incompetent to stand trial under United States law. A psychologist testified that Lopez-Smith was not only retarded, but suffered from organic brain disease

that substantially impaired his ability to retain facts and to comprehend the legal proceedings against him. However, the magistrate judge decided that evidence of mental incompetence was not pertinent to an extradition hearing.

On appeal, the 9th Circuit upheld denial of the writ, noting that, while criminal trial of an incompetent defendant violates the constitutional right to due process of law *in the United States*, "United States due process rights cannot be extended extraterritorially," as in the case of an extradited individual facing trial in a foreign country. It also noted that competence to stand trial, a significant issue in any adversarial system of criminal justice, might not be as material to legal defense in an inquisitorial system as in Mexico.

The court also determined that constitutional guarantees applied to trials are generally not extended to preliminary hearings, and that extradition proceedings are preliminary hearings. While some precedent for due process consideration in extradition was noted, it centered around denial of bail prior to a showing of probable cause. In this case, probable cause had already been established, and a request for extradition had previously been filed. However, the court could find no definitive authority establishing a relationship between preliminary hearings and questions of competency. Nevertheless, it determined that significant factors existed elsewhere.

The court analyzed foreign relations and the role of the Secretary of State as the ultimate bearer of responsibility in discretionary extradition treaties. It noted that while a magistrate exercises discretion in determining probable cause, it is the Secretary of State who must exercise responsibility and authority for effecting the actual extradition. Which considerations ultimately color the Secretary's final determination, whether based on the individual in question or on matters such as foreign policy, are properly left in the hands of the executive rather than judicial branch of government. And thus, whether or not an individual is competent to stand trial is not an issue when considered under these circumstances.

Involuntarily Sterilized Woman Allowed to Sue Under Civil Rights Statute

Lake v. Tyrone Hospital, 112 F.3d 682 (3rd. Cir. (Pa.) 1967)

The 3rd Circuit Court of Appeals recently decided that a mentally impaired woman who was sterilized without her knowledge can sue her parents, a hospital and physicians under the civil rights conspiracy statute commonly known as the Ku Klux Klan Act. The statute

was enacted in 1871 as a Congressional response to pervasive violence against freed slaves, but according to the 3rd Circuit, it also protects those subjected to discrimination in a conspiracy motivated by the desire to deprive "any person or class of persons" of fundamental rights guaranteed by the Constitution.

In 1977, when she was sixteen years old, Elizabeth Arnold Lake was sexually sterilized. The operation occurred with the approval of her parents and with the participation of doctors and a hospital. Lake did not consent to the operation, and did not know the nature of the surgery she had undergone. She was not made aware of her inability to have children until a medical examination occurred in 1993.

Lake and her husband invoked the civil rights conspiracy statute against her parents, doctors and hospital in federal district court, but her claim was dismissed after a pretrial motion by the defense. The trial court asserted that Lake had not proven that the hospital's participation in her sterilization constituted "state action" under federal law, and that the statute under which the suit was brought did not protect the mentally impaired.

The Court of Appeals disagreed, stating that the district court construed the statute too narrowly. The lower court had dismissed Lake's claim solely because it felt that Lake's membership in the class of handicapped individuals did not qualify her for protection. However, the appeals court pointed out that the Ku Klux Klan Act, while enacted to protect racial minorities from oppression, also contained language affording protection to "any person or class of persons" subjected to a conspiracy resulting in injury or violation of basic rights.

According to the Supreme Court, a class is defined as "something more than a group of individuals who share a desire to engage in conduct that the defendant disfavors." The Court of Appeals reasoned that under that definition, members of the group of individuals with disabilities have traditionally suffered restrictions, limitations, unequal treatment and political powerlessness based on attributes beyond their control. In Lake's case, the conspiracy of her parents, doctors, and the hospital rendered her powerless to determine her own reproductive future, thereby violating Constitutional guarantees of reproductive freedom.

In order to bring suit against the hospital, Lake had to argue that acquiescence in involuntary sterilization operations constituted "state action." The appeals court noted that the hospital was organized and licensed under state law, was federally funded, built on land from local government and shared profits with that government. It had received Social Security

Income checks for sterilizations of the mentally disabled during the relevant period, and had a governing board selected by local government. All those features argued in favor of considering the hospital an arm of the state for purposes of the civil rights laws.

Disability Policy Need Not Pay Disbarred Lawyer

Massachusetts Mutual v. Millstein, 129 F.3d 688 (2nd Cir. (Conn.) 1997)

That "no man may profit from his own wrong" is an ancient maxim of equity. The Second Circuit Court of Appeals recently applied this principle to a disability insurance claim when the insured attempted to collect benefits to replace his income following a conviction for fraud.

Millstein argued that his loss of earned income was a direct result of ADD.

Daniel Millstein practiced law in Connecticut for fifteen years. He was proficient in marital law, probate, tax, incorporation and bankruptcy. During his years of practice, he was involved in the abuse of multiple substances, a habit that began when he was in high school. Millstein's substance abuse continued unabated until he was forty, when he finally sought help at an in-patient rehabilitation program.

Following his discharge, Millstein sought psychiatric counseling and was diagnosed for the first time with Attention Deficit Disorder and/or Control Disorder (ADD/CD). The psychologist who made the diagnosis concluded that Millstein had suffered from those disorders for his entire life.

In addition to his problem with substance abuse, Millstein financed personal investments with money illegally diverted from clients' trust funds and from his employer. He also committed fraud by arranging third-party loans from clients for his own financial gain. As a result of these practices, and he was convicted of misuse of clients' funds and sentenced to prison, and his license to practice law was suspended.

Following the suspension, Millstein filed a claim with Massachusetts Mutual Life Insurance. He sought benefits under a disability income policy based upon the diagnosis of ADD/CD. The insurer paid him $10,900 while the claim was investigated. However, when Millstein's illegal activities and license suspension were discovered, the insurer refused to pay more benefits. Massachusetts Mutual went to court asking for a declaratory judgment that Millstein's incapacity predated the coverage period, and that his loss of earnings was not caused by his disability, but by his license suspension.

The policy in question defined "disability" as an incapacity that

was: a) caused by injury or sickness, b) began while the policy was in force, c) required a physician's or therapist's care, d) reduced the insured's ability to work, and e) resulted in a loss of earned income.

While Millstein admitted that he would still be capable of practicing law if his license had not been suspended, he argued that his loss of earned income was a direct result of ADD/CD combined with chemical dependency.

The Court of Appeals disagreed. Despite a psychologist's opinion that Millstein had suffered from ADD all his life, he had managed to attend law school, pass the bar, and practice law for a number of years. He had ingested a cornucopia of illicit drugs during that time, while he became proficient in several areas of the law. Millstein did not suffer loss of income until his license was suspended. The underlying cause of his loss of income was the license suspension, not his disabilities.

The court reasoned that if Millstein were allowed to collect under the policy, he would be benefitting from the illegal activities that had led to license suspension. As this result violated the principle that one should not gain from his own wrongs, the claim was rejected, and Massachusetts Mutual prevailed.

Employee who Threatens Supervisor Not Protected by ADA

Palmer v. Circuit Court of Cook County, 117 F.3d. 351(7th Cir. (Ill.) 1997)

Marquita Palmer was a social service caseworker for the Cook County Court. She suffered from depression and a delusional disorder marked by episodes of paranoia. These disabilities did not interfere with her work performance until Clara Johnson became her supervisor.

Palmer showed no sign of mental illness on the job prior to the hiring of Johnson. But shortly thereafter, she became convinced that a coworker was conspiring with Johnson against her. Palmer became verbally abusive toward the coworker, and was suspended after threatening the coworker with physical violence. Following her return to work, Palmer then directed her anger toward her supervisor, who suspended her again. She was transferred to another location until six months later a minor disagreement with Johnson led to another confrontation.

Palmer became convinced that Johnson was preparing to have her dismissed. After seeing a therapist, Palmer was diagnosed with major depression and paranoid delusional disorder. Despite therapy, Palmer became psychotic and began to threaten Johnson's life. After phoning several death threats to Johnson's office, Palmer was fired.

She challenged the dismissal, claiming protection under the Americans with Disabilities Act as a mentally ill person. She was fired because of behavior caused by her illness, Palmer argued, and thus her illness was the basis for her dismissal.

In the view of both the federal trial court and 7th Circuit, however, the reasons for Palmer's release were her overt threats of violence, not her mental illness. While her illness may have contributed to the threats themselves, the cause of her firing was the threat to kill her supervisor. The employer acted in response to unacceptable behavior, and the fact that the behavior might have been caused by a mental illness did not present an issue under the Americans with Disabilities Act.

According to the 7th Circuit, the ADA protects only employees able to perform the job for which they were hired. When Palmer threatened Johnson she was no longer able to do her job adequately.

Additionally, the employer had already provided a reasonable accommodation to Palmer by moving her to a different location within the court offices. Since the ADA does not require an employer to retain a violent employee, further accommodation was unnecessary.

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In the Virginia Courts

Court of Appeals Finds Weight of Expert Testimony within Discretion of Fact-finder

Addison v. Commonwealth, 1997 WL 557012 (Va. App. 1997)

According to the Virginia Court of Appeals, the weight accorded to expert testimony in competency hearings is within the discretion of the finder of fact. This case examines that finding with respect to first degree murder, stalking, and use of a firearm in commission of a felony.

On August 15, 1995, Gregory Scott Addison, convinced that his wife was having an affair, killed her with a .38 caliber handgun in front of the City of Norton Post Office. In the process of being taken into custody, he allegedly admitted his crime to a state trooper, and also advised the trooper that he had papers to prove that he was "crazy."

A competency hearing during which three psychiatrists testified about Addison's mental state was conducted in February of 1996. Addison's personal psychiatrist of fifteen years declared that Addison was psychotically dysfunctional and delusional, and recommended institutionalization for treatment and observation. An independent psychiatrist found him delusional as well, concluding that Addison was unable to assist counsel in his own defense and that he was incompetent to stand trial.

The Commonwealth's expert was more skeptical, and while admitting the possibility of some significant impairment, determined that Addison was aware of the charges against him, alert, and cognizant of legal proceedings, although uncommunicative when asked to discuss the nature of those proceedings. He judged Addison somewhat calculating with respect to his dysfunction, in the sense that the dysfunction provided a shield for other self-serving purposes.

Following the lead of Addison's long-time therapist, the trial court found Addison incompetent to stand trial and ordered that he be admitted to Central State Hospital for treatment and observation. A month later, a second competency hearing was conducted, and a psychiatrist from Central State testified about Addison's condition. While he found some symptoms of delusional disorder and dysfunction, he was unable to confirm the visual and auditory hallucinations Addison reported. He concluded that Addison would have difficulty maintaining his restraint and might become delusional during any discussion of his wife's infidelity. Addison did, he said, understand the operation of the court and could assist in his own defense unless he suffered an incapacitating relapse. The therapist urged caution and

suggested a diligent effort to refocus Addison on his own case in moments of high stress.

Based on this new evidence, the trial court found Addison competent to stand trial. At trial, the same expert witness from Central State testified that his opinion regarding Addison's competency to stand trial remained unchanged after a month's institutional observation, despite an alleged psychotic episode in the courtroom. A state trooper testified as to the unsolicited nature of Addison's confession and subsequent claim of being "crazy" with papers to prove it. His former cellmate testified about Addison's expressed desire to employ the insanity defense as a good way to circumvent the murder charge. The trial court found Addison guilty of first-degree murder, stalking, and use of a firearm. Addison appealed.

The Court of Appeals could not find an instance during the trial, notwithstanding one alleged hallucinatory episode, that would have provided probable cause to require an additional competency evaluation which might have confirmed that Addison was incapable of assisting his attorney or understanding the proceedings. In fact, Addison was observed as being clearly alert, communicative and cognizant of the testimony in court.

The appellate court also commented on the premeditated nature of the crime, noting no evidence of the "heat of passion" or tangible provocation. Indeed, Addison had felt for a long while that his wife was unfaithful, and said that he had killed her as an alternative to killing himself after stalking her for an entire day.

Finally, Addison's attempt to use his dysfunction as a legal ploy had been confirmed to some degree by two expert witnesses. According to one of them, Addison had intentionally fabricated responses to tests, and employed his alleged hallucinations to shield malingering. These findings became the basis for upholding the trial court conclusion.

Court of Appeals Rules Suicide a Consequence of Job Injury

Food Distributors v. Estate of Ball, 24 Va. App. 692, 485 S.E.2d 155 (1997)

As the result of an injury he incurred on the job, Kenneth Ball suffered unrelenting pain for six years. It affected his ability to work, to sleep, and to function normally. Ultimately, depressed and despondent, he killed himself by drug overdose. Following his death, his widow filed a claim for benefits under the Worker's Compensation Act. On review of the Worker's Compensation Commission finding in favor of Ball's estate, the Virginia Court of Appeals affirmed that suicide could be causally related to a compensable injury at work.

In 1989, Kenneth accidentally tripped over a phone cord in his employer's office, injuring his shoulder. His Worker's

Compensation paid for three successive surgeries to correct the injury, but he was finally diagnosed with thirty-three percent impairment of his upper extremity and a post-traumatic impingement syndrome. Described as an outgoing, vibrant person before the accident, Ball became "morose, moody, and at times angry." Despite medication and rehabilitation, Ball became increasingly depressed.

Following an attempt at suicide in 1990, Ball was hospitalized and treated, then released to individual and group counseling. He gradually became addicted to pain medication and antidepressants, sinking deeper into pain and despair. Finally, in 1995, six years after the injury, he committed suicide by taking a drug overdose.

Ball's estate and widow filed a claim for death and other benefits with Worker's Compensation pursuant to the doctrine of compensable consequences. The commission found the requisite causal connection and granted the award of benefits, noting that the proximate cause of Ball's suicide was his intractable pain.

Ball's former employer appealed, arguing that suicide was an independent and willful act that barred compensation. Furthermore, an independent psychiatrist had testified that Ball's suicide was less a cause of his pain than other factors in his life such as marital and business problems, personality factors, and a possible biological component. Under the doctrine of "voluntary willful choice" asserted by the employer, Ball's estate and widow could have been barred from compensation if suicide was judged to break the chain of causation arising from the injury.

Ball's employer appealed, arguing that suicide was an independent and willful act that barred compensation.

The Court of Appeals disagreed, noting that the doctrine of "chain of causation," was valid in the majority of states and has previously been adopted by the Virginia Workman's Compensation Commission. The Commission's reliance on the testimony of Ball's longtime therapist was within its discretion. There was substantial evidence in the record regarding the source of Ball's incessant pain and depression, despite the declarations of an independent psychiatrist to the contrary.

Under the chain of causation test, when the evidence suggests that but for the initial injury there would have been no suicide, the suicide is considered unintentional even though the act itself may have been volitional. According to this test, the mental disturbance must flow from the initial injury and result in suicide. Once these conditions are met, the chain of causation between

initial injury and subsequent claim remains unbroken, and the suicide becomes compensable.

Testimony of Counselor Allowed in Indecent Liberties Case

Conner v. Commonwealth of Virginia, 1997 WL 133263 (Va. App. 1997)

When seventeen-year-old J.T. Allen called his former teacher Robert Conner to ask him for a ride, he thought he was calling a friend for help. Instead, Conner took Allen home and made sexual overtures to the boy. Conner was subsequently convicted of taking indecent liberties with and contributing to the delinquency of a minor.

A trial judge is traditionally given wide latitude to determine the admissibility of evidence.

During the trial, evidence was offered to prove that following an auto accident in which the seventeen -year-old had been injured, Connor had been Allen's homebound teacher. A psychiatric nurse was allowed to testify regarding her observations of Allen's emotional state and demeanor following the alleged incident with Conner. The nurse was not qualified as an expert witness, and her testimony was restricted to her observations during counseling sessions. She was not allowed to draw conclusions or make diagnoses in court.

Following his conviction, Conner challenged the counselor's testimony as prejudicial and therefore inadmissible. The pivotal issues in the denial of Conner's appeal centered on the nature of a bench trial itself, and on the ability of judges to disregard potentially prejudicial comments, separating the admissible from the inadmissible. Absent clear evidence of abuse of discretion, a trial judge in a bench trial is traditionally given wide latitude to determine the admissibility of evidence.

The counselor testified as a lay witness and not as an expert, and lay witnesses regularly testify about the physical condition of persons with whom they are familiar. In this case, the counselor knew the victim for several years, and would certainly be able to note changes in his physical condition, particularly after a traumatic incident. Though her testimony provided circum-stantial rather than direct evidence of the crime, it was not irrelevant.

Supreme Court Review Denied; Sex Offender Registration Upheld

Kitze v. Commonwealth of Virginia, 23 Va. App. 213, 475 S.E. 2d 830; cert. denied, 118 S. Ct. 66 (1997)

The United States Supreme Court has denied a petition for certiorari in the case of John Kitze, allowing the opinion of the Virginia

Court of Appeals to stand in a case involving *ex post facto* application of the sex offender registration requirement.

Jeffrey Theodore Kitze was convicted in 1990 of rape and malicious wounding. His conviction was reversed by the Virginia Supreme Court in 1993 and the case was remanded with instructions for a new trial. The Supreme Court's decision was based on the comments of the Commonwealth's Attorney at trial. He had "improperly told the jury that if it found that Kitze had committed the offenses because of an irresistible impulse, then he would be set free, and he implied that the jurors, as protectors of the community, would have failed in their responsibility to protect the community."

On July 1, 1994, and prior to the second trial, the Sex Offender Registry was created to assist law enforcement agencies in protecting their communities from repeat sex offenders. At his second trial, in August of 1994, Kitze pled guilty to the offenses and was sentenced to a lengthy prison term. The judge also required him to register with the Sex Offender Registry, in keeping with the newly-enacted statute. Kitze appealed, claiming that the registration requirement was a retroactive application of a statute that did not exist at the time he committed the criminal offenses.

The Virginia Court of Appeals held that while some deterrent punitive impact might result by requiring registration, the main thrust of the provision was to assist law enforcement in tracking offenders and preventing recurrences of similar offenses. That Kitze might have to endure unpleasant consequences because of the registration did not in itself render the registration scheme penal in nature, and in any event, the effects of registration on Kitze were subordinate to the potential benefit to the citizens of the Commonwealth.

A dissenting judge disagreed, arguing that the *ex post facto* registration requirement was essentially punitive and that registration would primarily impose additional burdens upon Kitze, a first-time sex offender. In his view, the new law infringed upon Kitze's personal rights and went beyond the substantial punishment imposed. According to the dissent, the registration requirement should be forbidden like other incidents of punishment such as the levying of additional fines after the sentencing phase of a trial.

Several other states have held that sex offender registration is not, in itself, punishment. Minnesota, New Jersey and a growing list of other states have such statutes, and their position is that registration does not impose an affirmative disability, since the additional constraint of having to register with State Police is incidental to the remedial effects of the regulatory provision.

Mental Health Testimony May be Disregarded in Hearing to Modify Spousal Support

Street v. Street, 25 Va. App. 380, 488 S.E. 2d 665 (1997)

A petition to modify spousal support following a business failure and a sixty-per-cent reduction in personal earnings was brought by a man with Ritalin-controlled Attention Deficit Disorder. Despite uncontroverted testimony by a psychologist and a professional counselor concerning his incapacity to work, he was ordered to pay support based on pre-divorce income. The decision was endorsed by the Virginia Court of Appeals, which restated the principle that the court as fact finder is the sole determinant of how much weight to give expert testimony.

Daniel Street ran a carpet installation business that earned in excess of $1,000,000 for several successive years. However, his poor record keeping and billing practices had placed the company $36,000 in debt. As part of a divorce settlement, he was required to pay spousal and child support based on his personal earnings from the business. Shortly after the support orders were filed, he dismantled the ailing business and went to work for a friend, earning sixty-per-cent less than while he was married.

During a two-year separation prior to divorce, Street was diagnosed with Attention Deficit Disorder (ADD). Although controlled by Ritalin, the ADD had allegedly worsened during the stress of the divorce and the business dissolution. Consequently, Street requested a reduction in the amount of spousal and child support based on his changed financial circumstances and mental incapacity.

Despite the uncontested testimony of Street's mental health counselor and his psychologist, the trial court decided to disregard any discussion of his disorder. Instead, the court focused on its perception that Street closed the business in order to reduce his support obligation. Both experts gave factually credible evidence about the degree of impairment Street suffered, but the judge decided that since Street had derived substantial personal income from the business while treated with Ritalin for ongoing ADD, the closing of the business was voluntary rather than essential to his mental health.

The Court of Appeals upheld the trial decision, finding that Street's ADD was not an acute ailment but was chronic and easily controlled by Ritalin. If additional stress became a complicating factor, competent psychiatric help was readily available to him. In fact, Street had refused counseling when he first began taking Ritalin, and only sought it when his condition allegedly began to deteriorate following the divorce decree.

The testimony of Street's expert witnesses was compromised

in part by the substantial personal income Street had derived from the business for several years prior to its failure. If ADD had rendered Street incapacitated for those years as his psychologist suggested, his personal income would surely have suffered as well. That the termination of the business coincided with the entering of support orders also mitigated against an adjustment of the decree. Finally, the court reiterated that a judge is not bound by expert testimony, and that disregarding expert opinions does not constitute an abuse of discretion.

Testimony concerning Duress Judged Ultimate Issue in Robbery Conviction

Zelenak v. Virginia, 25 Va. App. 295, 487 S.E.2d 873 (1997)

In a decision upholding a conviction for attempted robbery, the Virginia Court of Appeals reiterated the prohibition of expert testimony on the "ultimate issue" and also allowed the use of statements made during a competency evaluation to impeach the defendant's testimony.

Katrina Lynn Zelenak drove the getaway car during a failed robbery attempt at a bank night depository. She and her co-conspirators were subsequently indicted for attempted robbery, conspiracy to commit robbery, and use of a firearm. Zelenak originally planned to offer an insanity defense during her trial, based on multiple personality disorder. When she withdrew the defense, the Commonwealth moved to exclude the testimony of her expert witness, a licensed clinical social worker. The Commonwealth argued that the expert witness would impermissibly suggest that her actions were motivated by fear that a co-defendant would kill her. Thus, her defense would be that she acted under duress, which would supply a legal excuse for the crime. Because a successful argument for duress would lead to Zelenak's acquittal, it represented an ultimate issue in the case. The defense countered that the expert testimony would not center on the ultimate issue in the case, but on Zelenak's general state of mind as related to her disorder.

The court reiterated that a judge is not bound by expert testimony, and disregarding expert opinions does not constitute an abuse of discretion.

The expert was to testify that Zelenak suffered from a pathological relationship with the planner of the robbery, and that she had been subjected to prolonged periods of violent sexual exploitation and humiliation. In the expert's opinion, Zelenak's disorder made her "susceptible to duress," and therefore susceptible to the control of

the accomplice.

The Court of Appeals concurred with the trial court that the common law defense of duress would excuse criminal conduct if the defendant could show that her behavior was the result of a fear of bodily injury or death. The proposed expert testimony asserting that Zelenak was "susceptible to duress" was apparently close enough to the "ultimate issue" to be proscribed by the Court of Appeals.

When Zelenak chose to testify in her own defense, her attorney attempted to limit cross examination on any statements made during the mental status evaluation. This motion was denied. When asked whether there was a reason Zelenak did not like her family, she responded, "No, I love my family very much." Over a defense objection, the prosecutor then challenged that statement with statements she had made during the evaluation, when psychologists were told that members of Zelenak's family had sexually and physically abused her.

The appellate court found that Va. Code sec. 19.2-169.7 rules out the use of disclosures "concerning the alleged offense" made by a defendant at a mental status evaluation but that it does not prohibit the use of other statements not directly related to the offense. Previously, mental health evaluation reports had seemed statutorily protected against use by prosecutors. According to the Court of Appeals, total protection of such reports may no longer be possible, at least when a witness chooses to testify in her own defense.

Check out The Institute of Law, Psychiatry & Public Policy's Site on the World Wide Web at:

www.ilppp.virginia.edu/ilppp

Full text of *Developments in Mental Health Law*
and
the report of the General Assembly (HB 240) Mental Health Study Commission are posted there.

In Other State Courts

Medicated Defendant Due New Trial in Illinois

Illinois v. Nitz, 218 Ill.Dec. 950, 670 N.E.2d 672; cert. denied, 117 S.Ct. 1289 (1997)

Following a trial during which he was receiving psychotropic medication, Richard Nitz was convicted of murder, aggravated kidnaping and robbery, He was sentenced to death on the murder conviction, and an appeal to the Illinois Supreme Court affirmed his convictions and sentences. In 1991 the United States Supreme Court refused to grant a petition for certiorari. On a second review concerning the conduct of the Nitz trial, the Illinois Supreme Court reversed the conviction because prosecutors had failed to disclose that he was medicated at trial. Once again, the U.S. Supreme Court has refused to set aside the decision.

Nitz received the psychotropic drug Tranxene prescribed for the management of anxiety three times daily throughout his trial and sentencing for murder.

By physician's orders, Nitz received the psychotropic drug Tranxene prescribed for the management of anxiety three times daily throughout his trial and sentencing for murder. Some of the common side effects of the drug include drowsiness, confusion, depression, and substantial disorientation.

At the time of Nitz's trial, an Illinois statute provided that "a defendant who is receiving psychotropic drugs. . . under medical direction is entitled to a [fitness] hearing." The statute did not specify who might qualify for the hearing. Nitz's attorneys were unaware that he was medicated during the trial, but when the drug administration was discovered, they filed relief under Illinois Post-Conviction Hearing Act. They claimed that Nitz's due process rights had been violated and asked for a new trial.

The trial court turned down Nitz's plea for post-conviction relief but on appeal, the Illinois Supreme Court found merit in the defense's due process argument. Where there is information available to raise the possibility that an accused is unfit to stand trial, the court held, the failure to inquire about competency violates constitutional due process guarantees. Illinois law provides for occasions when facts come to light after a trial that might have raised a doubt of fitness had they been known. While the withholding of evidence concerning medication violated a state law concerning fitness hearings, the federal constitutional issue arose when an

inquiry into trial competence did not take place. Nitz was granted a new trial to remedy both the statutory and the constitutional violation.

Civil Commitment Distinguished from Criminal Punishment in Arkansas

Edwards v. State of Arkansas, 328 Ark. 394, 943 S.W.2d 600; cert. denied, 118 S.Ct. 370 (Mem)(1997)

The U.S. Supreme Court has declined to review an Arkansas case involving the kidnaping of an attorney by his client. At issue was whether civil commitment and subsequent criminal charges based on the same conduct that led to commitment violated the constitutional prohibition against double jeopardy. Also in controversy was the possibility that a person found mentally ill under a commitment standard could at the same time be considered capable of forming the *mens rea* necessary for criminal intent.

Joe Edwards threatened his attorney's life for allegedly having an affair with Edwards' wife, whom he also threatened to kill. After Edwards kidnaped his attorney at gunpoint, he was found to present a clear and present danger to himself and others under the Arkansas civil commitment statute. He was committed to a psychiatric intensive care unit where he remained for ninety days.

On the day scheduled for his release, criminal charges of kidnaping and terroristic threatening were filed against Edwards, and the probate court ordered an extension of his commitment until the date of his arraignment. Edwards countered by filing a motion to dismiss the charges based on double jeopardy and collateral estoppel.

Edwards asserted that the State had already taken away his liberty by virtue of the civil commitment, and now sought to jeopardize his liberty a second time by prosecuting him for the same conduct. Protection from multiple punishments for the same offense was guaranteed by both the U.S. and the Arkansas Constitutions in their respective double jeopardy clauses, he argued, and his ongoing commitment was a punishment, since it deprived him of significant liberties.

Following a hearing, the trial court concluded that Edwards' civil commitment was not for an "offense," but for treatment and the prevention of harm, and therefore refused to dismiss the criminal charges. On appeal, the Arkansas Supreme Court ruled that a civil commitment did not meet the test of prior punishment for a criminal offense, even when the cause for the commitment was a potentially criminal act. The Court echoed the trial court in noting that the standards for civil and criminal proceedings are different, as is the burden of proof. Protection from criminal liability via the double jeopardy clause was precluded.

Edwards also argued that the State should be prevented from contending that he had the necessary criminal intent for prosecution after it had already found him "mentally ill" as a prior condition of civil commitment. However, the Court noted that a person might be mentally ill under the civil commitment law, but still have the capacity to form criminal intent. The two "manifestations of mental illness," said the Court, are not "mutually exclusive."

Ohio Affirms Duty to Protect

Estates of Morgan v. Fairfield Family Counseling Center, 77 Ohio St.3d 284, 673 N.E.2d 1311 (1997)

Matt Morgan was playing cards with his parents and sister one evening when he excused himself to go upstairs. He returned with a gun and shot his parents to death, wounding his sister in the process. He was charged with the murders, but a jury found him not guilty by reason of insanity. Though a subsequent lawsuit against Morgan's therapist failed, the Supreme Court of Ohio recently reversed the trial finding, ruling that the special relationship between an outpatient and a therapist justified imposition of a duty upon the therapist to protect third parties against the patient's violent propensities.

Matt Morgan's problems began to develop at school, at work, and at home during his senior year of high school. The problems continued after graduation until he was removed by police from the family home for violent behavior. After several months of homeless drifting, Morgan was taken to an Emergency Evaluation Center where he was diagnosed with schizophreniform disorder, a precursor to schizophrenia. The psychiatrist who evaluated him prescribed Navane, a neuroleptic medication to address symptoms of paranoid psychosis. Morgan received intensive therapy and medication for several months, and was then released to his parents with instructions to continue the medication and attend therapy on an outpatient basis.

The outpatient facility, Fairfield County Counseling Center, assigned Morgan to a psychiatrist. The psychiatrist decided to significantly reduce Morgan's dosage of Navane, and eventually discontinued it. Morgan's condition again deteriorated. He became more and more agitated, angry and violent. Although the counseling center was contacted, Morgan's job counselor and a social worker decided that his condition did not warrant intervention, and a psychologist recommended against involuntary hospitalization or forceful medication. Shortly after the center declared itself unable to assist, Matt killed his parents and seriously wounded his sister.

A lawsuit was filed against the counseling center and several of

its providers, alleging negligence. The central issue was the level of duty attributable to the center and the various professionals involved to protect others from the dangers Morgan posed to others. Did a "special relationship" exist between this outpatient and his therapists that demanded them to take control of his deteriorating situation rather than declare themselves unable to help?

The center knew of Morgan's deteriorating condition from direct contact with his mother, who had written several letters to them and called staff members. They were also able to control the situation by resuming prescribed medication, but chose not to do so. Neither did they proactively anticipate any of Morgan's violent behavior despite the diagnosis of the Emergency Evaluation Center prior to his release to outpatient status. These failures to control Morgan's potential for violence provided the basis for a finding of negligence.

The Ohio Supreme Court noted that while it is inherently difficult to predict anyone's future behavior, the center should have known that removing a schizophreniform patient from medication might very well cause that patient to suffer a relapse, and there was documented evidence of Morgan's tendency towards violence. That tendency was directly related to his ability to control his psychoses, which responded to medication and therapy. Three justices of the Ohio Supreme Court dissented from this extension of the "duty to protect" to the outpatient setting.

Call for Papers

Behavioral Sciences and the Law will devote a special issue to "Mental Illness and Criminal Responsibility." Potential contributions may focus on any relevant topic, including but not limited to legal aspects of the insanity and other mental illness defenses, scholarly reviews of the history and evolution of mental illness defenses, and international and cross cultural perspectives. Clinical and epidemiological studies are also welcome.

Deadline for receipt of manuscripts is **September 1, 1998**. Send three copies to the special editor, Alan R. Felthous, M.D., The University of Texas Medical Branch at Galveston, Department of Psychiatry and Behavioral Sciences, 301 University Blvd., 77555-0428, telephone (409)772-6883, E-mail: afelthou@utmb.edu.

The Virginia Patient Health Records Privacy Act of 1997

by Paul A. Lombardo

Until the 1997 legislative session, Virginia's law relating to confidential medical or mental health information was contained in a patchwork of statutes that were difficult to find and even more difficult to understand and apply. Taken together, those laws neither told patients when an expectation of confidentiality would be respected, nor clearly alerted the professional when a disclosure of confidential information was appropriate. Ironically, while there were more than twenty different statutes that allowed or required doctors to breach patient confidentiality, there was no statute in Virginia that specifically required confidentiality to be maintained in both public and private therapeutic contexts.

The only broad legal protection of confidential information available was provided by a privilege against mandatory disclosure in the litigation context. Virginia Code Sections 8.01-399 and 8.01-400.2 protected patients against compelled court disclosure of confidential medical information. Though these laws can provide a harbor against compelled revelations of confidential matter in court, their inadequacy as barriers to other improper disclosures of personal information was highlighted in a recent Virginia Supreme Court opinion involving a medical malpractice claim for breach of confidentiality.

Pierce v. Caday

A woman consulted her physician for advice and a prescription sedative, asking that the "highly confidential" nature of the conversation be respected. She later found that details of their discussion had been repeated by his employee to her coworkers. A suit followed, alleging that the doctor's failure to control his employee amounted to breach of an explicit contract of confidentiality. The trial court dismissed the suit, questioning both the form (a contract action) and the substance (an allegation of wrongful disclosure of information) of the woman's legal claim.

On appeal, the Supreme Court upheld the trial court, because the plaintiff had not complied with provisions of the malpractice act. It agreed that the claim was properly characterized as malpractice. The analysis of doctor/patient confidentiality that followed was instructive:

> While the General Assembly has implicitly recognized the existence of a qualified physician-patient privilege in Virginia, the only explicit statutory pronouncement of the privilege is an evidentiary rule restricted to testimony in a civil action. . .
> In the present case, the plaintiff seeks to fashion a cause of action for recovery in damages out of what has thus far been recognized in Virginia as merely a rule of evidence. (Pierce v. Caday, 244 Va.285, 422 S.E. 2d 371 (1992)).

Some states, the Court noted, had recognized wrongful disclosure of medical information as a valid tort claim; others had not. Because the plaintiff and defendant presumed that the claim was valid, the issue was not put to the Court, thus a decision on whether to judicially recognize such a cause of action was unnecessary. The Court could "assume without deciding" that such an action would be available. The Pierce case dramatized the absence of clear statutory protection in the Code of Virginia for medical and mental health confidentiality in contexts other than the courtroom.

Proposal for a New Law on Confidentiality

For three years, the Committee on the Needs of the Mentally Disabled of the Virginia Bar Association studied the problem of medical and mental health confidentiality in light of the Pierce case and the prescriptions of existing Virginia law. Following a review of laws in other states and consultation with lawyers and representatives of health professional associations, the Committee drafted a comprehensive bill that was introduced in 1996 and eventually adopted during the 1997 Session of the Virginia General Assembly (House Bill 2733). It went into effect July 1, 1997.

Structure of the Law

The law includes a comprehensive legislative statement on the subject of medical and mental health confidentiality in Virginia law. It addresses current deficiencies in the law, while providing guidance to both patients and practitioners concerning appropriate legal duties, responsibilities and expectations. The legislation is structured within five main sections.

The first section contains a general policy statement concerning medical records. Disclosure of records is prohibited unless otherwise allowed under state or federal law. Redisclosure of records is also prohibited, i.e., a person who has lawfully received a record may not disclose it beyond the purpose for which it was initially released, without the explicit permission of the patient. This is the

first time Virginia's Code has included "a right to privacy" for confidential medical information.

Definitions

The second section provides definitions for critical terms that appear in the statute. Broad definitions were adopted for the "providers" covered by the law. People, corporations, private or state operated facilities, other institutions or HMO's licensed to provide health care are all regulated by this law. Individuals falling within its range include physicians, dentists, pharmacists, nurses, optometrists, podiatrists, chiropractors, physical therapists, psychologists, social workers, and professional counselors, among others.

"Health services" information protected by the law encompasses examination, diagnosis, evaluation, treatment, pharmaceuticals, aftercare, habilitation, rehabilitation and mental health therapy of any kind.

"Record" is defined to include any written, printed or electronically stored material related to health services as well as the contents of any confidential communication made by a patient to a provider or acquired by the provider about a patient.

Permitted Disclosures

Twenty-five specific types of disclosures are permitted by various parts of existing law and these are enumerated and cross-referenced within the text of the new statute. Disclosure such as child and adult abuse reports continue to be mandated while reports by physicians concerning impaired practitioners, as well as reports to insurance carriers remain permissible under the new law. This section is the most lengthy part of the law, since it incorporates by reference virtually every other part of the Virginia Code that addresses the disclosure of medical information by providers. Such disparate issues as infectious disease reports, judicially ordered evaluations, disposition of records upon the sale of a medical practice and handling of records of the dead or incompetent are referenced here.

Consent and Request Forms

The new law provides a model written consent form to be signed by patients to authorize release of records. The form requires the name of the affected patient and the provider who maintains the records, the person who will receive the records, and a specific description of what records are to be disclosed. Patients are informed of the rule against redisclosure, their right to revoke consent, and are asked to list the expiration date for their consent to disclose.

Those who would request patient records are directed to provide a written request that identifies the nature of the information they are seeking, and shows evidence of the authority and identity of the requester to receive such information.

Subpoenas

The new law requires that no one who requests the issuance of a subpoena for records may do so without simultaneously providing a copy of the request to the person whose records are involved, or their lawyer, if they have one. People representing themselves in a lawsuit or witnesses who are called to testify but have no attorney must also receive a notice along with the request for subpoena. The notice must be printed in bold, capital letters. It functions to alert recipients of their right to oppose (quash) the subpoena and the need to contact their health care provider to prevent their records from being released.

A similar notice must be sent to providers. It informs providers who are contacted by patients wishing to quash a subpoena (to prevent records from being released) that they must send the records in securely sealed envelopes to the clerk of the court which issued the subpoena. Judges may then review the records in private to determine whether the subpoena may be honored, dismissed or limited.

Lawyers requesting a subpoena for medical records must now determine if the person whose records they seek is unrepresented. In addition to sending notices to unrepresented patients, witnesses and providers, a notice must now also go to providers directing them not to release records until ten days after the subpoena was served, but no more than twenty days from that date. That provision was written to provide adequate time for patients to object to a record release before they were turned over to a third party.

Standards for Release of Records: "Good Cause"

This section supplies the legal standard the court should apply when challenges to subpoenas ("motions to quash") are filed. The court is directed to consider five factors: 1) the particular purpose for which the medical information was collected; 2) the degree to which the disclosure of the records would embarrass, injure, or invade the privacy of the individual patient; 3) the effect of disclosure on the patient's future health care; 4) the importance of the medical records to the lawsuit or other proceeding; and 5) any other relevant factor. Patients arguing against release of medical information now have a specific standard that should alert the court to the sensitivity of medical information and the importance of maintaining confidentiality in the absence of compelling reasons to breach it.

Conclusion

Taken as a whole, the new legislation should have several beneficial effects. By cross-referencing existing statutes concerning confidentiality, it establishes a single reference point on that topic in the Code for patients, providers and lawyers. It gives those who create and maintain patient records clear guidance concerning prohibited and permitted disclosures. It requires lawyers to notify patients before disclosures of private information contained in their records are made in response to a subpoena and it alerts patients of their right to object to the disclosures. Providers are told how to comply with subpoenas without violating the law .

Direction for both the legal and health care communities on limits to patient confidentiality is long overdue. The new law does not cure all of the deficiencies in what remains a very porous system of medical information. It does, however, finally announce a strong legislative policy. Confidentiality has always been an expectation of patients and an ethical mandate for practitioners; now it is clearly protected by Virginia law.

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Book Reviews

Psychiatry and Criminal Culpability Ralph Slovenko. Wiley - Interscience, New York, NY, 1995, 436 pp.

reviewed by Gary Hawk

Ralph Slovenko, a law professor at Wayne State University, ranges widely over rocky legal and clinical terrain in *Psychiatry and Criminal Culpability*. Written for an interdisciplinary audience, the book is an effort to examine the relation-ship of psychiatry to legal determin-ations of criminal responsibility. Most of the book is given over to insanity defense issues, although other questions such as "syndromal" evidence are briefly discussed. A third section deals with issues and criticisms pertaining to psychiatric testimony. A final brief section asks the question "Whatever happened to sin?"

Meaningful treatment of the insanity defense demands a synthesis of law, psychiatry, social science and public policy, all placed within the perspective of historical development. The author attempts this approach but soon leaves the reader marooned or puzzled by abrupt and terse conclusions which lack overarching summary and integration. The tone varies from scholarly to almost chatty with a tendency to insert off-handed asides which may work in the classroom but seem out of place in print (e.g., "The label "psychopath","sociopath" or "antisocial personality" is not as informative as the street term "son-of-a-bitch" and that is what the psychiatric label really means.") More problematic is the author's broad generalizations which do not stand up to scrutiny or are contradictory. Thus, for example, Slovenko suggests that the insanity defense is less common today because the range of capital offenses has diminished ("Today, with fewer capital offenses on the books, there is less resort to the insanity defense" p. 21), but later he concludes the opposite: "Given the short-term institutionalization, there has been an increase in the number of insanity pleas in recent years" (p. 181).

The chapter devoted to clinical disorders of legal significance seems particularly distorted in its unbalanced focus on diagnoses such as multiple personality disorder which, although controversial, have relatively little relevance in court. In contrast, little space is devoted to psychotic disorders which animate most successful insanity pleas. While the author accurately notes in passing that schizophrenia "characterizes the majority of insane defendants," little discussion of why this should be the case is advanced. Yet in the short two pages devoted to schizophrenia, Slovenko claims, "The diagnosis of schizophrenia remains a source of controversy, as any perusal of the literature will quickly indicate." Footnotes for this assertion include four references, the most recent from 1983. The author also offers his own opinion that "it is

questionable whether any mind not totally incapable of coherent thought can fail to appreciate the wrongful-ness of a criminal act - most schizophrenics included."

Yet after this cursory treat-ment of schizophrenia (mood disorders only get a page), over twelve pages are devoted to multiple personality disorder. Professor Slovenko does the reader a disservice in this disproportionately long section by suggesting that multiple personality is a significant disorder in criminal matters: "With increasing frequency, the criminal justice system is confronted with defendants who claim to be multiple personalities." Statistically, however, the condition remains extremely rare in insanity pleadings. Bulimia gets as much space as mood disorders (Joyce Brothers is cited here) with the author suggesting that the condition could be the basis for an insanity plea although apparently no such case has ever been tried.

Written for an interdisciplinary audience, the book is an effort to examine the relationship of psychiatry to legal determinations of criminal responsibility.

Slovenko's approach of citing the individual case (often from newspaper coverage) while failing to clearly present the empirical facts about insanity is a major short-coming and lends the book an almost sensationalistic quality at the expense of analysis and meaningful overview. He also repeatedly embeds ill-founded statements in otherwise interesting discussions which color and detract from entire sections. He suggests, for example, that all experts become "advocates" when accepting cases (p. 235), but ignores the data which reveal that nearly 90% of cases evaluated result in findings unsupportive of insanity. He also implies that contested trials are inevitable ("...when the plea of insanity is raised, the prosecutor scours the country in search of a psychiatrist, even if he is senile, alcoholic or worse, for an opposing opinion. The "battle of the experts" is really set up by lawyers who take great pains to make sure they locate a psychiatrist sympathetic to their side's cause so as to "cancel out" the adversary's expert." p.234), but does not point out that most insanity acquittals result from cases where experts on both sides agree on diagnosis and opinion.

Two recent developments which have great importance for the insanity defense, conditional com-munity management of acquittees and the abolition movement of several states, receive only the briefest mention even though an entire chapter is devoted to dis-position of insanity acquittees. By the end of the book, the reader has been presented with many criticisms and questions for psychiatry and the law but few constructive sugges-tions. Overall, *Psychiatry and Criminal Culpability* adds more smoke than light to an issue of continuing significance to the law and society. More troubling, and perhaps unintentionally, the book reinforces some of the myths and misconceptions which surround psychiatrists in court.

The New Informants: The Betrayal of Confidentiality in Psychoanalysis and Psychotherapy*, Christopher Bollas and David Sundelson. Jason Aronson: Northvale, N. J., 1995, 215 pp.*

reviewed by Fran Lexcen

Confidentiality and privileged communication are essential to many professional relationships that require uncensored exchanges between therapist and client. But a psychotherapist's ability to maintain information in confidence has been weakened by recent legislation that requires reports about clients engaged in activities deemed dangerous to themselves or others. In addition, managed health care companies insist on written documentation of the content of therapy sessions to facilitate treatment decisions that may be made by unqualified staff. Other professions have begun to rely on psychological evaluations to validate legal proceedings against impaired individuals or to verify the validity of consent to medical treatment. The confessional nature of the psychotherapeutic relationship is no longer impervious to public exposure, and the impact of these intrusions is the topic of *The New Informants*, by Christopher Bollas and David Sundelson.

The authors begin with an interesting review of legislative issues. They outline several California cases that highlight the conflict between the legal obligation of therapists to report their clients for sexual assault of a minor and the client's trust in and reliance on the therapist. Two cases are presented in which the attending therapist refused to breach confidentiality on ethical grounds. In one of the cases a judge's opinion provides an eloquent argument in favor of therapeutic secrets:

> In the area of sexual abuse of children by adults, the law, presumably, has three objectives: to punish the abuser, to identify and protect his victims, and to cure him in order to protect future potential victims. Since it is fair to assume that child molesters like to avoid being prosecuted as much as other criminals, it obviously impedes the objective of cure if therapists who are supposed to effect it are legally bound to testify against their patients in court. Those who do so a few times should not plan on specializing in pedophilia.

This comment pointedly describes the dilemma of a therapist who is trained and motivated to relieve suffering, but instead must risk subjecting a client to public scrutiny and condemnation. Bollas and Sundelson also use the judge's remarks to demonstrate that courts can be persuaded of the importance of maintaining privileged communications in a treatment setting. They suggest that therapists should risk contempt of court charges to protect the professional boundaries of confidentiality.

This would be a more persuasive argument if child molesting were a condition known to respond to treatment. The unfortunate reality today is that there are no empirically supported interventions that effectively eliminate, or even ameliorate, the offending behaviors of child molesters. However, having chosen this issue as the context for their argument, the authors attempt to deflect criticism by asserting that psychoanalysis cannot be identified with disciplines such as psychology and psychiatry, and therefore cannot be held to empirical standards of effectiveness. They generally describe empiricists as the poorly trained products of graduate programs that breed legal conformists. Those same programs teach students to uphold reporting laws with callous indifference to the value of confidentiality or the resulting disruption to clients' lives. The students become the "new informants" referenced in the title.

The authors suggest that therapists should risk contempt of court charges to protect the professional boundaries of confidentiality.

In spite of this distracting digression, the authors raise genuine issues about the effect of revealing the content of therapy. For example, clients often ask their therapists to become involved in civil lawsuits to secure child custody rights or to obtain damages for suffering after a motor vehicle accident. Even though cooperation by the therapist is offered for the benefit and at the request of the client, it is tantamount to a publicizing a confidential relationship. Other compromises of confidentiality include the practices of health care organizations and managed care firms that allow clerical staff access to therapy records. An equally serious issue is the potential coercion of employees who express unfavorable opinions about their employers in the setting of an Employee Assistance Program.

In the context of treatment, the unauthorized use of patient records for deceased persons who were famous or infamous, the appropriate limits of practice for professionals below the doctoral level, and the ethical dilemmas inherent to forensic psychology are all briefly mentioned. However, the brevity of treatment leaves the greater challenges of each of those issues inadequately explored.

After asserting that no circumstance is serious enough to require a breach of confidentiality, the authors offer remedies that are already widely practiced. For example, they suggest a hypothetical of guaranteed confidentiality. Clients who reveal legally reportable material could be gently encouraged and persuaded by therapists to contact the appropriate authorities themselves, taking responsibility for the consequences of their own actions. In exchange, law enforcement agencies could support reduced penalties as incentives to individuals who volunteer information.

In fact, this is the strategy that is currently taught in graduate programs throughout the United States as the first level of response to the presentation of reportable material. A more interesting discussion would have addressed the question of subtle coercion in this scenario, whether or not reporting laws are in effect, and the risks associated with allowing the client time to consider this course of action.

As another solution to breaches in confidentiality, the authors suggest that incestuous child molesters, blithely referred to as "perverts" in this text, continue living in the home with their wives and victims while all family members engage in psychoanalysis. This is not far from the current state of affairs in most areas, where funds are insufficient to provide safe housing for underage victims and courts are committed to maintaining family cohesion. Sadly, the same lack of funding stands in the way of even rudimentary treatment for both victims and offenders. The likelihood of any, much less all, family members engaging in psychoanalysis is very low.

Sadly, the same lack of funding stands in the way of even rudimentary treatment for bofh victims and offenders. The likelihood of any, much less all, family members engaging in psychoanalysis is very low.

The last third of the book is devoted to arguments in favor of preserving psychoanalysis as a distinct field separated from other related disciplines such as social work, psychiatry and clinical psychology. Given that the publisher is known for texts containing similar advocacy, this stance should come as no surprise. The authors argue passionately that securing privileged communication for psychoanalysts is a method for establishing the desired distinction, and call on the relevant professional societies to press for legislation.

For readers interested in basic issues concerning the confidentiality of mental health information, the authors raise legitimate questions. However, the book does not adequately pursue these questions, becoming instead sidetracked into stereotypical contrasts of psychoanalysis with other forms of therapy offered alongside reflections on society, managed care and lawyers. The result is a defensive diatribe that bemoans the marginalization of psychoanalysts. Where the reader might expect a vigorous argument for patients' needs and expectations, there is instead a parochial "call to action" that is characteristic of interprofessional politics. The result is a text that will be informative only to a reader unfamiliar with these issues but prepared to wade through the authors' multiple agendas.

...*Marriage Laws*

-continued from page 3-

States such as Rhode Island [17] continue to use outdated labels as they did in the 1970's. More importantly, even those states that have amended their language use terms such as "incompetent" or "people with mental retardation," which provide little precision to guide decisions about whose marriage rights are affected. Including descriptions of functional capacity within a legal definition would represent a great improvement.

B. Legal Status of Prohibited Marriages: Void ab Initio or Voidable?

At common law, a marriage was void from its initiation if either party lacked the capacity to understand the nature of the marriage contract. Declaring a marriage void is drastic; it means the marriage may never be validated.[18] Even if both spouses are dead, third parties in a property dispute can attack the validity of the marriage alleged to be *void ab initio*. Furthermore, the parties to the marriage may act as if it had never occurred, thereby raising questions about the legitimacy of children.

Despite this potential for abuse, during the 1970's fourteen states classified a marriage involving a person with mental retardation as "void."[19] Over the last twenty years, only two have changed their policies: Pennsylvania by completely repealing its prohibition; and Wisconsin by requiring a judicial proceeding before a decree is given. [20] In twelve states, therefore, if a person with mental retardation falls within the language of the statute, the marriage can never be valid. There is no opportunity to demonstrate capacity; the marriage is presumptively invalid. This is a particularly harsh result in light of the vague and over-inclusive terms still used in the marriage laws of several states, as the preceding section suggests.

In the remaining states, the marriage of a person with mental retardation is "voidable." A voidable marriage is valid until it is undone by judicial declaration, and in most jurisdictions, a voidable marriage cannot be attacked after the parties have died. [21] Thus, if neither a spouse nor a guardian objects, the marriage remains valid. More importantly, if one of these parties does object, the person with mental retardation will have an opportunity to demonstrate his or her "competence" before a declaration is issued. Decisions in such cases usually favor people with mental retardation because most courts recognize a strong public policy against invalidating marriages. [22] As a result, courts strain to distinguish the capacity needed to form contracts generally from the lesser capacity needed to form a marriage contract. [23]

Like the laws declaring a marriage "void," the laws declaring a marriage "voidable" have remained static over the last two decades. Some change has

occurred, most notably in states like Massachusetts, which repealed the ban on the right of people with mental retardation to marry. Although "voidable" marriages might not seem as vulnerable as "void" marriages, the inconsistent and at times illogical procedures for dissolution discussed in the next section suggest there is a potential for abuse.

C. Dissolution of Prohibited Marriages

A striking feature of laws restricting people with mental retardation from marrying is the method for annulling these unions. During the 1970's, a petition for judicial dissolution could be brought by either party in eighteen states. In four states, only the disabled party could seek an annulment, while in eight states the right was granted to the non-disabled party. Sixteen states allowed a legal representative or an interested relative to initiate the proceedings.

If the purpose of the marriage prohibition is to protect people with mental retardation, why do some states only allow the non-disabled spouse to seek an annulment? It would seem logical to allow a guardian or next friend of the person with mental retardation to challenge the union. Likewise, if the purpose of the marriage restriction is to protect the "normal" spouse who is "tricked" into marrying the mentally disabled person, why do other states only allow the disabled person to petition?

Most of the laws in force in the 1970's failed to set a statute of limitations. Montana required that a petition be filed within one year of learning of the disability [24] and a few states required an action to be brought during the life of one or both of the spouses. Minor changes in this area have occurred over the last two decades. In Colorado, for example, a guardian must seek an annulment within six months of obtaining knowledge of the mentally retarded person's condition. [25] In Hawaii, either party, as well as the guardian of the incompetent person, may initiate a suit. [26] In Illinois, one can no longer seek an annulment after the death of either party. [27] Besides these innovations, the laws governing the dissolution of marriage remain relatively unchanged over the past twenty years.

D. Enforcement of the Marriage Restrictions

States have adopted a number of methods to enforce their laws prohibiting the marriage of people with mental retardation. Some states impose fines on any party who "aids or abets the marriage," or the clerk who "knowingly issues the marriage license," or the person who "knowingly solemnizes the marriage."[28] Depending on the jurisdiction, these penalties can range from a $50 misdemeanor [29] to a $1,000 felony.[30] In other states, an individual who violates the marriage prohibition, whether a minister, clerk or other public official, can face thirty days [31] to five years [32] in jail.

Some states take a completely different approach and require proof of the absence of incompetence before issuing a marriage license. In Michigan, for example, a person with mental retardation must file a certificate from two regularly licensed physicians stating that he has been "cured" and that there is no probability that these "defects or disabilities" will be transmitted to his children. Still other states direct enforcement toward the party who is of "sound mind." In Rhode Island, no dower will be assigned to the widow of a prohibited marriage, and any children will be considered illegitimate. [33] Other than changes in the amount of a fine or the length of a prison sentence, the enforcement mechanisms in place as of 1997 are identical to those that existed in 1978.

One feature of the regulatory scheme deserving comment is the general lack of enforcement. Most of the reported cases seeking the invalidation of a marriage or the punishment of a clerk or a minister date from the first half of the 20th century. Some critics of statutory reform would argue that people with mental retardation no longer have to fear prosecution for violating marriage statutes. Yet it is likely that some people with mental retardation do not attempt to marry because they fear being denied a license.[34]

Even if these statutes are not enforced, they are harmful to people with mental retardation because they are a continuation of the exclusion and discrimination these individuals have faced over the centuries. During the debates over the passage of the Americans with Disabilities Act, one witness stated "[t]his forced acceptance of second class citizenship has stripped us disabled people of pride and dignity ... [T]his stigma scars for life." Knowledge that the law refers to you as as an "idiot," "imbecile" or a "mental deficient" can be just as harmful to the self-esteem of a person with mental retardation as being forced to ride a "special bus" to a "special school." [35]

II. Policy Reasons for Prohibiting the Marriage of People with Mental Retardation

Why then do laws prohibiting people with mental retardation from marrying endure with only minor changes since the 1970's? Three explanations are commonly advanced to justify the restrictions: the potential children must be protected; people with mental retardation themselves must be protected; and society at large must be protected.

A. Protecting the Children

One justification given for laws restricting the right of people with mental retardation to marry is their presumed inability to be effective parents. The children of people with mental retardation will burden their families, it is argued, and their support will impose economic burdens on society at large.[36] These concerns may be reasonable when the parent is severely or profoundly

retarded, but such people are likely to be institutionalized and/or may lack the opportunity or the interpersonal skills to meet a spouse. Laws prohibiting marriage for people with mental retardation, however, do not take the different categories of mental retardation into account. Instead, imprecise language is used to describe people with mental retardation as one amorphous group. The result is that capable people are denied the fundamental right to marry because of the "danger" that they might procreate.

How valid are concerns about the parenting skills of the mildly or moderately retarded? Although there is no legal consensus on the meaning of the phrase "parenting abilities," four factors have been emphasized in child neglect cases: the parent must be able to meet the physical needs of the child, the parent must be able to preserve the health and safety of the child, the parent must be able to meet the emotional needs of the child, and finally, the parent must be able to promote the intellectual growth of the child.[37]

Although published research into the parenting abilities of people with mental retardation is still rather limited, some tentative conclusions can be drawn from the data that do exist.[38] First, there is no reason to believe that parents with mental retardation are inherently unable to provide for the physical needs of their children, especially since many such individuals take care of themselves and function independently in the community.[39] If they are able to prepare their own meals, do their own laundry and brush their own teeth, it is not unlikely that they can perform these tasks for a child. For example, a study of conditions in the homes of 127 people with mental retardation found them equivalent to the conditions in the homes of non-retarded persons of the same economic stratum.[40]

Secondly, there is no reason to believe that people with mental retardation are unable to maintain the health and safety of their children. In fact, parents with mental retardation may have a tendency to over-protect their children. More importantly, research indicates that there is no correlation between mental retardation and violence or sexual pathology, two of the greatest dangers to the welfare of children.[41] Thus, while earlier studies suggested a link between maltreatment and mental retardation, these findings have been discredited.[42] The relationship between these conditions might more likely be attributable to socioeconomic status, since maltreatment is more prevalent among the poor and many people with mental retardation fall into this group.[43]

Thirdly, there is no reason to believe that people with mental retardation are unable to meet the emotional needs of their children. In a study of twenty mothers classified as "mentally deficient," psychiatrists and psychologists found that retarded women exhibit "normal mothering ability" in their relationships and in the affection they display toward their children.[44] Similarly, clinical reports have shown that people with mental retardation can be "caring and giving to their children to the point of utter selflessness."[45]

A person with mental retardation might, however, have trouble creating the perfect environment for maximized intellectual growth of her child. She is, by diagnostic definition, incapable of performing certain tasks with the same degree of competence or efficiency as her "normal" counterparts. But while the home of a parent with mental retardation may be less than optimal, the same can be said of any home where a parent is not interested in child-rearing. More importantly, the deficiencies in the home of a person with mental retardation may abate with proper training, and research suggests that special education services can supplement a child's at-home learning.[46] Denying people with mental retardation the right to marry need not be the only means to guarantee a proper learning environment for a child.

B. Protecting People with Mental Retardation from Themselves

Another justification for laws restricting the right of people with mental retardation to marry is the doctrine of "parens patriae." This ancient English doctrine allowed the King to take custody of the person and the land of a mentally disabled subject for life. The doctrine survives in America as the justification for legislation concerning contractual and property rights, child custody, civil commitment and the protection of juveniles.[47] Although *parens patriae* legislation is supposed to protect the disabled individual, an opposite result often occurs in matters involving people with mental retardation.[48]

Marriage can be as important to mentally disabled people as it is for others without disabilities. It provides a sense of security, acceptance, and a feeling of being a "first-class citizen," rather than an outcast.[49] In addition, it offers a source of love, affection, and companionship that is valued as much by the disabled as by others. Despite the discomfort such notions may engender in some, people with mental retardation have the same sexual needs and drives as other human beings. Given the benefits of marriage, blanket prohibitions on the marriage rights of mentally disabled people can hardly be considered in their "best interest." Instead, these laws often have a detrimental effect, perpetuating the discrimination and exclusion that people with mental retardation have traditionally endured.

Two types of statutes have been adopted by states in an effort to act, pursuant to the doctrine of *parens patriae*, as the "wise, affectionate, and careful parent." [50] Both are based on the rule that a contract, including a marriage contract, is not valid unless the parties are able to understand it. In the District of Columbia, for example, an "idiot" may not contract marriage.[51] No inquiry is made into individual ability to understand the duties and consequences of marriage; people who are severely retarded and those with only mild retardation are captured by a single category.

In contrast, Arkansas prohibits marriage if either party is "incapable of contracting from want of will or understanding."[52] Under this approach,

individual determinations of competency are made and the class of people who may be prohibited from marrying is narrowed. A number of states have amended their laws and incorporated this language, which is a promising start for people with mental retardation.

But even this definition of capacity is open to wide interpretations. How many clerks are qualified to make this determination, especially when the law does not provide them with specific guidelines? Moreover, these competency statutes are based on a flawed presumption--that it is possible to define marriage objectively.[53] Marriage is a unique contract. It is complex and mysterious, but it is complex and mysterious for both retarded and non-retarded individuals.[54] As the President's Committee on Mental Retardation observed:

> [a]bout 40 states deny a retarded person the right to marry supposedly because mentally retarded individuals are not competent marriage partners. One out of four American marriages ends in divorce. Many others generate problems such as child abuse and wife-beating. How many "normal" people could pass a competency test as a good partner? [55]

Singling out people with mental retardation and requiring them to answer a quiz about the duties and responsibilities of marriage is both impractical and unjustified. Similar treatment for all other individuals would likely result in widespread license denial.

C. Protecting Society from People with Mental Retardation

Another justification given for the laws restricting marriage is the need to stop the spread of mental retardation. According to the "hereditary disease" theory, people with mental retardation impose serious costs and burdens on society and the law must minimize the damage.[56] One efficient way to contain mental retardation is to limit the ability of this group to procreate. This presumption reflects theories concerning the genetic basis of mental retardation, written into law during the eugenics movement of the early twentieth century and long since disproven. [57]

During the late 1970's, there were a number of statutory limitations explicitly designed to prevent the "passing on" of mental retardation to later generations. North Carolina, for example, prohibited the marriage of a person adjudged to be an "idiot, imbecile, mental defective, or of unsound mind" unless she was sterilized.[58] A more subtle means of achieving the same result was implied in a North Dakota statute, which permitted the marriage of women with mental retardation older than 45.[59] At that age, the ability to bear a child had presumably decreased. Over the last 20 years, these statutes have been repealed in every jurisdiction, except Michigan, which continues to require a certificate

from two physicians stating "there is no possibility that such person will transmit such defects or disabilities to the issue of marriage." [60]

III. Reforming the Marriage Laws

There is little evidence that the laws restricting marriage are advancing the policy reasons typically given to justify them. Those opposed to reform might be inclined to argue that many people with mental retardation do marry, despite the restrictions. But the continued existence of these outdated statutes is an affront to people with mental retardation. These laws serve as a reminder of the exclusion and segregation that people with mental retardation have suffered [61] and they undermine the current trend towards "normalization" in disability law. There are three potential avenues of reform available: amending the statutes; bringing suit under the Americans with Disabilities Act; and attacking the prohibitions constitutionally.

A. Amending the Statutes

Changing the language in statutes to reflect more recent scientific understanding of people with mental retardation could be done on a state-by-state basis. The key to statutory amendment would rest in selecting precise terms to define those who are prohibited from marrying so that mildly and moderately retarded persons are not classified along with profoundly retarded persons.

Proposals have been offered to develop a model marriage statute which would define the mental capacity to consent to marriage as "the capacity to understand the nature and duties and responsibilities which it entails."[62] While such language might represent an improvement in the majority of the existing statutes, it is based on the erroneous assumption that the skills required for marriage can be defined objectively.

A more useful law would be modeled after the statute currently in force in Maine. It would define the mental capacity to consent to marriage as the capacity "to make, communicate or implement responsible decisions concerning his person or property." [63] This language takes into account the paternalistic concerns of the state; it attempts to ensure that people with mental retardation will not be exploited, but it bases this determination on whether an individual can manage himself and his affairs, not his appreciation of an amorphous concept like marriage. In addition, the test embodied in such a statute begins to articulate a practical standard to determine "competency."

While the term "people with mental retardation" is an improvement over some older designations in the marriage laws, it is still too vague. The ideal statute would distinguish between the different degrees of mental retardation,

perhaps stating that the restriction only applies to individuals who are "profoundly retarded" or "severely retarded." Including a definition of the classifications, as Maine does, would also be helpful.[64]

Finally, a model statute would eliminate "void" marriages and institute a statute of limitation for bringing an annulment proceeding. This would help reduce strategic behavior on the part of competent spouses and children who wait until after the spouse with mental retardation dies to file a petition. Also, the ideal law would allow either marriage partner to seek an annulment, protecting both parties to the marriage.

B. Bringing Suit Under the Americans with Disabilities Act

The Americans with Disabilities Act (ADA) provides another potential avenue for reforming laws prohibiting people with mental retardation from marrying. Under the ADA, Congress concluded:

> [n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity.[65]

Congress went on to define a public entity broadly, including "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." [66]

An argument can be made that mildly retarded or even moderately retarded persons are "qualified individuals" for the purposes of marriage since they are usually able to care for themselves and function in the community. As a result, singling them out and denying them the fundamental right to marry is denying them the "benefits of the services, programs or activities of a public entity." Under this theory, a lawsuit would be brought against the official who is responsible for solemnizing the marriage or issuing the license, most likely a clerk or a member of the clergy.

The ADA has traditionally been used in cases involving public transportation, segregated education or inaccessible businesses. According to disability rights advocates, attending a school where a sign reads "For the Handicapped" is no different and no less demeaning than hanging a sign on a row of seats in a classroom that reads "Whites Only."[67] The same logic can be applied to marriage laws restricting people with mental retardation, for these statutes establish a separate standard "For the Mentally Deficient."

The potential success of an enforcement action under the ADA is not clear. Claims under the Rehabilitation Act of 1973, predecessor to the ADA, often failed because judges were uninformed about the range of limitations that accompany a diagnosis of mental retardation, and what can be done to

accommodate such disabilities. Federal agencies were reluctant to initiate actions and compliance investigators often turned their heads to violations.[68] The Congressional rhetoric and the broad mandate of the ADA alone will not be enough to reform marriage restrictions. While marriage has been recognized as a fundamental right, there is still a reluctance on the part of society at large to recognize that people with mental retardation have the same needs as other people. Sexuality, affection and companionship are not always seen as "rights" of people with mental retardation. These prejudices may be difficult to overcome.

C. Constitutional Attacks

1) Equal Protection

A third potential avenue toward reform of laws restricting people with mental retardation from marrying is an attack on the constitutionality of restrictive statutes on equal protection grounds. Supporters of this approach argue that other groups at high risk for being unsuitable spouses or parents, such as the chemically dependent, people with a history of violence or interpersonal abuse, or the poor, are not prohibited from marrying. In addition, while there may be valid reasons for restricting some people with mental retardation from marrying, state legislatures do not have the authority to discriminate against an entire category of people, many of whom live independent lives.[69] Because marriage has been recognized as a fundamental right,[70] laws regulating it are therefore subject to a more rigorous analysis.

A significant hurdle to an equal protection attack, however, is the decision by the Supreme Court in *City of Cleburne v. Cleburne Living Center.*[71] In *Cleburne,* applicants seeking to build a group home for people with mental retardation were denied a permit. These individuals alleged that the city's refusal discriminated against people with mental retardation. They maintained that mental retardation should be treated as a "quasi-suspect" classification for the purposes of equal protection analysis.[72] The Court declined to accord the people with mental retardation "quasi-suspect" status, however, and instead held that legislation involving people with mental retardation would only be subject to rational review. This means that marriage laws need only be "rationally related to a legitimate government end," a fairly low threshold to meet.

The Supreme Court does not seem inclined to change its mind on this issue, as illustrated by the more recent decision in *Heller v. Doe,* a case involving the burden of proof for the involuntary commitment of people with mental retardation in Kentucky.[73] Essentially the same criteria was used to determine if a person with mental illness or a person with mental retardation should be institutionalized, but the standard of proof for the former is beyond a reasonable doubt, while the standard of proof for the latter is only clear and convincing

evidence. The Court applied the rational basis test, as it did in *Cleburne,* and upheld the lower standard of proof for the person with mental retardation. According to Justice Kennedy, mental retardation is "easier to diagnose" and is a "permanent, relatively static condition," unlike mental illness. The "prevailing methods of treatment for the people with mental retardation, as a general rule, are" said Kennedy, "much less invasive than those given the mentally ill."

As this paper has suggested, mental retardation is difficult to define and spans a wide spectrum of ability levels--from people who can be regularly employed to people who must live in an institutional setting. The condition is anything but "easy to define." It is unclear whether the Supreme Court as currently constituted would endorse the logic of *Cleburne* and *Heller.* But as long as laws involving people with mental retardation are subject only to the "rational review" standard, making an equal protection challenge to marriage laws will remain problematic.

2) Due Process

The Supreme Court has held that it will not uphold a statute whose "words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law." [74] As a result, it can be argued that vague and imprecise terms such as "imbecile," "idiot," or "mental deficient" violate the substantive due process rights of people with mental retardation. Scientific research supports the classification of people with mental retardation into four categories covering a broad range of capabilities. The majority of laws do not take this scheme of classification into account and inaccurately categorize all people with mental retardation into a single group prohibited from marrying.

A challenge to these statutes could also be based on procedural due process, which requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[75]

Many marriage statutes simply allow a clerk or other official to refuse to issue a license because one or both of the parties is "incompetent." There are provisions outlining the penalties for performing a prohibited marriage and provisions outlining the requirements for dissolving such a marriage, but few states provide an applicant who is denied a license a review of the decision. If

states continue to prohibit people with mental retardation from marrying, certain procedures must be in place to allow for review by a neutral official when an application is denied. Otherwise, procedural due process will have been violated.

IV. Conclusion

Over twenty years ago, reformers turned their attention to laws restricting people with mental retardation from marrying. The medical community was taking a more enlightened approach toward mental retardation, Congress passed laws encouraging the "normalization" of people with mental retardation, and living conditions in institutions were coming under scrutiny. The future appeared bright. As we near the end of the 1990's, however, discriminatory and exclusionary treatment of people with mental retardation still lingers as part of the law.

While some states have repealed their statutes prohibiting people with mental retardation from marrying and others have updated the definitions of those subject to such laws, thirty-three states continue to distinguish between people with mental retardation and "normal" citizens. The justifications routinely offered for these laws, including the need to protect children of people with mental retardation, the need to protect society, or the need to protect people with mental retardation from themselves, are of questionable validity. This assessment is particularly true for individuals who are only mildly or moderately retarded. As a result, the time has come either to repeal these statutes outright or to amend them so that clerks and other officials are given the guidance they need when a person with mental retardation seeks a marriage license.

For centuries, people with mental retardation have endured second-class status. The persistence of laws prohibiting the marriage of "idiots" or "imbeciles" unnecessarily perpetuates the stigma. As one commentator observed:

> [p]resent laws that retain marriage prohibitions reflect little of what we know about people with mental retardation, while indicating a great deal about the society which permits the prohibitions to remain.[76]

These words, written in 1978, sadly hold true today.

A chart comparing restrictions on people with mental retardation in the marriage laws of all states can be found on the ILPPP web site at **www.ilppp.virginia.edu/ilppp**

Notes

1. Mattinson, *Marriage and the Mentally Handicapped*, Chapter 13 in Human Sexuality and the Mentally Retarded (de la Cruz & La Veck eds. 1973).
2. Connecticut, Massachusetts, North Dakota, Tennessee, and Virginia.
3. D.C. Code Ann. §30-103 (1996).
4. Mich. Comp. Laws Ann. §551.6 (1996).
5. Neb. Rev. Stat. § 42-103 (1996).
6. Del. Code Ann. tit. 13, §101 (1996).
7. See Brian J. Linn & Lesly A. Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons-The Eternal Child Grows Up*, 13 Gonz. L. Rev. 625, at 668. (1978).
8. Cal. Civ. Code §4201 (West 1970 & Supp. 1976).
9. Mass. Ann. Laws ch. 207 §5 (Michie/Law. Co-op 1969 & Supp. 1977).
10. Minn. Stat. Ann. §517.03 (West 1969 & Supp. 1977).
11. Me. Rev. Stat. Ann. tit. 19 §32 (1964 & Supp. 1977-78).
12. Del. Code tit. 13 §101(b)(1), (2) (1975 & Supp. 1977).
13. G. Baroff, Mental Retardation: Nature, Cause and Management, 9-10 (1974). Mildly retarded persons (who fall within the IQ range of 52-68 on the Stanford-Binet scale) are capable of self help, independent living, and regular employment. Moderately retarded persons (who fall within the IQ range of 36-51 on the Stanford-Binet scale) are capable of mastering self care and vocational skills, but have only limited capacities for independent living and regular employment. Severely retarded persons (who fall within the IQ range of 20-35 on the Stanford-Binet scale) and profoundly retarded persons (who fall within the IQ range of 0-19 on the Stanford-Binet Scale) are capable of mastering some self care and vocational skills, but require a supervised setting such as a group home or residential facility.
14. See American Association of Mental Deficiency, Classification in Mental Retardation 1, 32-34 (H. Grossman ed. 1983) "Mental age" refers to the intellectual average for a given stage of chronological maturity.
15. Minn. Stat. § 517.03(c) (West 1996).
16. Me. Rev. Stat. Ann. tit. 19 § 32 (West 1996).
17. R.I. Gen. Laws §15-1-5 (1996).
18. Louis G. Jacobs, *The Right of the Mentally Retarded to Marry: A Statutory Evaluation*, 15 J. Fam. L. 463, 469 (1976-77).
19. Today, Georgia, Kentucky, Maine, Michigan, Missouri, Nebraska, North Carolina, Rhode Island, and Wyoming continue this practice.
20. Wis. Stat. Ann. §767.03 (West 1996).
21. See Jacobs, supra note 18, at 469 n.42.
22. See e.g., Homan v. Homan, 147 N.W.2d 630 (Neb. 1967); Larson v. Larson, 192 N.E.2d 594 (Ill. 1963); Littreal v. Littreal, 253 S.W.2d 247 (Ky. 1952).
23. "Marriage depends to a great extent on sentiment, attachment, and affection which persons with equal, as well as those with stronger intellects feel and ... it does not depend, to the extent ordinary contracts do, on the exercise of clear reason, discernment, and sound judgment." Griffin v. Beddow, 268 S.W. 2d (Ky. 1954) 403, at 405.
24. Mont. Rev. Codes Ann. §48-311(5).
25. Colo. Rev. Stat. Ann. §14-10-111 (West 1996).
26. Haw. Rev. Stat. §580-21 (1996).
27. Ill.Ann. Stat. ch. 750, para.5/302 (Smith-Hurd 1996).
28. Ky. Rev. Stat. Ann. §402.990 (Baldwin 1996).
29. Idaho Code §32-406 (1996).
30. Mich. Comp. Laws Ann.§551.6 (West 1996).

31. Del. Code. Ann. tit. 13 §103 (1996).
32. Mich. Comp. Laws Ann. §551.6 (West 1996).
33. R.I. Gen. Laws §15-1-5 (1996).
34. See Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration,* 64 Temp. L. Rev. 393, at 411(1991). "Many persons with disabilities express fear and self-consciousness about their disability stemming from degrading experiences they or their friends have experienced. Even the apprehension of such treatment causes intense anxiety."
35. Senate Commision on Labor and Human Resources, Report on the Americans with Disabilities Act, S. Rep. No. 116, 101st Cong., 1st Sess., at 16 (1989).
36. See Jacobs, supra note 18, at 466-67.
37. See Greenspan & Budd, *Research on Mentally Retarded Parents*, in Families of Handicapped Persons 115, 117-20 (J. Gallagher & P. Vietze eds. 1986).Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 1000-16 (1975).
38. See Feldman, Towns, Betel, Case, Rincover & Rubino, *Parent Education Project II: Increasing Stimulating Interactions of Developmentally Handicapped Mothers*, 19 J. Applied Behav. Analysis 23 (1986).
39. See Classification in Mental Retardation, supra note 14, at 206-07. According to the current classifications, mildly retarded adults are able to handle all but the most complicated tasks and even a moderately retarded person is able to feed, bathe, and dress himself, prepare simple foods, and shop for several items without a list.
40. Charles, *Adult Adjustment of Some Deficient American Children-II*, 62 Am. J. Mental Deficiency 300, 301 (1957).
41. See Abramson, Parker & Weisberg, *Sexual Expression of Mentally Retarded People: Educational and Legal Implications*, 93 Am. J. Mental Retardation 328, 330 (1988).
42. Robert L. Hayman, *Presumption of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 Harv. L. Rev. 1201, 1220 (1990).
43. Id. at 1221.
44. Brandon, *The Intellectual and Social Status of Children of Mental Defectives*, 103 J. Mental Sci. 710, 720 (1957).
45. See e.g. Rosenberg & McTate, *Intellectually Handicapped Mothers: Problems and Prospects*, Children Today, 24 (Jan.-Feb. 1982).
46. See R. Kugel, Children of Deprivation (1967).
47. Id. at 638.
48. Id.
49. Jeffrey M. Shaman, *Persons Who are Mentally Retarded: Their Right to Marry and Have Children*, 12 Fam. L. Q. 61, 65 (1978).
50. Finlay v. Finlay, 148 N.E. 624, 626 (1925).
51. D.C. Code Ann. §30-103 (1996).
52. Ark. Code Ann. §9-12-201 (1996).
53. See Jacobs, supra note 18, at 483.
54. See Shaman, supra note 49, at 74.
55. President's Committee on Mental Retardation, Silent Minorities 33 (1974).
56. See Hayman, supra note 42, at 1206.
57. See generally, James W. Trent, Jr., Inventing the Feeble Mind, A History of Mental Retardation in the U.S (1994).
58. N.C. Gen. Stat. §51-12 (1976 & Supp. 1977).
59. N.D. Cent. Code §14-03-07 (1971 & Supp. 1977).
60. Mich. Comp. Laws Ann. §551.6 (1996).
61. See Cook, supra note 34, at 399-407.

62. Rames, *An Analysis of Wyoming Marriage Statutes, with some Suggestions for Reform-Part IV*, 7 Land and Water Law Rev. 127 (1972).
63. Me. Rev. Stat. Ann., tit. 19 §32 (West 1996).
64. Id. "Mental retardation" is defined as "a condition of significantly subaverage intellectual functioning manifested during a person's developmental period, existing concurrently with demonstrated deficits in adaptive behavior."
65. 42 U.S.C.A. §12132.
66. Id. at §§12131(1)(A)-(B).
67. 135 Cong. Rec. 10,797 (daily ed. Sept. 7, 1989). During a floor debate on the ADA, Senator Metzenbam argued that treating a person differently based on their disability was "tantamount to dredging up a 'whites only' sign and hanging it on a nearby lunch counter."
68. See Cook, supra note 36, at 396-97.
69. See Jacobs, supra note 18, at 478.
70. Loving v. Virginia, 388 U.S. 1, 12 (1967).
71. City of Cleburne v. Cleburne Living Center, 473 US 432 (1985).
72. See Marth Minow, *When Difference Has its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, Harv. C.R.-C.L. L. Rev. 111, at 113 (1987).
73. Heller v. Doe, 509 U.S. 312 (1993).
74. Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 243 (1932).
75. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).
76. See Linn & Bowers, supra note 7, at 676.

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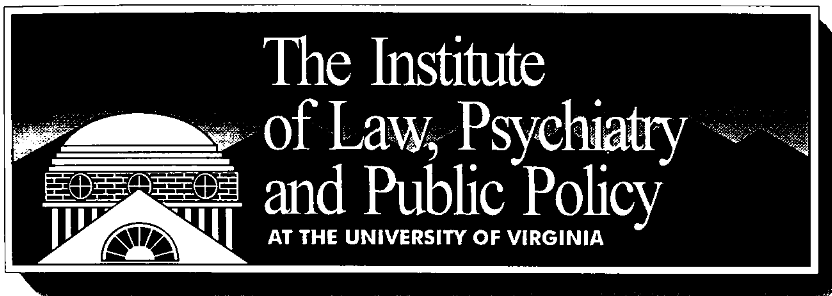

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