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Villain or Victim? Myths, Gender, and the Insanity Defense

By Scott Commerson*

I. Introduction

When a woman commits a heinous act, the explanations offered for her behavior differ vastly from those provided for her male counterpart. Society is more likely to attribute violent crimes committed by a woman to a biological or a psychological cause outside of her control, while less deterministic social and economic forces tend to be cited as the causal forces driving violent action by a man. In cases where social factors are implicated for female defendants, often only prior victimization is identified as being relevant. This divergence in the characterization of male and female crime reflects deeply imbedded views of women as being more passive, emotionally vulnerable, and incapable of self-control than men. The media's tendency to victimize female criminals reinforces and perpetuates such paternalistic gender stereotyping.

In the context of the insanity defense, the resolution of which is typically placed in the hands of a jury, this gender bias is compounded by the persistent myths that surround the defense. As will be discussed, the public grossly overestimates the frequency and success rate of the insanity plea, underestimates the amount of time that insanity acquittees spend in custody, and wrongly believes that there is little risk to the defendant in asserting the defense. Each of these myths interacts with widespread beliefs about women and criminality to produce a heavy bias in favor of a female defendant asserting an insanity defense as compared with a male defendant. Although for individual female defendants the bias may be beneficial, it comes at the societal cost of reinforcing gender-based stereotypes and denying equal treatment under the law. In addition, the public's ignorance and false beliefs about the insanity defense deprives defendants of both genders of a just outcome under the system.

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Part II of this article will provide a case study of Andrea Yates, the thirty-seven-year-old Texas homemaker who methodically drowned her five children. Yates' family background and psychiatric history are examined to supply a better understanding of the case but the section's primary focus is on the media coverage and public reaction to the case. A striking number of news accounts were very sympathetic to Yates, emphasizing her victimization at the hands of her husband and her long history of psychiatric problems. Pundits questioned what demons could have possibly driven the woman to commit the heinous act, portraying Yates less as an actor and more as an object devoid of volition or choice. Although there was ample evidence to support the idea that Yates may have been insane at the time she killed her children, the media's tendency to exculpate her on other grounds in its coverage reflected deep-rooted beliefs regarding women and violent crime. In addition, the gradual shift in focus from Yates to her husband, Rusty, and the public outcry to hold him culpable for his wife's crime, was an illuminating example of society's contrasting culpability standards for men and women.

Part III briefly describes the various versions of the insanity defense adopted by the states, followed by a discussion of the widespread public dissatisfaction with the defense and the web of myths that has been spun around it. In spite of the repeated debunking of these myths by researchers, the false beliefs persist and have significant ramifications for the legitimacy of the defense and the ability of our criminal system to assess culpability. This part also describes a critical psychological study (perhaps the only study to directly examine the relationship between gender of the defendant and the public's reception to the insanity defense) that showed a bias for a finding of Not Guilty by Reason of Insanity (NGRI) when the defendant was female compared to a male defendant who committed an identical crime. This section concludes with evidence of the effects of this gender bias on actual NGRI findings.

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Part IV attempts to tie together the phenomena examined in Part III to explain the gender bias in the insanity defense. There are two factors that arguably are primarily responsible for this bias: (1) paternalistic, stereotyped views of women and criminality and (2) widespread and persistent myths surrounding the insanity defense. These two factors interact to produce a more favorable response to women defendants asserting the

insanity defense than occurs for men. Finally, the implications of this gender bias are examined and the conclusion is reached that the consequences are injurious to both women and the criminal justice system because the bias reinforces stereotyped views of women that carry over to other areas of the law and detracts from our efforts to promote equal treatment under the law.

II. Andrea Yates: A Case Study

A. *The Crime*

"Get in the tub," Andrea Yates later said she told her oldest child, seven-year-old Noah. She had just drowned his four siblings (Mary, six months of age, Luke, two years old, Paul, age three, and John, age five), methodically holding each of the children under water and then laying them out on the bed wrapped in sheets. Noah had wandered into the bathroom to find his mother kneeling by the tub, staring at his baby sister's motionless body. "What's wrong with Mary?" he asked. Seeing the look on his mother's face, Noah squirmed and fought to escape the same fate. Tragically, the little boy was no match for his mother's unshakeable resolve.[1]

After she finished with Noah, Andrea called her husband Russell (Rusty) at work. "You have to come home," was all she would say at first. Pushed for further explanation, she responded in almost robotic fashion: "I hurt all five of the kids. I finally did it."[2] Rusty returned home to find police swarming around the Yates' three-bedroom house in the Houston suburb of Clear Lake. An officer broke the news to him. He rushed to the back door, from where he could see his wife seated impassively on the living room couch, staring blankly ahead. "I was banging on the window," he recalled. "'How could you do this?' I screamed. But she just kept looking straight ahead."[3]

B. *Background on Andrea Yates*[4]

Andrea Pia Yates grew up in Houston, the youngest of five children. Her father was a high school mechanics teacher and her mother was a hospital staffer. Her father could be exceedingly demanding (expecting her to earn "straight A's" in school) and a strict disciplinarian; in contrast, her mother was described as sensitive and nurturing. At Milby High School, Yates was captain of the swim team and graduated at the top of her class; her classmates recalled that she was a perfectionist. She rarely socialized and never went on a single date during her high school years. She subsequently enrolled in the nursing program at the University of Texas in Houston, where she worked several jobs in addition to her studies. After graduation, she was employed as a nurse at the University of Texas M.D. Anderson Cancer Center.

Yates met her husband in 1989, when they lived in the same apartment complex in Houston. She knocked on his door to ask if he knew who had dented her car. She later admitted that she had seen him around and wanted to meet him. They went to the Olive Garden on their first date and held hands. They were married in April 1993. Ten months after the wedding, the Yates' first child, Noah, was born. Yates left the nursing profession about the same time and two years later her nursing license became inactive.[5] Her husband, a deeply religious Christian who embraced traditional views about the roles of

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[1] This information was compiled from an account Yates reportedly gave to police investigators. Evan Thomas, *Motherhood and Murder*, NEWSWEEK, July 2, 2001, at 20.

[2] Gabrielle Cosgriff et al., *Life or Death*, PEOPLE, Mar. 4, 2002, at 83.

[3] *Id.*

[4] Unless otherwise noted, the background information on Andrea and Rusty Yates is from Cosgriff et al., *supra* note 2, at 85-87.

[5] Alan Bernstein et al., *A Life Unraveled / Mom Depicted as Private, Caring, Burdened by Hidden Problems* (June 24, 2001), *available at* Houston Chronicle Archive: http://www.chron.com/content/archive.

husbands and wives, did not want his wife to work.[6]

As Yates' other children were born, she became a model of efficiency. She was a stay-at-home mother and home-school teacher to her five kids—she baked cakes, sewed costumes, and helped with school projects. She did not show any signs of depression. The description given most often by friends, neighbors, and co-workers of the couple and their five children during these early years was "all-American family."[7] By all appearances, they were a normal, happy, and loving family. Neighbors remarked that Yates was a model of mental stability and patience as she reared her children.[8]

Yates' serious mental health problems became apparent after the birth of her fourth son, Luke, in February 1999. Her husband took the kids to stay with her mother after Yates became agitated and withdrawn. The next day her mother found Yates passed out in bed after taking forty or fifty tablets of her father's antidepressant medication Trazodone. She spent six days in the hospital, where she participated in group therapy sessions. She stated that she just wanted to sleep forever; she didn't want to die but wanted "the misery to go away."[9] A doctor diagnosed her with Major Depressive Disorder, probably triggered by the recent birth of her son, and prescribed Zoloft.

Unfortunately, the medication did not seem to help much, partly because of Yates' own resistance to taking pills that she didn't think she needed. At times she became so nervous and upset she scratched several bald spots on her scalp. One evening in July 1999, her husband found her in the bathroom holding a steak knife to her throat. He wrestled the knife away and she was taken to Memorial Spring Shadows Glen, a private psychiatric facility, in a virtually catatonic state. It was there that she finally told doctors that she was hearing voices and having visions involving a knife. "I had a fear I would hurt somebody," she told a psychologist. "I thought it better to end my own life and prevent it."[10] A shot of Haldol, a powerful anti-psychotic drug, seemed to snap her out of this state for within a day she was on her feet again.

Yates spent three weeks at Shadows Glen and seemed to make progress under the various antidepressants she was taking. But staffers were stunned to learn that she and her husband still planned to have more children. "Apparently patient and husband plan to have as many babies as nature will allow!" read an astonished notation on her chart. "This will surely guarantee future psychotic depression."[11] To help his wife cope, her husband suggested she get a part-time job, which would enable her to be out of the house. He offered to cut back his own hours and take on a bigger share of the household duties. But, perhaps typical of her perfectionism, she refused.

Yates did well for the next year or so, taking several antidepressants. The birth of daughter Mary in November 2001 did not apparently trigger any immediate depression or psychotic episodes. But in March 2002, Andrea suffered a crushing blow: the death of her father. In addition to raising five children, she had cared for her Alzheimer's-stricken father in his final months. Almost immediately after her father's death, disturbing symptoms began to reappear. She constantly carried her daughter Mary, refusing to put the baby down, and became easily panicked about her well-being. By the time her husband took her to

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[6] A former neighbor, who worked as a psychiatric nurse, stated that "[Rusty] didn't want her working at all . . . He wanted her staying at home." *Id. See also* Mike Snyder, *Rusty Yates on Trial, Too, with Public's Commentary* (Mar. 13, 2002), *available at* Houston Chronicle Archive: http://www.chron.com/content/archive.

[7] Bernstein et al., *supra* note 5.

[8] *Id.*

[9] Cosgriff et al., *supra* note 2, at 85.

[10] *Id.* at 86.

[11] *Id.* at 86.

Devereux, a nearby psychiatric hospital, she had lost ten pounds in a month. After twelve days Yates was discharged, with regular outpatient sessions recommended as a follow-up.

After discharge, she began to deteriorate rapidly. Her husband took her back to see her doctor at Devereux on May 4. He expressed concern to the doctor about his wife's safety, explaining that she had not been eating or drinking enough and had at one point been found with the bathtub filled with water and unable to explain what she was doing. After a ten-day stay, Yates was eating and sleeping better and the doctor took her off the Haldol. She was discharged on May 14, although the last notation on her hospital record noted that she was "still depressed, still with suicidal impulses."[12] Her mother began helping more with the kids. Indeed, there was only one hour of time (between when her husband left for work and when her mother would arrive) that Yates was home alone with the children. It was during this one-hour interval, approximately one month after her discharge from Devereux, that Yates killed her children.

Five days after the killings, a psychiatrist who examined Yates at the request of her attorneys found that she was having hallucinations. "She believed Satan was living in her and that she and Satan both must be punished," an examining psychologist would later testify.[13] In a statement to police, Yates stated that she had been having visions of killing her children for several months. The District Attorney announced that he would seek the death penalty. Over the seventeen-day trial, jurors heard more than thirty witnesses and saw more than 300 pieces of evidence.[14] A pediatric pathologist testified for the prosecution that the killings were organized and deliberate,[15] while a nationally renowned psychiatrist testified for the defense that, as a result of her psychosis, Yates did not know her actions were wrong.[16] On March 12, 2002, a jury deliberated for three hours and forty minutes and returned a "guilty" verdict.[17]

C. *Reactions to the Case*

Yates' crime was called "incomprehensible"[18] and "unspeakable"[19] in the frenzy of media coverage immediately surrounding the event. There were some who thought the thirty-seven-year-old housewife was a "heartless monster guilty of a crime so heinous it can never be forgiven."[20] Yet it was surprising how many accounts of the crime carried strong strains of sympathy for Yates. News reports focused on the internal pressures that "drove"[21] her to commit the horrible act[22] and several of these stories went so far as to posit that Yates' acts were understandable at some level when one considered the stresses under which she lived.[23] Moreover, nearly all the reports seemed to take it as a given that Yates suffered from a mental disorder at the time she committed the murders.

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[12] *Id.* at 87.
[13] *Id.*
[14] Lisa Teachey, *Jurors Say They Believed Yates Knew Right from Wrong* (Mar. 18, 2002), *available at* Houston Chronicle Archives: http://www.chron.com/content/archive.
[15] Teachey, *supra* note 14.
[16] Carol Christian, *Yates' Illness Severe/Did Not Know Actions Wrong* (Feb. 27, 2002), *available at* Houston Chronicle Archives: http://www.chron.com/content/archive.
[17] Teachey, *supra* note 14.
[18] Thomas, *supra* note 1, at 20.
[19] *Id.*
[20] Cosgriff et al., *supra* note 2, at 83.
[21] Thomas, *supra* note 1, at 20.
[22] *See generally* Cosgriff et al., *supra* note 2, at 83; Thomas, *supra* note 1, at 20 ("Andrea Yates was the ultimate caregiver—until depression and the strains of raising five children drove her to an unspeakable crime. Her descent into darkness.").
[23] *See* Thomas, *supra* note 1, at 21 ("Though parents everywhere recoiled at Andrea Yates' coldblooded madness, not a few mothers were reminded of how they, too, have felt at their wit's end."). *See also* Cosgriff et al., *supra* note 2, at 83 (reporting that TV host and adoptive mother Rosie O'Donnell told ABC News, "When you've been on the edge, you understand what it's like to go over.").

There was a surprising surge of support for Yates as her case went to trial. Many of her supporters blamed her crime on a failure of the American mental health system, while others saw the tragedy as illuminating issues facing all women.[24] A neighbor of Yates (who was a former psychiatric counselor) echoed the feelings of some when she observed, "[m]en become psychotic too. But this was precipitated by postpartum depression and hormonal changes, so in that sense it is a women's issue."[25]

What seemed to strike a nerve with women in particular was the idea that motherhood itself—and all the pressures and expectations that go along with it—could have been a precipitator. Anna Quindlen, a noted columnist for *Newsweek*, expressed her empathy for Yates and offered that America's "insidious cult of motherhood"—basically, society's insistence that mothers be all things to all people—might bear some responsibility for Yates' crime.[26] Quindlen remarked that every mother she spoke with about the case had the same reaction:

> She's appalled, she's aghast. And then she gets this look. And the look says that at some forbidden level she understands. The look says there are two very different kinds of horror here. There is the unimaginable idea of the killings. And then there is the entirely imaginable idea of going quietly bonkers in the house with five kids under the age of 7.[27]

Quindlen's column is most notable for illuminating a widely shared—yet rarely voiced—sentiment underlying the sympathy for Yates. Yates was viewed not only as a victim of her own demons and the mental health institutions' failure to treat them but she was also seen as victimized by the heavy burden society places upon women and, more specifically, mothers. As portrayed by her defenders, she was a good mother who was overwhelmed by emotional problems and the stress of bearing and raising five children with no help.[28]

A popular newsmagazine, *People*, captured the country's ambivalent yet impassioned response to Yates' crime. Accompanying a cover picture of Yates (taken at a court appearance, where a somber, middle-aged woman with a vacant stare and large patches of hair missing from her scalp stood with arms crossed) was the intriguing headline: "VILLAIN OR VICTIM?"[29] The rhetorical question reflected the torn feelings many people experienced when they learned the details of the crime. They were shocked and horrified by the monstrous nature of what Yates had done, yet strangely compelled to see *her* as a victim too. The media played upon and encouraged the public's ambivalence, relentlessly reiterating the horrific details of the crime while suggesting that Yates might not be responsible for her actions.[30]

The media accounts employed language that emphasized Yates' lack of volition. One article stated that depression and the strains of raising five children "drove"[31] Yates to her crime, that she had finally succumbed to the "demons"[32] and "snakes that were writhing in her head."[33] Other articles focused on Yates'

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[24] *See, e.g.,* Cosgriff et al., *supra* note 2, at 84 (quoting a Houston attorney and former state legislator on the Yates case: "The first indictment I would have is against the kind of mental health care she got. She's a victim too." The article also quotes the president of Texas National Organization of Women as stating: "She was psychotic. It's a travesty for her to undergo a trial.").

[25] *Id.*

[26] Anna Quindlen, *Playing God on No Sleep*, NEWSWEEK, July 2, 2001, at 64.

[27] *Id.*

[28] Cosgriff et al., *supra* note 2.

[29] *Id.*

[30] Such headlines also reflect the media's tendency to paint mental illness in black-and-white, all-or-nothing terms.

[31] Thomas, *supra* note 1, at 20.

[32] *Id.* at 22.

[33] *Id.* at 24.

postpartum depression (PPD)[34] and possible schizophrenia.[35] The media emphasized the link between PPD and psychosis, even though research has shown that their joint occurrence is extremely rare.[36]

There was clear support for the idea that Yates was mentally ill when she committed her crime. However, it is still notable that the media almost immediately latched onto biological/psychological explanations for her behavior with little discussion of other possibilities. As the media focused on explaining Yates' behavior through biological/psychological theories, a good deal of the public outrage regarding the crime was being redirected from Yates to her husband, Rusty. Yates' ultimate convictions for first-degree murder only served to increase the widely held sentiment that he bore responsibility for his children's deaths. The media saturated the public with details about her husband's controlling nature, his insistence on having more children, his rigidly traditionalist religious views, and his seeming indifference to his wife's illness.[37] The sympathy initially felt by many for the husband's immeasurable loss turned to condemnation. An oft-repeated observation was that he should never have left his children alone with a mother suffering from mental illness.[38] Some observers even suggested that the wrong parent was being prosecuted.[39] In an illuminating television report, several ordinary citizens were interviewed about their thoughts on Rusty Yates.[40] They expressed very strong beliefs that he should be charged with *something*, whether criminal negligence or child endangerment.[41] These beliefs were maintained in spite of the frequently-voiced opinion of many legal experts that he could not be charged with any crime.[42]

In his defense, Rusty Yates maintained that no one at the facility ever mentioned to him that Andrea had violent fantasies and had voiced fears of harming others. He stated that he assumed that if she had problems with mental illness after any subsequent children she could get another round of Haldol to make her well again.[43] He also pointed to the failure of doctors to maintain her on Haldol despite his "begging all along" that his wife be kept on the same drugs that had worked for her before.[44] He also claimed that his wife was adept at hiding her dark moods, sometimes

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[34] *See* Susan H. Greenberg et al., *The Baby Blues and Beyond*, NEWSWEEK, July 2, 2001, at 26.

[35] Sharon Begley, *The Mystery of Schizophrenia: From Andrea Yates to 'A Beautiful Mind.' The Faces of a Tragic Disease*, NEWSWEEK, Mar. 11, 2002, at 44.

[36] *See id.* at 28, reporting statistics from the Postpartum Research Center that while depression occurs in 10 to 20% of new mothers, only 0.2% of new mothers experience psychosis.

[37] Snyder, *supra* note 6.

[38] *Id.*

[39] In a February 21 letter to the Houston Chronicle, Jody King wrote: "If the state of Texas allows Russell Yates to go unpunished for his part in the drowning death of his children, it will be a shame," *available at* Houston Chronicle Archives: http://www.chron.com/content/archive.

[40] Patrick Nolan, "Could Russell Yates Face Criminal Charges?" (Mar. 13, 2002), *available at* ABC13 News Online: http://abc.local.go.com/ktrk/news/31302_news_yatestoday_html.

[41] Florina Lopez, concession worker, stated: "I don't like [Rusty Yates]. I think he played a big role . . . He should be on trial, not her." Michael Taylor, shoeshiner, said: "That could drive a person insane if you have five kids to look after and he's constantly pumping babies in her, baby after baby." *Id.*

[42] For example, appearing on the same ABC program noted in the preceding footnote, University of Houston Law Professor Jody Kruas stated that there was very little chance that Rusty Yates would be charged with any crime because it would be difficult to establish that there was a risk to the children and not just a risk to Andrea Yates herself. *Id.*

[43] Rusty Yates told a reporter, "We counted each child as a blessing, not a burden . . . [If she got sick again] there would be the same symptoms and she would get the same treatment." Cosgriff et al., *supra* note 2, at 86.

[44] *Id.* at 87.

resisted taking her medications, and he had not believed she was a danger to their children.[45] The readiness of so many (in the public and the media) to blame Rusty Yates for his wife's deterioration and assign him partial culpability for her crime is striking in contrast to the willingness of a sizeable number to consider various excusing factors for Andrea Yates' behavior. Although the public reaction is not particularly surprising when one considers the media's infatuation with Rusty Yates' alleged failure to address his wife's problems, it is notable how little attention was ever paid to the psychological pressures and stresses that may have influenced *his* behavior, especially given the apparent failure of mental health professionals to properly diagnose or treat his wife for her illness. Condemnation of Rusty Yates was prevalent among women and men.[46] The tendency to blame him is consistent with the notion of the woman as passive, vulnerable, and less culpable for her actions than the man. It may also reflect a societal suspicion that when a woman does something very bad there must be a man somewhere to blame for her behavior.

The District Attorney's announcement that he would seek the death penalty for Andrea Yates was not a popular decision.[47] In spite of the District Attorney's suggestion that the enormity of her crime demanded the most severe punishment[48] and the fact that support for capital punishment ran strong in the Houston area, there was little sentiment in favor of executing Yates.[49] Many legal commentators believed that the prosecutors knew that they could not get the death penalty but wanted a death-qualified jury to ensure a conviction.[50] The underlying theory was to exclude those jurors who could not vote for the death penalty because they might be more sympathetic to an insanity defense.[51] Obtaining capital punishment for a woman with known psychiatric problems, however, would be a highly difficult proposition, even in pro-death penalty Texas. Given that men are generally far more likely to be sentenced to death than women,[52] it is likely that had *Rusty* Yates been mentally ill and murdered the Yates' children, the response to the District Attorney's decision would have been markedly different. A murder trial in Texas several months after the Andrea Yates' verdict indicates the difference gender can make. On May 21, 2002, John Battaglia was sentenced to lethal injection for gunning down his children as his wife listened helplessly on the phone.[53] While acknowledging the defendant's history of domestic abuse, the defense presented witnesses who called him a loving father and psychiatrists who said he suffered from a bipolar disorder characterized by extremely manic and depressive behavior.

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[45] Synder et al., *supra* note 6.

[46] A University of Houston philosophy professor, Cynthia Freeland, stated that a male student in her feminist psychology class made it clear that men shared many of the same concerns. "Ask men, fathers what they think of Russell Yates," the student wrote. "Gender will disappear from the essay. The man is deviant." *Id.*

[47] A defense lawyer observed: "No prosecutor is chomping at the bit to try this case . . . And I would guess none of them would be excited to seek death for this troubled mother." Lisa Teachey, *DA Will Seek to Put Yates on Death Row / Mom Pleads Insanity in Children's Drownings* (Aug. 9, 2001), *available at* Houston Chronicle Archives: www.chron.com/content/archive.

[48] Harris County District Attorney said: "One of the things we look at is the impact of preventing other people from committing similar types of crimes." Cosgriff et al., *supra* note 2, at 84.

[49] A poll by the Houston Chronicle in November showed that only 19% of those surveyed wanted Yates to die, while 57% believed a life sentence was fair punishment. *Id.*

[50] Teachey, *supra* note 47.

[51] *Id.*

[52] *See generally* Ilene H. Nagel et al., *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L & CRIMINOLOGY 181 (1994).

[53] Associated Press, *Man Sentenced to Die for Killing Daughters* (May 1, 2002), *available at:* FOXNews.com//story/0,2933,51597,00.html.

The jury only took nineteen minutes to convict him.[54]

There was disagreement among jury experts about whether women or men would be more sympathetic to Yates' insanity defense. While some experts opined that women would be more sympathetic because they could identify with the defendant's situation, others argued the opposite—that women would actually be *less* forgiving than men.[55] The idea that women might be less sympathetic to Yates' case supports the theory that sympathy for her originated from a male-oriented patriarchal view of feminine weakness that would be more prevalent among men. However, it might also reflect women's repulsion to the idea that a mother could have killed her children in this way.

While the predominantly female jury hearing Yates' case returned a "guilty" verdict after a relatively short three-hour deliberation, Texas' narrow insanity standard did not leave them much choice.[56] Under Texas law, the only question to be considered when a defendant asserts an insanity defense is whether the defendant because of mental illness did not know right from wrong.[57]

If the jurors thought that Yates knew that what she was doing was wrong, even if she lacked self-control as a result of her mental condition, then they had to find that she was legally sane.[58] Yet they spared Yates the death penalty. In a television interview after the verdict, jurors stated that giving Yates a life sentence was the right and fair thing to do. Having convicted her, they still had sympathy for her condition[59] and felt that the death sentence would be too harsh.[60]

There were many elements to the Yates case that influenced people's reactions—Yates' long history of mental illness, her status as a white, middle class suburbanite with whom many American women could identify, and the fact that she had not tried to hide her crime. Although Yates' gender is certainly not the only factor that influenced people's reactions to the case, the fact that she was a woman accused of a heinous crime had the greatest impact on shaping the media's and the public's response to the crime and, ultimately, the judicial outcome.

III. The Insanity Defense: Myths and Biases

A. *Various Formulations of the Defense*

Law-makers, scholars, and the public have long debated the merits of allowing an insanity defense and argued about its proper scope.[61]

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[54] The jury took six and a half hours to sentence him to death, determining that he posed a future danger to society and there were no mitigating circumstances to warrant a life sentence. *Id.*

[55] Robert Gordon, a Texas-based jury expert not connected to the case, found that "[o]ur research shows women are much more critical of her conduct than men." Cosgriff et al., *supra* note 2, at 87.

[56] "I think once we got into deliberation, it was that question," stated a juror. "It wasn't anything else. It was just 'Did she know right from wrong?'" Teachey, *supra* note 14.

[57] TEX. PENAL CODE § 8.01(a) (2002) ("It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor as a result of severe mental disease or defect, did not know that his conduct was wrong."). Many states, including Virginia, also allow an insanity defense to be established when a defendant lacks volitional control over his or her acts because of mental illness (i.e., the irresistible impulse test).

[58] Jill, a juror, stated: "Andrea Yates herself in her interviews said she knew it was wrong in the eyes of society . . . She knew it was wrong in the eyes of God, and she knew it was illegal. And you know, I don't know what wrong means if all those three things aren't factored into it." Teachey, *supra* note 14.

[59] "Yes, I have sympathy for her," a juror said. "Now she has to live with this for the rest of her life. And it's going to be in her mind every day." *Id.*

[60] *Id.*

[61] *See generally* Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 SYRACUSE L. REV. 477 (1982); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV.

This section will address the media's portrayal and public perceptions of the insanity defense and how they interact with gender stereotypes to produce gender-biased results.

The landmark 1843 case, *The Queen Against Daniel M'Naghten*,[62] established the modern insanity rule. M'Naghten was a Scottish woodcutter who assassinated Edward Drumond, Secretary to the English Prime Minister, Sir Robert Peel, in the mistaken belief that the secretary was the prime minister.[63] The defendant was described during the trial by nine medical witnesses as "an extreme paranoiac entangled in an elaborate system of delusions."[64] Apparently, M'Naghten believed that the prime minister was responsible for the financial and personal misfortunes that plagued him. The jury found the defendant not guilty on the grounds of insanity, causing a national uproar.[65] Yet the test for insanity in that case, what has become known as the *M'Naghten* rule, was adopted in the federal courts in America in 1851 and ultimately in most of the state courts.[66] The test established that a person is insane if, at the time of his or her act, the person was laboring under a defect of reason, arising from a disease of the mind, that he or she: (1) did not know the nature and quality of the act that he or she was doing; or (2) if he or she did know it, he or she did not know that what he or she was doing was wrong.[67]

Critics of the *M'Naghten* rule argued that the rule was too restrictive because it failed to recognize degrees of incapacity and focused solely on *cognitive* disability, disregarding mental illnesses that affect *volition*.[68] To broaden the scope of *M'Naghten*, some states added a third prong to the insanity test, the "irresistible impulse test." While the precise language of the test varies by jurisdiction, the idea is that a person is insane if, at the time of the offense, he or she "acted from an irresistible and uncontrollable impulse."[69] The American Law Institute (ALI) test as provided in the Model Penal Code incorporates both the *M'Naghten* and irresistible impulse tests. Under the ALI test, a person is not responsible for his or her criminal conduct if, at the time of the conduct, he or she lacked substantial capacity to: (1) appreciate the criminality of his or her conduct or (2) conform his or her conduct to the requirements of the law.[70] The ALI test uses the word "appreciate" rather than "know" to broaden the cognitive prong and uses the phrase "lacks substantial capacity" so that total incapacity is not required. Congress adopted a variation of this test for the federal courts in 1984.[71] In all the jurisdictions that recognize the defense, insanity is a question for the jury unless the defendant waives his or her right to a jury trial.

B. *Public Perceptions: The Mythology of the Insanity Defense*

While the insanity defense has long been one of the most controversial and hotly debated issues in criminal law,[72] it is only in recent years that researchers have focused on the

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599 (1990); Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9 (1982).

[62] 10 C.L. & F. 200, 8 Eng. Rep. 718 (1843).

[63] Rita J. Simon, *The Defense of Insanity*, J. L. & PSYCHIATRY 183, 187 (Spring 1983).

[64] *Id.* (internal citations omitted).

[65] *Id.* at 188.

[66] *Id.*

[67] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 319 (2d ed. 1995).

[68] *Id.* at 321.

[69] *Id.*

[70] MODEL PENAL CODE § 4.01(1) (2000).

[71] Under the law, a person was excused if he or she proved by clear and convincing evidence that, at the time of the offense, as the result of a severe mental disease or defect, the defendant was unable to appreciate: (1) the nature and quality of his or her conduct or (2) the wrongfulness of his or her conduct. 18 U.S.C. § 17(a) (1988).

[72] Professor Frances Allen remarked, "The issue of criminal responsibility has attracted more attention and stimulated more controversy than any other question in the substantive criminal law." FRANCES ALLEN, THE BORDERLINE OF CRIMINAL JUSTICE 105 (1985).

public's perceptions of the defense.[73] In the wake of the 1982 verdict that acquitted by reason of insanity John Hinckley, Jr., the would-be assassin of President Reagan, proposals for reform or abolition of the insanity defense were submitted to both houses of Congress and to state legislatures throughout the nation. A number of states restricted the defense and a few abolished it altogether.[74] Studies found that there was widespread dissatisfaction with the defense and people tended to grossly overestimate both its frequency and its success.[75] The dissatisfaction appeared to be longstanding. In a nationwide poll taken a year before the attempted assassination by Hinckley, eighty-seven percent of the respondents agreed with the statement "too many murderers are using the insanity plea to keep from going to prison."[76] Many considered the defense a "loophole."[77]

After the Hinckley verdict, commentators began to examine carefully the "myths" that had developed about the insanity defense.[78] Commentator Michael L. Perlin identified a number of myths associated with the plea and rebutted them with empirical evidence showing their falsity.[79] First, Perlin stated that the public *grossly overestimated both the frequency and success rate of the insanity plea*, arguing that the public was abetted by bizarre depictions, distortions, and inaccuracies in media portrayals of mentally ill individuals charged with crimes.[80] Perlin cited recent research revealing that the insanity defense is used in only one percent of all felony cases and is successful in only a fourth of these cases.[81] Second, Perlin showed that contrary to the myth *that insanity acquittees only spend a short amount of time in custody*, the vast majority of these acquittees actually spend considerable time in custody.[82] Third, Perlin debunked the myth that *there is no risk in asserting an insanity defense* by offering evidence that homicide defendants who asserted an insanity defense at trial but who were ultimately found guilty, served significantly longer sentences than comparable homicide defendants who did not assert an insanity defense.[83]

The existence of these myths has important implications. While the forty-six states that currently recognize the plea vary in their formulations of the defense, verdicts are typically left in the hands of a jury. Jurors' pre-existing views of the defense may influence the outcomes of individual cases and, in particular, may interact with pre-existing gender stereotypes to produce gender-biased outcomes.

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[73] *See* Richard A. Pasewark, *Insanity Plea: A Review of the Literature*, 9 J. PSYCHIATRY & L. 357 (1981) (noting that there has been "an extreme dearth of empirical data" relating to the insanity defense plea).

[74] *See* Valerie P. Hans & Dan Slater, *'Plain Crazy': Lay Definitions of Legal Insanity*, 7 AM. J.L. & PSYCHIATRY 105, 105 (1984).

[75] *See id.*

[76] Richard W. Jeffrey & Richard A. Pasewark, *Altering Opinions About the Insanity Plea*, J. PSYCHIATRY & L. 29 (Spring 1983), quoting A.P.-NBC *Insanity Defense Poll*, Oct. 6, 1981.

[77] *Id.* (citing three studies reflecting the view that the defense is a "loophole.").

[78] MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 107 (1994).

[79] *See id.*

[80] *Id.* at 108.

[81] *Id.*, relying on Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study,* 19 BULL. AM. ACAD. PSYCHIATRY & L. 331 (1991).

[82] PERLIN, *supra* note 78, at 109-10, relying on a comprehensive study of California practice showing that only one percent of insanity acquittees were released following their verdict, four percent were placed on conditional release, and 95% were hospitalized. *See also* Golding et al., *The Assessment, Treatment and Community Outcome of Insanity Acquittees*, 12 INT'L J.L. & PSYCHIATRY 149 (1989) (in a study of all persons found NGRI in the Canadian province of British Columbia over a nine-year period, the average time spent in hospitalization or supervision was slightly over nine and a half years).

[83] PERLIN, *supra* note 78, at 109.

Although the insanity defense is introduced in only a tiny percentage of cases, it is most visible when used in cases involving heinous, violent acts in which the defendants may face the death penalty if convicted.[84] The high-profile (and often sensational) nature of such cases leads to extensive media coverage. A plea of insanity raises troubling questions regarding moral responsibility and social policy, thereby intensifying public scrutiny.[85] In spite of the rarity with which the defense is invoked, its perceived illegitimacy has widespread repercussions for the criminal justice system.

C. *Impact of Gender on Public Response to Insanity Defense*

Women defendants have not been a major focus of studies on public perceptions of the insanity defense, perhaps because of the relatively small percentage of women who historically committed violent crimes. However, there is evidence that women defendants who plead insanity are judged differently from their male counterparts.

Researchers approached individuals in a shopping mall and asked for their reactions to a newspaper article.[86] The article involved the shooting death of an individual.[87] The two variables manipulated in the article were: (1) the gender of the assailant and (2) whether the assailant had had previous psychiatric hospitalization.[88] Each respondent read a version of the article and rated the appropriateness of the insanity defense in this case.[89] Not surprisingly, when the assailant had a history of psychiatric hospitalization, he or she was viewed as being less responsible for the act compared to an assailant without such a history, with an NGRI plea considered more acceptable.[90] More significantly, when the gender of the assailant was manipulated, a male assailant was judged to warrant a longer prison sentence if found guilty than a female assailant.[91] The male assailant was also thought to be more likely to repeat his crime than a female assailant.[92] Finally, respondents rated an insanity verdict more acceptable if the assailant was female.[93]

The study's findings are significant on a number of levels. The insanity defense received social acceptance under certain defined conditions: when the assailant was female or when a long psychiatric history was reported. Both male and female respondents generally rated the male assailant more harshly. Specifically, he was considered more likely to shoot someone again and was believed to deserve a longer prison sentence if convicted.[94]

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[84] Simon, *supra* note 63, at 183.

[85] "[The purpose of the insanity defense is] to draw a line between those who are morally responsible and those who are not, those who are blameworthy and those who are not, those who have free will and those who do not, those who should be punished and those who should not and those who can be deterred and those who cannot." *Id.* at 184, quoting ADAM STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 218 (1975).

[86] Ninety-six males and 96 females participated as subjects in the study, ranging from 17 to 65 years of age. The distribution of race and socioeconomic status closely approximated that of the United States population. Michael E. Faulstich et al., *The Insanity Plea: A Study of Societal Reactions,* 8 LAW & PSYCHOL. REV. 129, 130 (1984).

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 131.

[92] *Id.*

[93] *Id.* One interesting finding was that female respondents, more often than male respondents, perceived the assailants as actually wanting to kill their victims. This result may offer explanation for the finding of some researchers that women tended to be less sympathetic to Andrea Yates' case than men.

[94] The study was conducted in 1984; replication of this study would show whether there have been any shifts in society's attitudes over the past nineteen years.

The impact of these gender biases is illustrated by another study that compared women and men in the Oregon insanity defense system over a four-year-period.[95] This study found that women charged with homicide were more likely to be found NGRI than their male counterparts.[96] Furthermore, the female acquittees spent a shorter time in custody and were more likely to be conditionally released[97] and the female acquittees were more likely to be discharged because they were no longer considered to be dangerous.[98] Another study also found that female insanity acquittees spent less time subsequently hospitalized than do male acquittees.[99]

Society's tendency to attribute violent crime by women to a mental disorder or a biological cause apparently not only influences the amenability of jurors to the NGRI plea and the ultimate release of insanity acquittees, but the phenomenon may also influence the criminal process in other ways. When police decide whether to press charges in the first place or when prosecutors decide whether to plea-bargain, assumptions about gender may play an important role. Studies have reported that women defendants receive more lenient treatment because of judicial paternalism, the social costs to children and families of sending women to prison, or the view that female defendants are less dangerous and more amenable to rehabilitation than male defendants.[100] It is also a well-documented fact that women defendants in violent crimes are far less likely to receive the death penalty than men.[101]

IV. Explaining the Gender Bias

Two factors are primarily responsible for the gender bias in the application of the insanity defense: (1) paternalistic, stereotyped views of women and criminality and (2) widespread and persistent myths surrounding the insanity defense itself. These factors interact to produce the gender-skewed results in the studies discussed above.

A. *Entangled Myths: Female Criminality and the Insanity Defense*

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[95] Jeffrey L. Rogers et al., *Women in Oregon's Insanity Defense System*, J. PSYCHIATRY & L. 515 (Spring 1983).

[96] Twenty-nine percent of women who were charged with homicide were found not guilty by reason of insanity in Oregon courts compared to nine percent of their male counterparts. *Id.* at 522. When found guilty, the women were more likely to be convicted of lesser crimes. None of the women were found to have committed murder (those found guilty were convicted of manslaughter or attempted murder), compared to 23% of the men who asserted the insanity defense. *Id.*

[97] Five of the six females in the homicide/ attempted homicide group were conditionally released after an average of 13 months of hospitalization; 12 men out of 22 were conditionally released after an average of 16 months of hospitalization. The remaining 10 men were not conditionally released during this period. *Id.* at 525.

[98] Following acquittal, three of the five women were subsequently discharged because they were considered no longer dangerous after an average of 31 months total under psychiatric review. Only two of the 22 long-term men were discharged, one after 42 months of review and the other after 44 months. *Id.*

[99] An investigation was conducted utilizing extensive data on all persons adjudicated NGRI in New York State from 1965 to 1976 (278 total). While no significant differences were found for race, a significant difference was found for gender with female patients spending less time hospitalized than males. Michael R. Hawkins, Sex and Race in Insanity Hospitalization (unpublished Ph.D. dissertation, University of Wyoming) (on file with Dissertation Abstracts Online).

[100] Ilene H. Nagel et al., *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders under the United States Sentencing Guidelines*, 85 J. CRIM. L & CRIMINOLOGY 181 (1994), citing literature review by Darrell Steffenmeister et al., *Gender and Imprisonment Decisions*, 31 CRIMINOLOGY 411 (1993).

[101] As of 1989, only 398 of 16,000 (2.5%) lawful executions in the U.S. were females. Victor L. Streib et al., *Executing Female Juveniles*, 22 CONN. L. REV. 3, 4 (1989).

The tendency to attribute crime by women to internal forces outside of their control has deep roots. Early criminologists focused on the "inherent nature" of women as the root cause of female criminality.[102] This "inherent nature" referred to a woman's sexuality, her biology, and her psyche.[103] Whereas economic, social, and political factors were considered to be the basis of the criminal behavior of males, female criminals were seen as victims of their own biology. A popular and enduring explanation for female crime related to the menstrual cycle. In the 1845 defense of a woman charged with infanticide, evidence was presented that the mother was suffering from disordered menstruation and she was subsequently found NGRI.[104]

Other early theories on criminality concentrated on what was believed to be a woman's unique psychological state. Influenced by the theories of Sigmund Freud,[105] criminologists tended to view female criminality and delinquency as maladjustment to a normal feminine role. The view was that women criminals had betrayed their womanhood, calling for therapeutic intervention for these poor "misfits" rather than punishment. The consequence was that courts upheld longer sentences for females as they were deemed to be more amenable than males to psychological treatment because their crimes were attributed to a psychosocial source.[106] While mental health professionals have gradually moved away from these blatantly biased views of female criminal behavior, such thinking still manifests itself in subtler ways. Indeed, while very few people today would state as a general rule that women are less capable of self-control than men, the studies outlined above on perceptions of female criminality seem to suggest that many people continue to believe this, at least at an intuitive level. Some feminist scholars have argued that modern defenses purportedly designed to protect women, such as the battered woman's defense, actually reaffirm the idea that women lack the same capacity for rational self-control that is possessed by men.[107]

In the aforementioned study in which respondents read a fictional account of a shooting in which the gender of the shooter was manipulated, respondents were more receptive to the insanity defense when the assailant was female, the male assailant was thought to be more likely to repeat his crime, and the male assailant was deemed to warrant a longer prison sentence than the female assailant.[108] The sense among respondents seemed to be that violent acts by women were isolated incidents, perhaps reflecting a temporary loss of control or brief psychological break, while men were motivated by external causes, such as anger and greed, and so were more likely to commit offenses again. In addition to posing less danger to society, it can be inferred that the female assailant was judged to be less accountable for her crime because she lacked the same level of self-control. What is particularly significant is how these gender-biased perceptions interact with widespread myths about the insanity defense.

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[102] BARBARA COWEN, WOMEN AND CRIME, VIOLENCE AND THE PREVENTION OF VIOLENCE 157 (1995).
[103] *Id.*
[104] *Id.* at 158, citing S. EDWARDS, WOMEN ON TRIAL (1984).
[105] In Freud's view, a woman is anatomically inferior. When a little girl discovers that she has no penis, she experiences grave disappointment, severe trauma, and intense envy. The girl assumes she has been castrated and she grows up envious and resentful. The woman learns to compensate for her inferior organs through narcissism. The original penis wish is transformed into a desire for a baby, with a man as bearer of the penis and provider of the baby. According to Freud, the deviant woman has not learned to compensate appropriately for her inferior organ; her criminal behavior is her way of rebelling against her sex role. *See* COWEN, *supra* note 102, at 160-61.
[106] *Id.* at 162.
[107] Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 1 (1994).
[108] *See* Faulstich et al., *supra* note 86.

The societal view that female defendants are less dangerous than men and more amenable to treatment interacts with three of the major myths identified by Perlin.[109] First, the myth that NGRI acquittees spend less time in custody than defendants convicted of the same offenses works more to the detriment of men than women. Because women are perceived as being less likely to repeat their crimes and more likely to benefit from treatment during the short-time that they are in custody, the belief that they will be returned to the streets after an NGRI verdict will be considerably less of a concern to jurors. Also, given that women are deemed less accountable for their actions than similarly situated male defendants, the idea that they might spend a shorter time in custody after an NGRI verdict will not cause as much dissonance in jurors' minds.

Second, the idea that the insanity defense is frequently and successfully used will seem like a much greater problem for defendants whom jurors believe are likely to commit crimes again. Thus, jurors will be most resistant to an "abusive" system that repeatedly allows a criminal to avoid culpability by recourse to the insanity defense when that defendant is male.

Third, public concern that the insanity defense is being exploited (a concern encouraged by the myth that there are no risks to the defendant in asserting the defense) will disfavor the finding of NGRI in male defendants. Because men commit more violent crimes, jurors will conclude that they are more likely to exploit the defense.

Examination of these myths shows that biased outcomes result not simply from paternalistic gender biases that favor the finding of insanity in women. They also emanate from the entanglement of such beliefs with false assumptions about the defense itself that effectively *dis*favor men.

[109] COWEN, *supra* note 102, at 162.

B. *Implications of the Gender Bias and Possible Solutions*

While paternalism may elicit sympathy and a greater presumption of innocence (or insanity) for the female defendant, such views ultimately reinforce stereotypes of women as irrational, emotionally weak, and lacking in self-control. As discussed, this cultural attitude manifests itself in a reluctance to hold women fully culpable for their actions and inevitably trickles over to other areas of the law. Even within the insanity context, the implications of such a view are quite troublesome. In short, is it really to women's benefit to be perceived as *crazier* than men? Further, the consequences of holding women less culpable may work to their disadvantage even in the sentencing context. Until the late 1960s and early 1970s, women defendants ordered to undergo treatment were held in custody for longer periods of time than if they had been incarcerated.[110]

Moreover, by focusing solely on the biological and psychological causes of crimes by females society may overlook the significant role played by social, political, and economic factors.[111] Consequently, deterrence and prevention of criminal behavior by females will be severely limited. This is especially troublesome considering that violent crime by women is not as rare as many believe and may be on the rise.[112] It has been suggested

[110] PERLIN, *supra* note 78, at 107-14.

[111] For example, in some studies African-American females have demonstrated a higher incidence of violence than white males, a disparity some have attributed to a differential exposure to poverty. Baskin et al., *The Political Economy of Female Violent Street Crime*, 20 FORDHAM URB. L.J. 401, 402-03 (1993).

[112] More than two million women, some 600,000 of them juveniles, commit a violent offense each year. Jodie Morse, *Women on a Binge*, TIME, Apr. 1, 2002, at 56, 59. *See also* Cheryl Hanna, *Ganging up on Girls: Young Women and their Emerging Violence,* 41 ARIZ. L. REV. 93 (1999), reporting that from 1992 to 1996, the violent crime rate for juvenile girls rose 25% while the crime rate

that the tendency to equate female criminality with psychological or biological disturbances may reflect a societal reluctance to address women's problems *unless* they are explained as illnesses.[113] If that is the case, our legal system should not perpetuate such a systematic injustice. Along the same lines, evidence demonstrates that chivalrous treatment is selectively applied by judges and juries, benefiting upper-class white women more than poor minority women, resulting in racial and socioeconomic sentencing disparities. Another problem is the suggestion by some that women defendants who deviate from their sex-stereotyped role are treated more harshly under a paternalistic system.[114] Finally, the most important reason we should avoid gender disparities in the application of the insanity defense is to promote the long-recognized goal of equal protection under the law.

More study is needed in this area to determine just how pervasive the gender bias is in shaping perceptions of insanity and to verify whether the public's views have shifted since the 1984 Faulstich study.[115] The media and public reaction to cases like Andrea Yates' suggests that paternalistic views of female criminality remain strong. Given that insanity is typically a question for the jury, the judicial system must address the stereotypical assumptions and biases that jurors are likely to bring to the jury box. Yet this places the judiciary in a quandary. Short of a complete societal revolution, it will be difficult (if not impossible) to control the assumptions that jurors bring to a case and defense lawyers will understandably attempt to capitalize upon such beliefs if they are to the defendant's benefit.

As the coverage of the Yates case attests, the media bears considerable responsibility for perpetuating such assumptions. Although to some degree the media may simply be reflecting the views of society, it must recognize the considerable influence it has in shaping public opinion and not allow unsupported biases and stereotypes to go unchallenged. The media should take a cue from the shift in recent years by the social science and legal communities in broadening the explanatory bases for female criminality. In reporting the news, the media should similarly aim for a more complex understanding of violent crime by women. Although the media coverage may never be completely gender-neutral, it can and should strive for more balanced and objective coverage.

Nevertheless, it will be an uphill battle to transform society's ingrained views of gender. Quicker strides might be made by modifying another group of misperceptions that enhances the gender bias associated with the insanity defense, namely, public misperceptions of the insanity defense itself. Altering public opinions about the insanity defense is possible, as reflected by a survey of Wyoming college students and community residents.[116] Before being presented with the actual statistics, respondents grossly overestimated the extent to which the insanity plea was used as well as its success rate.[117] However, when presented with the actual statistics on the frequency and success rate of the plea, there was a marked and significant alteration in the respondents' opinions regarding the use and abuse of the plea.[118] Significantly fewer

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for boys remained steady (relying on Howard N. Synder, *Juvenile Arrests 1996*, JUV. JUST. BULL., Nov. 1997, at 2).

[113] *See* Dorothy E. Roberts, *Foreword: The Meaning of Gender Equality in Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 1 (1994).

[114] R.J. Simon, Women in Court, *in* THE CRIMINOLOGY OF DEVIANT WOMEN, 255-64 (F.Adler & R.J.Simon eds., 1979).

[115] *See* Faulstich et al., *supra* note 86.

[116] Jeffrey & Pasewark, *supra* note 76, at 29.

[117] *Id.* at 33.

[118] *Id.* at 33-34.

individuals expressed the belief that the plea was abused.[119]

The study indicates that it is possible to correct people's misconceptions about the insanity defense by educating them about the realities of the defense. When a defendant in a high-profile murder case invokes the insanity defense, coverage of the trial should be tempered by statistics on the actual frequency and success of the defense. Further, the consequences of an NGRI verdict should be made clearer to jurors and to the public at large. As a matter of fairness, jurors deserve to know that if they find a defendant NGRI, the defendant will be taken into custody and will likely remain there for a considerable period of time. Statistics showing the average length of time in custody by NGRI acquittees should also be included in news reports. Greater dissemination of accurate facts and information regarding the use of the defense will help to dispel the myths that are perpetuated by the media's sensationalistic and highly charged coverage of insanity cases. Because such myths interact with a paternalistic view of female criminality, debunking them will reduce the gender-biased outcomes in insanity cases. Ultimately this will make the assessment of culpability—which lies at the very heart of our criminal justice system—fairer and more just for *all* defendants.

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[119] Less promisingly, a substantial portion still clung to the belief that the plea was used too frequently. *Id.* at 34.

Cases in the United States Supreme Court

Changes Made to Procedures Associated with Federal Insanity Defense

The U.S. Supreme Court adopted changes to the Federal Rules of Criminal Procedure that concern the insanity defense that took effect December 1, 2002. Rule 12.2 now makes it clear that a court may order a defendant to submit to a mental examination once the defendant indicates an intention to raise an insanity defense. The changes also state that if the defendant intends to present expert evidence of mental condition at capital sentencing, the trial court may require the defendant to give notice of that intent and order a mental examination. The results of that examination, however, are not available to the government unless the defendant is convicted of a capital crime and reaffirms an intent to introduce expert evidence regarding his or her mental condition at sentencing. 70(42) U.S. Law Week 2694 (2002).

Directing Jury to Continue Deliberations Despite Juror Stress Not Basis for Retrial

The U.S. Supreme Court in a per curiam order overturned a Ninth Circuit ruling that had granted a new trial to an individual convicted by a California jury of second degree murder. The Ninth Circuit had ruled that the state trial court judge had coerced the jury's verdict. After 28 hours of deliberation one of the jurors sent a note to the judge asking to be dismissed from the jury because of "health problems." During a meeting with the judge, the juror explained that she was unable to "make snap decisions" because of the "seriousness of the charges" and was "beginning to feel a little burned out." However, after the judge explained that dismissing her would necessitate a new trial, the juror agreed to continue. The next day, the foreman of the jury sent the judge a note stating that the jury could no longer deliberate because almost all the jurors agreed that this same juror was unable to understand the judge's rulings, to reason, and to be reasonable. The judge called the jury into the courtroom where the foreman stated that the jury was divided 11 to 1 and was having the same conversation over and over again. The trial judge directed the jury to continue deliberating. After a day off, the juror sent the judge another note asking to be dismissed from the jury, this time because of feelings of distrust and disrespect from the other jurors and because she had reached a point of anger that prevented her from being objective. The judge, meeting with the juror, asked her if she was still continuing to deliberate. The juror said she was and the judge returned her to the jury room. Four days later the jury returned a guilty verdict. The Supreme Court concluded that a state appellate court determination that there was no jury coercion was reasonable and that the Ninth Circuit exceeded its authority in reversing the trial court verdict. *Early v. Packer*, No. 01-1765 (U.S. 2002); 71(17) U.S. Law Week 3312-14 (Nov. 5, 2002).

Execution of Mentally Retarded Defendants Unconstitutional

The U.S. Supreme Court ruled that the execution of mentally retarded defendants is excessive and disproportionate to their culpability and is therefore prohibited by the Eight Amendment ban on cruel and unusual punishments. The defendant had been convicted in a Virginia court of kidnapping, robbery, and murder and sentenced to death. In reversing a 1989 decision, the Court determined that a national consensus has now developed opposing the execution of mentally retarded individuals. The Court reasoned that there is now a widespread view that disabilities in areas of reasoning, judgment, and impulse control mean that individuals with such disabilities do not act with the level of moral culpability associated with the most serious adult criminal conduct. As a result, retribution and deterrence, which the Court identified as the justifications for the death penalty, will not be served by their

execution. As a second rationale for its ruling, the Court noted such impairments can jeopardize the reliability and fairness of the guilt and sentencing phases of trials and thus create a special risk of wrongful execution. The Court cited the tendency of such individuals to give false confessions, their reduced ability to make a persuasive showing of mitigation, and problems they have giving meaningful assistance to counsel. *Atkins v. Virginia*, 70 U.S.L.W. 4585 (U.S. 2002); 71(5) U.S. Law Week 3105-06 (2002).

Prisoner Sex Offender Treatment Program Can Compel Disclosures

The U.S. Supreme Court held that a prison sex offender program that requires participants to reveal their entire sexual history or suffer a loss of privileges and transfer to a more secure facility does not compel self-incrimination in violation of the Fifth Amendment. The plaintiff, despite his protestations of innocence at his trial, had been convicted and imprisoned for kidnapping and sex offenses. The state corrections department decided that he needed to enroll in a pre-release sex offender treatment program. The prisoner refused to accede to the program's requirements that he disclose his sexual history, including the crime of conviction and any other sexual conduct, whether criminal or not. No immunity or privilege was associated with such disclosures. His refusal to participate resulted in an automatic change in classification and transfer to a more restrictive facility. The Court held that this change was permissible and procedural safeguards were not required prior to its imposition. A plurality of the Court stated that recidivism was a particularly serious problem among sex offenders, that rehabilitation programs are widely touted as effective in reducing recidivism, and that such programs are more likely to succeed if offenders are required to accept responsibility for past offenses. The court concluded this program bore a rational relation to a legitimate penological objective, the adverse consequences for not participating were related to the program objectives, and the adverse consequences did not constitute atypical and significant hardships in comparison to the ordinary incidents of prison life. Justice O'Connor in a pivotal concurring opinion determined that the penalties the prisoner was facing were not sufficiently "significant" to trigger constitutional protection. *McKune v. Lile*, No. 00-1187 (U.S. 2002); 70(47) U.S. Law Week 1748-49 (2002).

No ADA Claim if Employee's Disability Threatens Employee's Own Safety

The Americans with Disabilities Act (ADA) limits an employer's ability to refuse to hire an individual or to dismiss a current employee because of that individual's physical or mental disability. However, employers can make such employment decisions if the individual's disability poses a direct threat to health or safety in the workplace. It has been clear that this exception includes direct threats to the employer's workforce. It was unclear, however, whether it applied to threats to the disabled individual's own health or safety or whether the individual had the right to waive such threats. The U.S. Supreme Court unanimously ruled that a disabled individual does not have this right. In this case the employee had liver problems (ultimately diagnosed as hepatitis C) that could be aggravated by exposure to chemicals that were present in the workplace. The Court did note that this defense to an ADA claim could be successfully raised only after (1) an individualized assessment of the individual's ability to do the job safely and (2) a reasonable medical judgment based on the best available objective evidence or current medical knowledge. *Chevron U.S.A. Inc. v. Echazabal*, No. 00-1406 (U.S. 2002); 70(47) U.S. Law Week 1743 (2002).

Court to Review Whether Defendant Can Be Forcibly Medicated to Render Competent to Stand Trial

The U.S. Supreme Court agreed to review a lower court opinion that a criminal defendant can be forcibly administered antipsychotic medication to render the defendant competent

to stand trial on federal charges of making false representations in connection with payments for health care services, mail fraud, and money laundering. The Eighth Circuit (282 F.3d 560) ruled that such medication did not violate the defendant's due process rights in light of the government's essential interest in bringing the defendant to trial on serious charges, the trial court's finding that there were no less intrusive means to achieve this interest, and medical evidence that antipsychotic medication was medically appropriate for the defendant's condition. The court also found there was a reasonable probability that this medication would enable the defendant to participate in his trial. The Eighth Circuit also rejected the defendant's argument that requiring the defendant to stand trial in a medicated state that may effect his ability to communicate with counsel and his demeanor violated the defendant's Sixth Amendment right to a fair trial. The court responded that this right would be sufficiently protected by permitting the effects of the medication on the defendant's competency and demeanor to be considered at trial. The circuits have split on whether the government is allowed to involuntarily administer antipsychotic medication solely to render a defendant competent to stand trial when a nonviolent offense is involved. *Sell v. United States*, No. 02-5664 (U.S. 2002); 71(17) U.S. Law Week 3307 (Nov. 5, 2002).

Court to Review Whether Counsel Must Present Psychological Issues as Mitigating Evidence at Capital Sentencing

The U.S. Supreme Court agreed to review a lower court opinion that determined that defense counsel in a capital murder case in Maryland was not required to develop and present at sentencing an exhaustive social history of the defendant as possible mitigating evidence that might enable the defendant to avoid the death penalty. This social history included the defendant's history of physical, sexual, and mental abuse at the hands of his parents and guardians and that the defendant's IQ indicated borderline mental retardation. The Fourth Circuit (288 F.3d 629) held that the defense counsel's decision not to investigate such evidence was "virtually unchallengeable" and did not constitute an "ineffective assistance of counsel" so long as counsel knew rudimentary facts about the defendant's background. *Wiggins v. Corcoran*, No. 02-311 (U.S. 2002); 71(19) U.S. Law Week 3346 (Nov. 19, 2002).

Court to Review Whether Denial of Medical License Due to Applicant's Mental Illness May Violate Americans with Disabilities Act

The U.S. Supreme Court agreed to review a lower court opinion that established that an applicant for a medical license who had been denied that license because of his mental illness could proceed with a lawsuit claiming that this denial violated Title II of the Americans with Disabilities Act. The Ninth Circuit (279 F.3d 1167) ruled that this suit against the California Medical Board was not barred by the Eleventh Amendment and that medical licensing clearly falls within the scope of activities encompassed by Title II protections. *California Med. Bd. v. Hason*, No. 02-479 (U.S. 2002); 71(19) U.S. Law Week 3347 (Nov. 19, 2002).

Court to Review Prescription Drug Discount Plan

The U.S. Supreme Court has agreed to review the constitutionality of a Maine statute that seeks to secure prescription drug discounts for some 325,000 uninsured, non-Medicaid-eligible state residents by authorizing the state to negotiate rebate agreements with drug manufacturers. The law authorizes the state to negotiate rebates that are at least equal to those applicable to the Medicaid program. If companies refuse to provide discounts, the statute would allow the state to deny access by Medicaid beneficiaries to the drugs of these companies, eliminating a substantial market for these companies. *Pharmaceutical Research and Mfrs. of Am. v. Concannon,* No. 01-188 (U.S. 2002); 11(27) BNA's Health Law Reporter 968 (2002).

Court to Review Liability of Public Hospitals for False Medicaid Claims

The U.S. Supreme Court has agreed to review a Seventh Circuit decision that a municipality is a "person" within the meaning of the False Claims Act (FCA) and thus is not immune from being sued under the whistleblower provisions of the FCA. The lower court decision would make local public hospitals subject to liability for submitting false claims to the government, including claims for Medicaid reimbursement. *Cook County v. United States ex rel. Chandler,* No. 01-1572 (U.S. 2002); 11(27) BNA's Health Law Reporter 972 (2002).

Court to Review Sex Offender Registration Requirements

The U.S. Supreme Court granted review of a ruling by the Second Circuit (271 F.3d 38) that held that Connecticut's sex offender registration law authorizing public dissemination of information about registrants without providing them individual hearings on whether they are likely to be dangerous was unconstitutional. *Connecticut Dep't of Public Safety v. Doe*, No. 01-1231 (U.S. 2002); 70(44) U.S. Law Week 3703 (May 5, 2002).

Execution of Inmate with Lengthy History of Psychiatric Illness Initially Stayed but Court Ultimately Denies Review

The U.S. Supreme Court, after initially granting a last-minute stay of an execution of an inmate in Texas with a lengthy history of psychiatric illness, subsequently denied his petition for review. The inmate's attorneys had requested the stay on the grounds that the inmate, James Blake Colburn, was incompetent to be executed and had been denied his constitutional rights during proceedings in state court. The initial order, issued by Justice Scalia, did not specify on which issue the stay was granted. Purportedly, Colburn has tried to commit suicide at least fifteen times and his chronic paranoid schizophrenia has often left him hearing voices that command him to harm himself or others. The stay gave Colburn's attorneys ninety days to file a request for the full Court to review the case. The request was subsequently filed but denied by the Court, enabling Colburn's scheduled execution to proceed. *Colburn v. Cockrell*, No. 02-7910 (U.S. 2003); 71 U.S. Law Week 3488 (Jan. 21, 2003); Jim Yardley, *Court Stays Execution of Mentally Ill Texan,* New York Times, Nov. 13, 2002, at 1.

Review Denied of Dismissal of Suit Focused on Juvenile Offender's Suicide While in Boot Camp

The U.S. Supreme Court refused to review a lower court opinion that dismissed a civil rights complaint filed by the parents of a boy who committed suicide while in custody at a Texas boot camp for juvenile offenders. The Fifth Circuit in an unpublished opinion (4/12/02) ruled that plaintiffs had failed to establish that the shift supervisor's conduct was objectively unreasonable when it was not shown that the supervisor had knowledge of an obvious substantial risk of suicide. Furthermore, the Fifth Circuit concluded that there was no liability on the part of the county operating the boot camp when there was no evidence that its policy makers acted with deliberate indifference to the mental health needs of the juveniles placed in this program. *Smith v. Blue*, No. 02-385 (U.S. 2002); 71(17) U.S. Law Week 3309 (Nov. 5, 2002).

Review Denied of Execution of Juveniles Under the Age of Eighteen

The U.S. Supreme Court refused to review a lower court opinion that imposed the death penalty on an individual that was under the age of eighteen when he committed his offense. However, four justices (Justices Stevens, Souter, Ginsburg, and Breyer) filed a dissenting opinion to this denial of a writ of habeas corpus arguing that such executions are unconstitutional as inconsistent with the evolving standards of decency in a civilized society as required under the Eighth Amendment. Noting the Court's recent decision in *Atkins v. Virginia* (2002) that the Constitution prohibits the application of the

death penalty to mentally retarded persons, the dissent asserted that the Court should reconsider its decision in *Stanford v. Kentucky* (1989) that permitted the execution of individuals who were under the age of eighteen at the time of the offense. The dissent noted twenty-eight states expressly forbid the execution of juvenile offenders, five states have changed their laws since 1989 to forbid such executions, and no state has lowered the age of eligibility to sixteen or seventeen since 1989; juveniles under eighteen are distinguished from adults in a number of legal contexts; juveniles lack the requisite culpability to justify the imposition of such a penalty and age eighteen is a reasonable dividing line in establishing psychological and emotional maturity; and a national consensus has developed that juvenile offenders should not be executed with a 2001 national survey finding the majority of Americans believe the death penalty should not apply to juveniles. *In re Stanford*, No. 01-10009 (U.S. 2002); 71(15) U.S. Law Week 3279-80 (Oct. 22, 2002).

Review Denied of Student Expulsion After Showing Violent Poem to Teacher

The U.S. Supreme Court refused to review a decision by the Ninth Circuit (257 F.3d 981) that ruled that the emergency expulsion of a high school student after he showed a poem to a teacher did not violate the First Amendment. The lower court determined that school officials had reasonable grounds to forecast that the student might substantially disrupt or materially interfere with school activities based on the violent imagery of death and suicide in the poem, coupled with his past suicidal ideations, family conflicts, breakup with and reported stalking of his girlfriend, past disciplinary problems, and recent absences. *LaVine v. Blaine Sch. Dist.*, No. 01-1604 (U.S. 2002); 70(50) U.S. Law Week 3795 (2002).

Review Denied of Dismissal of Suit Focusing on Suicide of Student Following School Suspension

The U.S. Supreme Court refused to review a lower court decision that held the Constitution does not require a public school to hold a hearing before suspending a student for a disciplinary infraction or to notify her parents before suspending the student and busing her to an empty home in a distraught condition where she committed suicide. The Seventh Circuit had ruled (295 F.3d 701) that school officials provided sufficient due process when it notified the student, who was in the seventh grade at the time, of the basis for the disciplinary action being taken and gave her a chance to tell her side of the story. The student was given a three-day suspension for having cigarettes in her locker at school. Plaintiffs had complained that the student's fragile emotional condition, caused or significantly enhanced by the school official's conduct, had created a constitutional duty to notify her parents and to not bus her to an empty home in her distraught condition. However, the court determined that the school had not created a risk that the student would commit suicide and therefore had no duty to protect her after school hours. Even if the school had created this risk, the court added that the school would not be liable for the student's suicide simply because it directed her to take the bus home. The court found that the school would have taken the same action even if the student had not been suspended. The court was unpersuaded by the fact that the school had made arrangements for another student disciplined for the same violation to be picked up by the student's parent because the school had been able to contact this parent and make these arrangements. In contrast, the locker search that led to the first student being disciplined did not occur until school was almost over, the dismissal bell rang before parents could be contacted, and the student willingly took the bus home. *Martin v. Shawano-Gresham School District*, No. 02-507 (U.S. 2002); 71(21) U.S. Law Week 3386 (Dec. 3, 2002).

Review Denied of Ruling that Insanity Defense Not Compromised by Forcible Administration of Psychotropics

The U.S. Supreme Court refused to review an unpublished ruling by the Texas Criminal

Court of Appeals that focused on the insanity defense. The lower court held that a defendant was not prevented from presenting an effective insanity defense by the fact that (1) he had been forcibly administered psychoactive medication during his first trial or (2) his illness was in remission during his second trial. The lower court concluded that a capital defendant's demeanor at trial is not relevant to an insanity defense because the defense addresses the defendant's state of mind at the time of the offense. The court below also rejected the defendant's argument that the medication at the first trial prevented him from confronting witnesses. *Shisinday v. Texas*, No. 01-1267 (U.S. 2002); 70(46) U.S. Law Week 3737 (2002).

Review Denied of Ruling that Permits Suit to Proceed that Alleges Death of Inmates Linked to Failure to Meet Psychiatric Treatment Needs

The U.S. Supreme Court refused to review a lower court opinion that reinstated a suit based on the death of individuals who had been arrested and died during a manic outburst purportedly linked to their need for psychiatric treatment. The Ninth Circuit ruled (290 F.3d 1175) that a county policy that prevented medical or psychological evaluation of combative arrestees despite the county's knowledge that individuals in urgent need of psychiatric treatment can be combative satisfied the "deliberate indifference" standard required to establish municipal liability under the federal constitution. *Washoe County, Nev. v. Gibson*, No. 02-560 (U.S. 2003); 71(26) U.S. Law Week 3461 (Jan. 14, 2003).

Review Denied of Ruling that Mental Health Co-Workers Can Be Liable for Failing To Help Patient Being Assaulted by Employee

The U.S. Supreme Court declined to review a federal appeals court decision that found that state mental health care workers who failed to come to the aid of a patient being punched by a co-worker could be held liable under federal law (42 U.S.C. § 1983) for violating the patient's civil rights. The First Circuit (264 F.3d 86) had ruled that the workers were subject to liability for failing to prevent the co-worker's use of excessive force. The First Circuit also determined that the patient's psychological injury, even if there was no physical injury, was a sufficient basis for a civil rights claim. *Rennie v. Davis*, No. 01-1144 (U.S. 2002); 11(20) BNA's Health Law Reporter 745 (2002).

Review Denied of Ruling that Upheld California's Retroactive Sex Offender Registration Requirement

The U.S. Supreme Court refused to hear an appeal of a California Court of Appeal opinion (4/28/00, unpublished) that upheld a registration requirement imposed upon sex offenders. The lower court held that the retroactive application of a statute that increased the waiting period before a former prisoner could apply for relief from the registration requirement and that made individuals convicted of certain crimes ineligible for such relief was permissible. *Harper v. California*, No. 01-1302; 70 U.S. Law Week 3689 (2002).

Review Denied of Ruling that Permits Suit Challenging Denial of Permit for Facility for Recovering Alcoholics

The U.S. Supreme Court refused to review a decision by the Second Circuit (294 F.3d 35) that permitted a suit to proceed that challenged the denial of a special use permit for residential facilities for recovering alcoholics. *City of Middletown v. Regional Econ. Community Action*, No. 01-1624, 123 S. Ct. 74 (Oct. 7, 2002).

Cases in Other Federal Courts

Use of Psychiatric Testimony to Establish Defendant Lacked Mens Rea Supported by Fourth Circuit But Not Under the Circumstances Presented

The Fourth Circuit, in an opinion that is binding in Virginia but addresses federal and not state law, clarified the use of psychiatric testimony to establish that a defendant lacked the specific intent (i.e., mens rea) needed to convict a defendant of a specific intent crime. The defendant had been charged with mailing threatening communications to his former girlfriend, the mother of his two children. One of the elements of this crime is that the defendant intended to mail the letter, an intent the defendant claimed he lacked. In support of this position, he obtained a summary letter from a psychiatrist that the jail where the defendant was housed had discontinued the defendant's medication shortly before he sent the first in his series of letters to the former girlfriend. It was the psychiatrist's opinion that although there was no clear indication that the defendant's psychiatric symptoms around the time of the offense were of sufficient severity to totally negate his ability to understand the nature, quality, or wrongfulness of his actions, it was clear that he was quite psychiatrically impaired during the time in question. Consistent with this opinion, the defendant did not attempt to raise an insanity defense but argued that the psychiatrist should have been allowed to testify along these lines to establish that the defendant lacked the requisite specific intent.

The Fourth Circuit, however, upheld the exclusion of this testimony. The Fourth Circuit did note that the circuits addressing this question seem to agree that psychiatric testimony regarding a defendant's mental condition can be used to disprove specific intent for specific intent crimes even if an insanity defense is not being pursued, a position the Fourth Circuit was inclined to adopt. However, the court added that cases when psychiatric evidence is offered purely to rebut the government's evidence of specific intent will be rare. Furthermore, in this case, the court concluded, the psychiatrist's opinion was not relevant because it did not address the defendant's intent to mail the letters but only that the defendant was not taking his medication at the time of the offenses and thus was not able to exercise control over his actions or reflect on the possible consequences of his actions. *United States v. Worrell*, No. 01-4857 (4th Cir. 2002); 17 Virginia Lawyers Weekly 738 (Dec. 30, 2002).

Medications Had Insufficient Effect to Invalidate *Miranda* Waiver

The Fourth Circuit, which encompasses and provides legal precedent for Virginia, ruled that even though a defendant was on pain killers and narcotics such as morphine when questioned by a police officer who gave him his *Miranda* warnings, defendant's statements were properly admitted at trial because the record did not establish the medications' effect on defendant and whether they affected his judgment, rendered him incapable of making an informed decision, or left him incapable of thinking rationally. *United States v. Cristobal*, No. 01-4505 (4th Cir. 2002); 17(2) Virginia Lawyers Weekly 31 (2002).

Police Officer Not Entitled to Qualified Immunity for Excessive Force Claim by Mentally Disabled, Confused Older Man

The Fourth Circuit ruled that a police officer who responded to a call to assist a family in dealing with a husband who suffered from depression and dementia was not entitled to qualified immunity from the husband's excessive force claim under 42 U.S.C. § 1983. The police officer had sprayed the husband with pepper spray and shot him three times. The court concluded that there was considerable evidence that a reasonable officer in the defendant's position would not have perceived that the husband was armed. The officer testified that immediately before

the shooting the husband's hands were obviously empty and that he never reached into his pockets or clothing. The court found that the evidence could be taken to indicate that the officer shot a mentally disabled, confused older man, obviously unarmed, who was stumbling toward the bathroom in his own house with pepper spray in his eyes, unable to threaten anyone. *Clem v. Corbeau (Motz)*, No. 01-1799 (4th Cir. 2002).

Federal Government Permitted to Take Property of Deceased Medicaid Patients

The Fourth Circuit upheld a law allowing the federal government to take the property of deceased Medicaid patients to recoup health-care costs. *West Virginia v. United States Dep't of Health & Human Servs.*, No. 01-1443 (4th Cir. 5/7/02).

IDEA Claim for Year-Round Educational Services for Autistic Child Denied

The Fourth Circuit, in a case of first impression, rejected a claim by parents who wanted their public school system to pay for summer services for their autistic daughter. The parents had sued under the Individuals with Disabilities Education Act (IDEA), asserting that their daughter's educational achievements would likely regress without these extended services. The court held that the parents did not have to show that the child had actually regressed in her abilities without such assistance, asserting that such would require a "Hobson's choice" on the part of the parents. However, the court determined that "likely regression" was not a sufficient basis for mandating such services because all students, disabled or not, may regress to some extent during lengthy breaks from school. Instead, to prevail the parents must prove that the child's gains during the school year would be "significantly jeopardized" without such services. To make this showing, the parents could use expert testimony based on a professional individual evaluation to forecast the likelihood that the child's educational gains would not be maintained without year-round services. But, in this instance, the parents had only conflicting supporting evidence and it failed to make their case for additional funding. *MM, a Minor v. School Dist. of Greenville County*, No. 01-1364 (4th Cir. 2002); 17(15) Virginia Lawyers Weekly 345, 348-49, 364 (2002).

Claim Dismissed Involving Accident Involving Driver Under Influence of Prescribed Pain Medication

The Fourth Circuit held that plaintiffs in North Carolina failed to state a claim against the Veterans Administration Hospital under the Federal Tort Claims Act. Plaintiffs were injured in an auto accident when the other driver was under the influence of pain medicine prescribed by the defendant and alcohol and claimed that the defendant's employees had negligently dispensed narcotics to the driver and that this caused their injuries. The court noted that it was not certain whether North Carolina courts would allow a suit by a third party against a hospital for negligently providing narcotics to a driver but found that, even if they did, plaintiffs had failed to offer evidence that the hospital knew or should have known the driver was under the influence of alcohol at the time it dispensed the pain medication and would shortly thereafter drive an automobile, and thus failed to state a cause of action. *Iodice v. United States*, No. 01-1640 (4th Cir. 2002); 16 Virginia Lawyers Weekly 1265 (2002).

Proposed Summer School Services for Autistic Child Found Sufficient

The Eastern District of the U.S. District Court in Virginia found that a school board's proposal for summer services to a seven-year-old boy who suffers from a high-functioning form of autism passed muster under the IDEA. The court determined that even though the board's plan did not offer as much individual therapy as the parents desired, it called for "reasonable progress" toward certain educational goals and was not required to seek "mastery" of all skills, and was based on the recommendations of the school therapist who worked most extensively

with the child. The court discounted the testimony of the parents' experts for failing to visit the child's program, for not observing the child in the school environment and with his peers, for not reviewing the entire school file, and for not talking with the teachers, assistants, principal, or the child's other service providers. *Faulders v. Henrico County Sch. Bd. (Williams)*, No. 3:01cv519 (E.D. Va. 2002).

Negligence Suit Against College for Failing to Prevent Freshman's Suicide Can Include Punitive Damages Claim

The representative of a deceased student was permitted by the Western District of the U.S. District Court in Virginia to amend its negligence suit against a college and its dean to include a claim for punitive damages. The complaint alleges that the defendants were negligent in failing to act on specific warnings that a particular college freshman, who previously had attempted to hang himself, intended to harm himself again that evening. According to the complaint, the dean left the student alone in his room and went to another floor to speak to the student's girlfriend. During this conversation, the girlfriend became aware of a recent e-mail from the student instructing the recipient of the e-mail to tell the girlfriend that "he was sorry and that he [the student] loved her." According to the plaintiff's complaint, the dean was told about the message but did not go to the student's room to investigate, notwithstanding his knowledge of the student's earlier suicidal statements and action and the fact that the dean had assumed control of the situation. The court ruled that punitive damages could be awarded if reckless indifference or conscious disregard in failing to act on the information provided could be shown at trial. *Schieszler v. Ferrum College*, No. 7:02cv00131 (W.D. Va. 2002); 17 Virginia Lawyers Weekly 740 (Dec. 30, 2002).

Ban on Television Viewing as Condition of Probation Impermissible

The Second Circuit ruled that a federal trial court could not impose a ban on television viewing as a condition of probation for a defendant convicted of credit card theft. The condition had been imposed to foster self-reflection by the defendant and to decrease the likelihood of recidivism. The condition, which would have lasted for ten months of home detention, was found to be inconsistent with the U.S. Sentencing Guidelines. The Second Circuit concluded that the condition was insufficiently related to the defendant's pattern of increased criminality. *United States v. Bello*, No. 01-1682 (2d Cir. 2002); 71(18) U.S. Law Week 1287-88 (Nov. 12, 2002).

Eighth Circuit Rules Officials Can Force Prisoner to Take Antipsychotic Medication to Make Sufficiently Sane to Execute

The Eighth Circuit, on a six-to-five vote, has ruled that officials can force a prisoner on death row to take antipsychotic medication to make him sane enough to execute. Without the drugs, the Arkansas prisoner could not be put to death because the U.S. Supreme Court has prohibited the execution of the insane. The majority opinion determined that the drugs were generally beneficial to the prisoner and the courts did not need to consider the ultimate result of medicating the prisoner. The court reasoned that the inmate's interest in being free of unwanted medication must be balanced against society's interest in punishing criminal offenders. The inmate killed a grocery store clerk in 1979 and was sentenced to death that year. His mental health began to deteriorate in 1987 and he reportedly believes that his prison cell is possessed by demons and that a prison doctor has implanted a device in his ear. The dissent stated that the majority's holding presented doctors with an impossible ethical choice: treat the prisoner to afford him short-term relief that ultimately results in his execution or leave him untreated but condemned to a world filled with disturbing delusions and hallucinations. *Singleton v. Norris*, No. 00-1492, 2003 WL 261795 (8th Cir. 2003); Adam Liptak, *State Can Make Inmate Sane Enough to Execute,* New York Times, Feb. 12, 2003, at 1.

Suit to Compel Medicaid Agency to Pay for Home-Based Mental Health Services for Mentally Ill Children Can Proceed

The First Circuit ruled that parents and guardians of mentally ill children can pursue a lawsuit against the Massachusetts Medicaid program to obtain broader health coverage. The parents or guardians of nine Medicaid-eligible children, claiming to represent thousands of children in the state with severe psychiatric or behavioral disorders, are seeking to compel the state Medicaid agency to pay for home-based mental health services rather than rely exclusively on institution-based psychiatric care. The lawsuit charges that the failure to provide these services violates the Medicaid law's guarantee to cover "early and periodic screening, diagnosis and treatment" for both physical and mental illnesses. Massachusetts had argued that its right to sovereign immunity, contained in the Eleventh Amendment, barred the lawsuit and that it already provided a "fair hearing" for protests of coverage denial. The First Circuit rejected this argument and concluded that the Eleventh Amendment allows federal courts to issue an injunction that requires state officials to adhere to the requirements of federal law and that a fair hearing requirement did not foreclose other remedies. *Rosie D. v. Swift*, No. 02-1604 (1st Cir. 2002); 11(45) BNA's Health Law Reporter 1613-14 (Nov. 14, 2002).

Lawyer Cannot Be Sued for Malpractice That Causes Client to Commit Suicide

The Seventh Circuit ruled that a lawyer whose alleged malpractice causes a client to commit suicide cannot be sued for legal malpractice. The lawyer's client had been involved in a bitter dispute with the Internal Revenue Service (IRS) for over fifteen years. Hired in 1996, the tax attorney had been warned by his client's therapist that his client suffered from severe depression and had suicidal tendencies. The IRS had rejected his client's latest submission, submitted at the attorney's direction, and scheduled yet another audit, with the client committing suicide just before the audit. The client's wife claimed that the attorney had given her husband bad tax advice, this poor advice led to the IRS's decision to perform an audit, and this scheduled audit caused severe psychological harm that ultimately led to his suicide. The court ruled that although Illinois law requires psychiatrists to protect suicidal patients from self-harm, a similar duty does not extend to attorneys. The court reasoned that lawyers, as non-medical professionals, cannot be expected to anticipate the mental health consequences of their legal advice and to screen clients for suicidal tendencies. *Cleveland v. Rotman*, No. 01-2488 (7th Cir. 2002); 71(5) U.S. Law Week 1067 (2002).

License to Prescribe Drugs Cannot Be Revoked Because Physician Recommended Medical Marijuana

The Ninth Circuit has concluded that the federal government cannot revoke a physician's federal license to prescribe drugs or begin an investigation to accomplish that purpose simply because the physician recommends the use of medical marijuana to a patient. The federal policy came in response to a 1996 California voter initiative that decriminalized the use of marijuana for medical purposes, a position that eight other states have adopted. The Ninth Circuit ruled that such revocations strike at core First Amendment freedom of speech interests of doctors and patients. *Conant v. Walters*, No. 00-17222 (9th Cir. 2002); 71(17) U.S. Law Week 1274-75 (Nov. 5, 2002).

Zoning Permit Denial for Methadone Clinic Violates ADA

The Sixth Circuit held that a city's denial of a zoning permit to a group that sought to establish a methadone clinic for recovering drug addicts violated the Americans with Disabilities Act (ADA). The court determined that the city's fear that the potential clients would increase criminal activity in the area was based on the unfounded fear and stereotype that recovering drug addicts necessarily attract increased criminal activity. *MX Group Inc. v. Covington, Ky.*, No. 00-6305

(6th Cir. 2002); 71(4) U.S. Law Week 1063 (2002).

Families of Mass Shooting Victims Cannot Recover from "Densensitizing" Media

The Sixth Circuit held that families of victims of a high school mass shooting spree could not pursue a tort claim under Kentucky product liability law against distributors of video games, movies, and Internet sites whose content allegedly "desensitized" the shooter to violence. The court concluded that the shooter's actions were not reasonably foreseeable to the manufacturers of these media and thus they owed no duty of reasonable care to prevent harm to the victims. In addition, the court noted that the theory that the defendants' works were defective products was flawed in that the victims were not the users of the works or even bystanders injured by the works themselves. *James v. Meow Media Inc.*, No. 00-5922 (6th Cir. 2002); 71(7) U.S. Law Week 1115-16 (2002).

Psychiatric Hospital Not Eligible for Exemptions from Medicare Payment Limits

The District of Columbia Circuit ruled that a facility that had gradually converted from a general acute care hospital with a psychiatric unit to a free-standing psychiatric hospital did not qualify for exemptions from Medicare payment limits. *P.I.A. Michigan City Inc. v. Thompson*, No. 00-5455 (D.C. Cir. 2002); 11(25) BNA's Health Law Reporter 911-12 (2002).

Employee Refusing to Take HIV Blood Test Can Be Fired Under ADA

A federal district court in New York has ruled that a psychiatric hospital employee could not sue under the Americans with Disabilities Act (ADA) after he was fired for refusing to take a blood test for HIV and AIDS. The employee and a nurse were attempting to medicate a ten-year-old patient. In the process of restraining the patient, the nurse inadvertently pierced the employee's skin with the same needle she then used to inject the patient. The hospital ordered the blood test to determine whether the patient had been exposed to HIV or AIDS. The court found that the employee had failed to show that he suffered from a disability or that the hospital regarded him as having a disability as required to invoke the protections of the ADA. *Kressler v. Four Winds Hospital*, No. 01 CIV. 10993 (S.D.N.Y. 2002); 11(25) BNA's Health Law Reporter 899 (2002).

Cases in Virginia State Courts

Efforts to Make Defendant Competent to Stand Trial by Involuntarily Administering Psychotropic Medication Upheld

The Virginia Supreme Court ruled that a writ of habeas corpus is not available to a defendant resisting the state's efforts to make the defendant competent to stand trial by administering psychotropic medication over the defendant's objection. The court determined that a writ of habeas corpus in Virginia is only available when a ruling favorable to the defendant would result in the immediate release of the defendant. Because a ruling in this case would not result in such a release but only limit the means the state could use to attempt to restore the defendant's competence to stand trial, the court concluded that such a writ was not a mechanism that the defendant could use to block the involuntary administration of this medication. The court also noted the defendant had already received an evidentiary hearing from the circuit court on whether forcible treatment was essential in his case, the circuit court had the authority to order the defendant's forcible medication, the circuit court had used the standards and procedures required by the Virginia Code and the U.S. Supreme Court in its decision of *Riggins v.*

Nevada (1992), and the circuit court had properly determined that restoration could not be accomplished by means other than the use of antipsychotic medication, that lesser intrusive alternatives had no effect and were not appropriate, and that without this treatment the defendant presented a danger to others. *Murphy v. Reinhard*, No. 020389 (Va. 2002); DMHL thanks Jane Hickey, Senior Assistant Attorney General, for providing a copy of this opinion.

Defendant's Mental State at Time of Offense Irrelevant Absent Insanity Defense

The Virginia Court of Appeals rejected a mentally retarded defendant's argument that his deficient mental capacity and alleged intoxication negated his ability to reason and should therefore reverse his second-degree murder conviction. The court concluded that evidence of a criminal defendant's mental state at the time of the offense is, in the absence of an insanity defense, irrelevant to the issue of guilt. The court added that voluntary intoxication is not an excuse for any crime. *Arnold v. Commonwealth (Humphreys)*, No. 0143-01-2 (Va. Ct. Ap. 2002).

Testimony of Child Witness via Closed-Circuit Television Upheld

The Virginia Court of Appeals upheld the use of closed-circuit television to obtain the testimony of a six-year-old child who was the purported victim of criminal sexual abuse by her father. Under the Virginia Code, such an arrangement is permitted if it can be shown that testifying in court will cause the witness "severe emotional trauma." The court rejected the defendant's argument that the evidence only showed the child's "nervousness" about testifying. The court noted that an expert witness, who had met with the child, testified that the child "had a very difficult time talking about court," did not want to "talk" in front of her father, became nervous, distracted, and threw things around the room when discussing "talking" in front of her father, and became nervous when the expert pretended a father doll was bathing a baby doll. The court also noted testimony regarding various characteristics of the child that made her more vulnerable to emotional harm from testifying, including that she was not a verbal child, had a short attention span, possibly suffered from attention deficit disorder, did not deal with stress well, and was already exhibiting a poor appetite. The court also cited the victim's age, that her father was the accused perpetrator, and expert testimony that the child would likely feel less apprehension about testifying on closed-circuit television. *Parrish v. Commonwealth*, No. 1113-01-1 (Va. Ct. App. 2002); 17(11) Virginia Lawyers Weekly 263 (2002).

Worker's Compensation Claim Based on Post-Traumatic Stress Disorder Rejected

The Virginia Court of Appeals rejected a worker's compensation claim based on alleged post-traumatic stress disorder. Claimant asserted that she suffered trauma when a supervisor at her new job burst into the office yelling, waving his arms, and asking about another employee. The court noted that post-traumatic stress disorder is a compensable injury if caused by either a physical injury or an obvious sudden shock or fright arising in the course of employment. However, the court ruled that the claimant had not proven that she suffered the kind of shock or fright that would cause her on-going psychological impairment justifying workers' compensation benefits. The court noted that the loud conversation was not directed at the claimant, was not verbally or physically threatening, and was not out of the ordinary experience that claimant encountered as a social worker. *Phillips v. RADA/Rural Area Development Ass'n Inc.*, No. 2129-02-3 (2002); 17 Virginia Lawyers Weekly 844 (Jan. 27, 2003).

Juvenile's Waiver of Fifth Amendment Rights Accepted Despite Prior Finding of Incompetence to Stand Trial

The Richmond Circuit Court found that a juvenile's waiver of his Fifth Amendment rights was knowing, intelligent, and voluntary and thus his statements could be admitted at trial.

The court so ruled even though the juvenile's guardian was not present at his interview and the juvenile had been found incompetent to stand trial in January 2002, had a poor academic record, and had no prior contact with the criminal justice system. The court noted the juvenile's guardian had agreed to the interview and waited outside the interview room, the juvenile was not handcuffed, the length of the interview was short (under a half hour), questions were asked in a normal tone of voice and simple language was used, the detective paused after each question to make sure the juvenile understood before asking the next question, the detective made no threats and did not use coercion, the juvenile appeared alert and attentive, and the detective believed that the juvenile understood the questions.

The court also found that the juvenile did not have a significant "mental defect." The court determined the juvenile's academic deficiency did not amount to a mental defect.

Finally, although the juvenile had been previously found to be incompetent to stand trial, the court noted he had been restored to competency a month later and the finding of incompetence was based on a lack of understanding of the roles of courtroom personnel, trial procedures, and the meaning of burden of proof and reasonable doubt. The court concluded this ignorance of the trial process did not pertain to the juvenile's ability to understand *Miranda* warnings. *Commonwealth v. Hodges*, No. 02-1075-F (Va. Circ. Ct. 2002); 17 Virginia Lawyers Weekly 724 (Dec. 23, 2002).

Parental Rights of Woman with Paranoid Schizophrenia Not Terminated

The Richmond Circuit Court refused to terminate the parental rights of a woman who suffers from paranoid schizophrenia. The court determined that the criteria for termination in Virginia had not been met, namely, that the evidence did not show that the mother had been unable or unwilling to remedy the condition that led to her child's continued placement in foster care, despite efforts by social or other service agencies toward that end, or that it would be in the child's best interest to terminate the mother's parental rights.

The court noted that the mother initiated and sought the assistance of the authorities to look after her child when her hospitalization was imminent and she had no relatives to assist her. Furthermore, the mother had cooperated with efforts by the Department of Social Services, although at times she was unable to comport herself as would be expected of a mother of a very young child. The court found that much of the mother's inability to improve her mental illness was due to her pregnancy and the impact this had on her ability to regulate the intake of her medicines. The court added that severe mental illness was not a prima facie basis for a finding of conditions of termination. *In re Pendleton*, No. CJ01-CH-1718 (Va. Circ. Ct. 2002); 17 Virginia Lawyers Weekly 746 (Dec. 30, 2002).

Hospital Not Liable for Release of Individual with Mental Illness

A Virginia judge upheld a jury verdict that found a health care corporation not liable for the alleged "negligent release" of plaintiff's mentally ill son. After his release, the son had driven his car through the wall of the family's home and beaten his mother to death with a baseball bat. The closing argument by defendant's attorney had asked the jurors to consider their verdict to be a vote on the quality of nursing care in the county and to consider the impact of their verdict beyond the courtroom. Plaintiff asserted that this argument raised matters outside the evidence and was prejudicial. The court responded that there had been evidence introduced at trial that mental health professionals face competing concerns when an adult psychiatric patient wants to leave the hospital against medical advice and that they must balance the benefits of seeking involuntary commitment against the patient's right to refuse further treatment.

Even if the argument was impermissible, the court ruled that defendant was immune from liability because no evidence was introduced that the son communicated to any of the hospital nurses or physicians a specific and immediate threat to cause serious bodily injury or death to an identified or readily identifiable person or that the son had the intent and ability to carry out any threat immediately or imminently as required by Virginia Code § 54.1-2400.1. Evidence that a family friend told a social worker at another mental health center not affiliated with the defendant that the son thought a compact disk was telling him to kill his father when his father at the time was out of the country and not expected to return in the near future was not sufficient to meet this requirement. *Head v. Inova Health Care,* No. 189605 (Fairfax Cir. Ct. 2001); 17(4) Virginia Lawyers Weekly 17 (2002).

Medical Malpractice Action Against Psychiatrist Settled

A medical malpractice suit filed in Fairfax County against a psychiatrist was settled with the psychiatrist agreeing to pay plaintiff $435,000. After an initial office visit in early 1997 to obtain treatment for alcoholism, the psychiatrist diagnosed the then fifty-year-old plaintiff as severely depressed and prescribed benzodiazepine. The plaintiff claimed this prescription continued uninterrupted even though the psychiatrist recognized the plaintiff had become dependent upon and was abusing the drug and continued to abuse alcohol. The plaintiff's experts stated the diagnosis of major depression after one office visit was unjustified and, therefore, the prescription of benzodiazepine was improper. They also stated this prescription was a breach of the standard of care given the plaintiff's history of alcoholism, his statements of current alcohol use, and clear evidence he was abusing the prescription. The plaintiff contended this breach resulted in numerous injuries, including between November 1998 and July 1999 a single-vehicle automobile accident, a fall down stairs that resulted in an amputation of his right leg above the knee, and a suicide attempt. The plaintiff's experts stated the plaintiff would not have suffered any of these injuries but for the fact the psychiatrist continued to prescribe benzodiazepine and failed to treat the plaintiff's alcoholism. 17(11) Virginia Lawyers Weekly 265 (2002).

Physician at State Psychiatric Hospital Ordered Reinstated

A Virginia Circuit Court judge has ruled that a physician who was fired by a state psychiatric hospital can be reinstated by his immediate supervisor over the objection of the hospital director and the state agency that oversees the hospital. The physician, an internist at Western State Hospital, had received three "Group II" disciplinary notices, with dismissal warranted on the accumulation of two such notices. The physician contested the last two notices pursuant to the Virginia Code, which provides for up to three levels of management review. At the first level of review, the physician's immediate supervisor, who was also a physician, called for reversal of the two disciplinary notices being challenged and concluded that the physician should be reinstated. However, the next two levels of management review, the medical director and the overall facility director, overturned the supervisor's reinstatement ruling. Four more hearings were held and all upheld the termination.

Upon appeal to the Circuit Court, the judge ruled that under the Code each level of management review had the authority to provide the employee with a remedy and thus the supervisor could reinstate the physician in his job notwithstanding that the next two levels of management review disagreed with this outcome. The judge noted that this had the effect of giving an immediate supervisor the last word on discipline and more authority than an agency director. However, the judge said this result was dictated by the Code as written. The Office of the Attorney General for Virginia indicated it would appeal the ruling and it has been suggested that an administrative or legislative change might follow that would restore greater authority to

agency heads. The statutory scheme applies to all non-exempt, non-probationary state employees. *Horner v. DMHMRSAS*, No. VLW 002-8-193 (Staunton Cir. Ct. 2002); 17(10) Virginia Lawyers Weekly 233 (2002).

Nursing Home Breached Duty to Provide for Safety of Disabled Resident

An arbitrator in Virginia awarded $750,000 to a disabled sixty-year-old female resident of a nursing home who alleged she had been raped by an employee of the nursing home. She claimed the nursing home had been negligent in the hiring, retention, and supervision of the employee and had breached its duty to provide for her safety. 17(2) Virginia Lawyers Weekly 52 (2002).

Cases in Other State Courts

Informed Consent Invalid When Obtained After Inaccurate Disclosure of Physician's Credentials and Experience

The New Jersey Supreme Court ruled that a physician's misrepresentations about his credentials and experience at the time he obtained consent to perform a medical procedure can provide the basis for a lawsuit by his patient that the physician failed to obtain informed consent for the procedure. The court concluded that even if the physician has accurately portrayed the risks associated with the procedure itself, significant misrepresentations can affect the validity of any consent that is ultimately obtained. The court did caution, however, that (1) any misrepresentation or exaggeration would have to significantly increase the risk of the procedure and (2) this increased risk would have to cause a reasonably prudent person, not just this patient, to refuse the treatment. *Howard v. University of Med. & Dentistry of New Jersey*, No. A-100 (N.J. 2002); 71(3) U.S. Law Week 1043 (2002).

Psychiatric Hospitals Immune from Liability for Psychiatric Evaluation Detention

A California Appeals Court held that psychiatric hospitals are immune from lawsuits claiming false imprisonment and malpractice when there was probable cause to believe involuntary detention for evaluation and treatment of a person with a mental disorder is necessary to protect the individual or others. Although the 72-hour treatment and evaluation provisions of the California Lanterman-Petris-Short Act only confer immunity on "individuals," the court concluded that the purpose of the provision would be defeated if immunity was given to the nurses, physicians, psychiatrists, and social workers of a hospital but not the hospital itself and thus the immunity encompasses institutions and agencies with which health care professionals are associated, affiliated, or employed. In the case before it, the court concluded that probable cause was present when the individual told her treating physician that she was under "great stress" and had "thoughts of suicide, was depressed, wanted to sleep for a week, and was very tired and in pain," and the physician believed the individual "had multiple medications at home in lethal amounts." *Cruze v. National Psychiatric Servs. Inc.*, No. B154191 (Cal. Ct. App. 2003); 12(3) BNA's Health Law Reporter 97-98 (Jan. 16, 2003).

Medical Malpractice Can Form Basis for Suit Under Adult Protective Services Act

The Arizona Supreme Court in a case of first impression ruled that negligent acts, including medical malpractice, could be considered abuse under the Arizona Adult Protective Services Act. The case centers on the care provided Norma McGill who died at age sixty-four. McGill had a long history of mental illness and had been placed in behavior facilities for about thirty years. The disputed cause of her death was listed as cardiac arrest due to neurotoxicity secondary to medication and breast cancer. Her estate sued her primary care physician, a treating

psychiatrist, and a company providing behavior and mental health services. The plaintiffs based their claim under the Adult Protective Services Act on the defendants' alleged malpractice in caring for McGill. A lower court had ruled that something more than malpractice must be shown for liability under this Act. The Arizona Supreme Court, however, ruled that negligent acts did not always have to occur over a period of time to constitute abuse or neglect under the Act, that suits under the Act were not limited to intentional acts, and that medical malpractice could form the basis for a suit. *In re Norma McGill v. Albrecht*, No. CV 99-20030 (Ariz. 2002); 11(47) BNA's Health Law Reporter 1701 (Dec. 5, 2002).

Undertreating Pain Can Be Elder Abuse

A California judge ordered a doctor to pay $893,888 in damages, attorneys' fees, costs, and interest to the family of a deceased lung cancer patient who alleged that undertreatment of pain amounted to elder abuse. *Bergman v. Eden Medical Center*, No. H205732-1 (Cal. Super. Ct. 4/9/02); 11(24) BNA's Health Law Reporter 877 (2002).

Chicago Can Proceed with Lawsuit Against Gun Manufacturers

An Illinois Appellate Court has permitted the city of Chicago to proceed with a lawsuit against gun manufacturers. The court ruled that the city stated a viable public nuisance claim under Illinois law. The city alleges that the firearms industry creates a public nuisance by channeling large numbers of firearms into suburban jurisdictions with lax gun control policies, even though gun manufacturers know buyers traffic these guns in Chicago. The court concluded that these allegations sufficiently invoked the public's right to be free from unreasonable jeopardy to its health, welfare, and safety and reasonable apprehensions of danger to person and property. The court rejected the defendants' argument that they could not be held liable for the criminal misuse of their products. *Chicago v. Beretta U.S.A. Corp.*, No. 1-00-3541 (Ill. App. Ct. 2002); 71(20) U.S. Law Week 1328 (Nov. 26, 2002).

Other Legal Developments

Mental Health Parity Requirements in Group Health Insurance Extended

At the end of 2002, President Bush signed legislation that provided a one-year extension of a 1996 act that set mental health parity requirements in the group health insurance market. The act, set to expire on December 31, 2002, requires group health plans to equalize annual and lifetime dollar limits for mental health benefits when compared to other medical and surgical benefits.

Sen. Pete Domenici (R-N.M.) and other lawmakers are expected to continue their efforts to expand the mental health parity law to close what they contend are loopholes that allow health insurers to discriminate against people with mental health conditions by setting higher copayments, deductibles, and coinsurance payments for mental health services. Opponents counter that such legislation would significantly increase health care costs. 11(47) BNA's Health Law Reporter 1686 (Dec. 5, 2002).

California Agrees to Pay for Alleged Improper Submissions of Medicaid Claims

California and Los Angeles County agreed to pay the United States $73.3 million to resolve allegations that they violated the False Claims Act by submitting Medicaid claims for services to individuals who did not qualify for coverage under Medicaid. The government alleged that the state and county billed Medicaid for services provided to minors when they had no basis for concluding the minors qualified

financially for Medicaid services. The services included drug and alcohol abuse and mental health services. 11(26) BNA's Health Law Reporter 939 (2002).

Psychiatric Hospital Required to Better Serve Its Hearing Impaired Patients

A settlement announced by the Department of Justice requires a psychiatric and substance abuse hospital in Connecticut to pay $25,000 to an individual and adopt measures to serve its hearing impaired patients. The settlement requires the hospital to participate in a statewide on-call system that ensures around-the-clock availability of sign language and oral interpreters. The hospital must also provide for relevant employee and volunteer training. *In re Silver Hill Hospital*, DOJ, No. 202-14-44, *settlement announced* 6/3/02; 11(25) BNA's Health Law Reporter 913 (2002).

Alaska Public Psychiatric Hospital Fined for Exposing Employees to Workplace Violence

In what has been characterized as an "extremely rare" action, the only public psychiatric hospital in Alaska has been cited and fined by that state's worker safety agency for allowing employees to be exposed to workplace violence in the form of assaults by patients. The seventy-four-bed facility admits approximately 1,500 patients per year and cannot, by law, turn away patients. It reportedly frequently operates over census, is addressing patients that are more ill than in years past, and faces the same nationwide shortage of nurses as other hospitals. An inspection found that the hospital reported thirty-three incidents resulting in a lost time injury in 2000, of which 85 percent were due to uncooperative or combative patients. Among required remedial steps are greater employee participation in efforts to keep workers safe. 11(34) BNA's Health Law Reporter 1225-26 (Aug. 22, 2002).

Medical Malpractice Settlements Increasingly Accessible to Public

The California Medical Board joined a growing trend that has a number of states making information publicly available about medical malpractice settlements, in some cases via the state medical board's Web site. Traditionally, such information has been sealed and made unavailable to the public. Advocates of giving the public access to this information argue that it will better equip members of the public to choose their physicians wisely.

Critics assert that doctors settle lawsuits for a variety of reasons, most of which have nothing to do with culpability, and thus this information provides no insight into a physician's competence. They add that without an understanding of these other reasons for agreeing to settle, false impressions will be gained and physicians will feel compelled to resist settlements.

Virginia posts some malpractice settlement information but there are several qualifications that exempt some information from disclosure. 71(3) U.S. Law Week 2043-45 (2002).

Child Testimony by Alternative Methods Endorsed

A model statute to guide the obtaining of child witness testimony by alternative methods has been approved by the National Conference of Commissioners on Uniform State Laws. This model act, which must be enacted by the various states to have the force of law, is broader than most existing state statutes. For example, it applies to both criminal and non-criminal proceedings. The model act authorizes various alternative means for children to testify that avoids a direct courtroom confrontation between child witnesses and litigants. It also provides factors to be considered and standards to be used by courts in deciding whether to allow alternative means of testifying. 71(8) U.S. Law Week 2137-38 (2002).

Submission Guidelines

Developments in Mental Health Law encourages the submission of articles on timely and interesting topics in the area of mental health law.

The typical article is ten to fifteen pages long, without substantial footnoting. The reading audience is multi-disciplinary, typically with legal or mental health training but not necessarily both. Therefore, *Developments* seeks articles that are useful to a general audience interested in mental health law.

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Developments in Mental Health Law
Institute of Law, Psychiatry & Public Policy
University of Virginia Law School
UVA Health System Box 800660
Charlottesville, VA 22908-0660

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Restorative Justice, Therapeutic Jurisprudence, and Mental Health Courts: Finding a Better Means to Respond to Offenders with a Mental Disorder

By Sharon G. Garner* & Thomas L. Hafemeister

I. Introduction

In recent years restorative justice has resurfaced in many countries, including the United States, as a viable alternative to the traditional criminal justice system. Instead of the typical trial and sentencing, a restorative justice approach has defendants participate in a mediation circle or conference with their victims. The goal is to have the offender admit to the crime and express remorse and to have the victim respond with forgiveness. Together they then devise a plan that punishes the offender and makes amends to the victim. The sanctions for the crime are determined by those most affected by the crime in the hope that this will encourage healing in the victim and the surrounding community and remorse and reform by the offender.

An unresolved question is whether restorative justice programs are successful for only a small, select number of offenders or whether they are effective for a wide range of offenders. This article addresses one group of criminal defendants, namely, individuals with a mental disorder, for whom a restorative justice approach at first glance might seem inappropriate. However, this article concludes that this approach should encompass such offenders when their disorder is relatively stable and when they possess sufficient interpersonal skills to engage in a meaningful dialogue with their victims. The restorative justice approach promotes the psychological well-being of such offenders and their victims without undermining the social and legal goals of deterrence and retribution. In addition, this article discusses how restorative justice complements the principles of therapeutic jurisprudence and mental health courts, two

Also in this issue:

* University of Virginia, J.D., 2004. The authors thank the reviewers of this article for their helpful comments.

related innovative approaches that recognize the need for distinct treatment for this population of offenders.

II. Traditional Criminal Justice Theories and Their Impact

Criminal law, like all law, is a reflection of the society that creates it.[1] However, unlike other types of law, criminal law involves *public* law. Although the direct victim of a crime is typically a private party, crime involves more than a private injury. A crime causes "societal harm" because the injury suffered involves "a breach and violation of public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."[2] Publicly-funded attorneys, who represent the community at large, not private counsel, prosecute crimes. Victims are distanced from the criminal process so their private feelings of hurt and revenge do not discolor the proceedings. We rely on the state to prosecute suspected wrongdoers and to punish offenders by taking their life, liberty, or property.[3] Having the state pursue an offender and a jury or judge, rather then the direct victim, decide the appropriate sanction, limits the spirals of revenge and violence and enables the community to experience greater tranquility and stability.

Theories of punishment in modern criminal law center on retribution, deterrence, and incapacitation. Retributive theory assumes that human actors are responsible moral agents who are capable of making choices for good or evil.[4] Someone who breaches a societal norm is punished because it is a moral wrong to violate these norms. An offender must "pay" society for the crime by suffering punishment for the transgression.[5]

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[1] Thomas L. Hafemeister & John Petrila, *Treating the Mentally Disordered Offender: Society's Uncertain, Conflicted, and Changing Views*, 21 FLA. ST. U. L. REV. 729, 731 (1994).

[2] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 1.01 (3d ed. 2001) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1765-1769)).

[3] *Id.* § 2.01.

[4] RICHARD J. BONNIE ET AL., CRIMINAL LAW 3 (1997).

[5] *Id.* at 3 ("[T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense.") (citing 2 SIR

Deterrence theory rests on the notion that human actors perform a hedonistic calculus of pain and pleasure when choosing a course of conduct.[6] If the costs are too high, the rational person will not commit crimes. Potential offenders (including the immediate offender) are thought to be discouraged from criminal behavior when they see the consequences suffered by those who commit crimes. Unlike retribution, deterrence specifically seeks to prevent or reduce the incidents of crime.[7]

Proponents of the theory of incapacitation assert that society has the right and the obligation to take measures to protect its members from harmful behavior. If it is determined that an offender is a likely recidivist, a restraint must be imposed such as incarceration.[8] Incapacitation always "works" while the offender is in prison because he or she cannot commit new offenses in the community during this time.[9]

It is no coincidence that these theories together have created a society that imprisons more people for the purposes of crime control than any society in history.[10] During the first seventy years of the last century, the incarceration rate in the United States consistently averaged 110 prisoners for every 100,000 people.[11] In the 1970s this rate began to increase, and in the 1980s and 1990s it grew exponentially to the point that the United States now imprisons over 700 of every 100,000 people. This rate of incarceration is second highest in the world, and no other Western nation has yet to reach a rate of incarceration of over 125 per 100,000 people.[12] As a result, the United States is saddled with a flourishing punishment industry.[13]

III. Jails and Prisons: America's New Hospitals for Persons with Mental Disorders

As the United States imprisons more and more offenders, jails and prisons are becoming America's new "mental hospitals."[14] Conservative crime theories along with the backlash from deinstitutionalization have made "prisons brim with [the] mentally ill."[15] Beginning in the 1950s, new drugs on the market, such as Thorazine, allowed people with schizophrenia and other institutionalized patients to function better in the community. The United States Supreme Court decided *O'Conner v. Donaldson* in 1975, compelling state hospitals to release patients who were not "dangerous" and who could survive in the care of family and community.[16] These factors, coupled with a civil liberties movement and the financial constraints faced by the states, contributed to a decline in the population of state mental hospitals from approximately 500,000 in the 1950s to less than 100,000 today, with more reductions planned.[17] When hospitalized patients are released, however, they may return, homeless, to the streets.[18] Limited mental health funding exists for supervision, administration of medication, or community outreach programs to help patients succeed outside institutional settings.[19]

JAMES FITZJAMES STEPHEN, A HISTORY OF CRIMINAL LAW OF ENGLAND 81-82 (1883)).

[6] *Id.* at 11.

[7] *Id.* at 13.

[8] *Id.* at 22.

[9] *Id.* at 22.

[10] DENNIS SULLIVAN & LARRY TIFFT, RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES 9 (2001).

[11] *Id.* at 9.

[12] *Id.* at 9-10.

[13] *Id.* at 11.

[14] E.F. Torrey, *Jails and Prisons—America's New Mental Hospitals*, 85 AM. J. OF PUB. HEALTH 1611 (1995).

[15] Fox Butterfield, *National Report*, N.Y. TIMES, July 12, 1999, at A10.

[16] 422 U.S. 563 (1975).

[17] Jennifer Hodulik, *The Drug Court Model as a Response to "Broken Windows": Criminal Justice for the Homeless Mentally Ill*, 91 J. CRIM. L. & CRIMINOLOGY 1073, 1082 (2001).

[18] *Id.* at 1073.

[19] *Id.* at 1074-75.

Moreover, in response to rising street crime statistics, legislatures and politicians changed their policies concerning both the homeless and individuals with mental disorders. For example, Rudolph Giuliani, mayor of New York City from 1993-2002, ushered in a new policy called the "Broken Windows" approach to crime control.[20] This approach, proposed by James Wilson and George Kelling in an *Atlantic Monthly* article,[21] argues that allowing indications of disorder, such as broken windows, to remain unaddressed demonstrates a loss of public order and control in the neighborhood, breeding more serious criminal activity.[22] Because the presence of the homeless was viewed as an indicator of disorder, efforts were made to keep them out of sight. This was accomplished by sweeping the homeless population into jail by arresting them for violations of public ordinances such as "begging, sleeping, camping, sitting, lying down, loitering, or obstructing pedestrian traffic in public places."[23] Because of the large number of homeless people who also have a mental disorder, jails and prisons quickly became the new public "mental hospitals," the "primary purveyors of public psychiatric services for individuals with serious mental illness in the United States."[24]

The evidence of this is staggering. In the San Diego County jail, 14% of the 4,572 male and 25% of the 687 female inmates are on psychiatric medications.[25] The assistant sheriff claimed that they have become "the bottom-line mental health provider in the county."[26] In Seattle's King County, 160 of the 2,000 inmates are severely mentally ill. In the Los Angeles County jail system, 3,300 of its 21,000 inmates require mental health services on a daily basis. It has become "de facto the largest mental institution in the country."[27]

Until the mid-1800s and the wide-spread establishment of psychiatric facilities, it was common practice to jail individuals with a mental illness. It seems we have regressed to this practice. Needless to say, just like their 19th century counterparts, modern jails have proven inadequate to meet the needs of this group of people.[28] One commentator writes of the difficulties of housing inmates with mental illness in jails and prisons:

> Correctional institutions have rigid formal rules and even more subtle informal rules both institutionally and within the inmate population itself. Mentally ill inmates often cannot comprehend these rules. If there ever was a place where horrific paranoid delusions might really come true, it is in a prison. Mentally ill prisoners are not only inherently vulnerable to abuse, but they are also often provocatively irritating and offensive to other prisoners and prison guards. Yelling, removing clothes, throwing food, setting fires to drive demons out of the cell are not unusual behaviors for them. Attacks, rapes and dominating relationships are often regular plights of mentally ill prisoners. Suicide is also a common problem.[29]

As a result of this grim prison situation, mentally ill inmates tend to pass through a "revolving door" from homelessness to incarceration and then back to the streets with little psychological treatment.[30]

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[20] *Id.* at 1076.
[21] James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.
[22] Hodulik, *supra* note 17, at 1076.
[23] *Id.* at 1076.
[24] Torrey, *supra* note 14, at 1611.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 1611-12.
[28] Hodulik, *supra* note 17, at 1083.
[29] Paul F. Stavis, *Why Prisons Are Brim Full of the Mentally Ill: Is Their Incarceration a Solution or a Sign of Failure?* 11 GEO. MASON U. CIV. RTS. L.J. 157 (2000).
[30] LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision*

IV. Criminal Justice System Alternatives

Because the few mental hospitals remaining do not have sufficient bed space and prisons are a harmful environment for individuals with a mental disorder, a greater understanding of the need for diversion programs is developing. Lamb and Bachrach note:

> We have begun to realize that community care may indeed hold the potential to be more humane and more therapeutic . . .; however, this promise cannot be realized unless comprehensive services for the most severely mentally disabled persons have been mandated and adequate sources have been provided to ensure the implementation of these services.[31]

A. *Mental Health Courts and Therapeutic Jurisprudence*

One response employed in several states, including Florida and California, is the establishment of mental health courts, which are similar to drug courts in their goals and operation. These courts attempt to divert offenders with a mental disorder from the prison system into treatment regimes without sacrificing the notion of criminal responsibility.[32]

Mental health courts often attempt to apply the principles of therapeutic jurisprudence,[33] a school of thought that has explored alternatives to the conventional criminal justice system. Therapeutic jurisprudence looks at the law itself as a social force that produces consequences that are sometimes therapeutic and sometimes pathogenic.[34] Therapeutic jurisprudence scholars draw upon social science research to propose the design, interpretation, and application of law that promote the psychological or physical well-being of people the law affects without sacrificing other legal and political values.[35]

Applying the principles of therapeutic jurisprudence,[36] mental health courts attempt to reduce the criminal behavior of offenders with a mental disorder by directly addressing the disorder that is causing the illegal conduct.[37] In a mental health court, a thorough hearing is conducted to determine whether the defendant is competent to participate in the proceedings. Concurrently, the judge hears expert testimony from mental health professionals to determine the defendant's mental condition and needs. He or she then assesses whether the defendant is capable of obtaining basic necessities and is likely to be violent towards him/herself or others. The judge plays a particularly active role in selecting and supervising dispositions.[38] One mental health court judge who has embraced a therapeutic jurisprudence approach has written that "the court [can] do more than just be a mere adjudicator of charges, but [can] actually take an active role in the treatment of people coming before it."[39]

Like any system, however, the mental health court system has problems ranging from its

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of Therapeutic Justice for Mentally Ill Offenders, 24 SEATTLE U.L. REV. 373, 374 (2000).

[31] H. Richard Lamb & Leona L. Bachrach, *Some Perspectives on Deinstitutionalization*, 52(8) PSYCHIATRIC SERVICES 1039, 1040 (2001).

[32] Kondo, *supra* note 30, at 403.

[33] Nancy Wolff, *Courts as Therapeutic Agents: Thinking Past the Novelty of Mental Health Courts*, 30 J. AM. ACAD. PSYCHIATRY & L. 431 (2002).

[34] Juan Dalmau Ramirez, *Inauguration Therapeutic Jurisprudence Forum of the International Network on Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 95 (1998).

[35] *Id.* at 95; Robert F. Schopp, *Integrating Restorative Justice and Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 665, 666 (1998).

[36] John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38(2) CRIM. L. BULL. 244, 257 (2002).

[37] Wolff, *supra* note 33, at 431.

[38] Kondo, *supra* note 30, at 407.

[39] *Id.* at 406-07.

expense to not encompassing those offenders who have the greatest treatment needs and are the most vulnerable within the criminal justice system. One commentator has criticized mental health courts for only accepting offenders who have committed low-level offenses, have no prior criminal histories of violence, and are willing to accept that they need treatment for, or assistance with, their mental disorder.[40] Writing about several of the problems mental health courts illicit, Nancy Wolff suggests that there are "other ways to engage the court as a therapeutic agent that will yield a better portfolio of consequences."[41]

B. *Restorative Justice Approach*

Restorative justice, somewhat like therapeutic jurisprudence, seeks to promote a holistic focus within the criminal justice system. The restorative justice model emphasizes reparation for the emotional and material loss of the victim, reintegration of the offender into the community, and the restoration of tranquility to the community.[42]

Methodologically, a restorative justice approach centers on informal decision-making, such as victim-offender mediation and family group conferencing, that directly involves the victim, the offender, and the community in developing a mutually acceptable plan for repairing the harm done by the offender. These interactions encourage emotional responses, especially a core sequence in which the offender expresses shame and remorse followed by forgiveness by the victim.[43] The expression of these emotions promotes the recovery of the victim, reduces recidivism, and reintegrates the offender into the community. Most proponents of restorative justice agree that this approach is not a useful vehicle for fact-finding or for adjudicating guilt.[44] They assert this approach should be utilized, however, when the offender is clearly responsible for the offense and when the victim and the offender voluntarily participate in the session.

Advocates of restorative justice look at crime through a "new lens" that focuses on the harm suffered by individuals, communities, and relationships, and on problems that, if not resolved, will result in future crime and a weakening of community life.[45] The traditional criminal justice approach is characterized as "invit[ing] the public and legal system to indulge the passion for revenge untroubled by moral qualms."[46] Restorative justice, on the other hand, stands for the proposition that "justice" must amount to more than punishing the guilty. Proponents assert that crime "creates obligations to make things right" and responses to crime should be aimed at "healing the wounds" caused by criminal acts.[47] Victims, offenders, and the community are viewed as the primary "stakeholders" in the process rather than the state.[48] Under this approach, the state does not have a monopoly on decision-making following criminal acts. This model seeks to restore a sense of control over events to the victims by enabling them to determine what they need physically and emotionally to repair the harm. It also attempts to restore a sense of control to the offenders because they are directly responsible to their victims to make amends for their actions.

Restorative justice is meant to promote the personal healing of all parties. Unlike conventional procedures, this approach directly addresses the needs of victims. Proponents emphasize the emotional reaction of victims to crime:

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[40] Wolff, *supra* note 33, at 431.
[41] *Id.* at 431.
[42] Schopp, *supra* note 35, at 666-67.
[43] *Id.* at 667.
[44] *Id.* at 668.

[45] GORDON BAZEMORE & MARA SCHIFF, RESTORATIVE COMMUNITY JUSTICE: REPAIRING HARM AND TRANSFORMING COMMUNITIES 4 (2001).
[46] David Dolinko, *Three Mistakes of Retributivism*, 39 U.C.L.A. L. REV. 1623, 1652 (1992).
[47] BAZEMORE & SCHIFF, *supra* note 45, at 7.
[48] *Id.* at 8.

> In any situation in which we have been harmed in some way, whether at home, in school, at work, or on the street, our hope is that the person responsible for the harm will at the very least acknowledge what he or she did, perhaps recognize the devastating effects his or her acts created in our life, and maybe even offer an apology. In harm or conflict situations, we all look for some kind of accountability. Setting the record straight helps all involved to re-ground their shaken lives. Although we might find support from our family and friends for our misfortune, without an acknowledgment of our lessened state by the one who caused it, we find it hard to simmer down; we feel that we are still being dismissed, that our needs are being written off, that we don't count.[49]

In the conventional system, victims are removed from the process almost entirely, leaving them with an emptiness difficult to fill even with psychological counseling. In a therapeutic restorative process, the victim can seek an acknowledgement of the harm done by the offender, accept an apology for it, and offer forgiveness in return. This acknowledgement is a signal that the mentality that conceived and executed the crime has begun to dissolve, leaving room for concern for others. The crime cannot be undone, but "once we hear words spoken that acknowledge the pain and distress of our lives, as we experience it, we find ourselves enabled to move on, even if only slightly."[50]

The offender also can experience positive psychological effects from restorative justice mediation. Supporters of this approach assert that "[c]onventional programs often show little or no concern for the needs of those who were the source of the harm, writing them off as animals or as non-persons."[51] Restorative justice, however, aims to rehabilitate the offender and restore him or her to the community. Interactions with and reparations to the victim act as a cathartic for the perpetrator, who can begin to forgive society and various individuals for perceived injustices, to engage in acknowledgement and self-forgiveness, and to form bonds again with the community.

Both material and symbolic reparations are important facets of restorative justice. A core sequence of events must occur in a restorative justice conference for it to be effective for both victim and offender: (1) the offender must express genuine shame and remorse for his/her actions and (2) the victim must forgive the offender. Restorative justice proponents believe that the emotion of shame can be the difference between an effective and ineffective conference. The role of shame is to "bring home the seriousness of the offense, but [it should] not [be] so much as to humiliate and harden [the offender]."[52] For example, observations indicate the typical juvenile offender experiences excessive shame. If asked to nominate friends to participate in the conference, the young offender usually will recoil from this request because of a desire that friends not be told of the offense.[53] However, an adult offender sometimes has too little shame to make the meeting work.[54] The emotional meeting of the minds through the shame and forgiveness sequence is an integral part of the restorative justice process and the offender's apathy can cause the system to break down.

Considerable empirical evidence that restorative justice is effective now exists. Victims, offenders, and community

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[49] SULLIVAN & TIFFT, *supra* note 10, at 2-3.
[50] *Id.* at 4.
[51] *Id.* at 22.
[52] JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).
[53] Thomas J. Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 97, 105 (1998).
[54] *Id.* at 105.

representatives have all expressed high satisfaction levels with their restorative justice experiences.[55]

For example, an empirical study of what victims wanted out of the criminal justice process found these aspirations consistently were more often realized in cases randomly assigned to restorative justice conferences than when cases were assigned to a court for resolution.[56] In general, victims reported that they wanted:

1. a less formal process where their views count,
2. more information about both the processing and the outcome of their cases,
3. to participate in their cases,
4. to be treated respectfully and fairly,
5. material restoration, and emotional restoration, including an apology from the offender.

This study found that "overall, victims most often said their conference had been a helpful experience, allowing them to feel more settled about the offense, to feel forgiving towards their offender and to experience a sense of closure."[57] Perhaps the most striking result was that more than half the court-assigned victims of violence said they would harm their offender if they had the chance, compared with only 7% of those assigned to the restorative justice program.[58]

Studies have also found an apparently high level of satisfaction among offenders participating in restorative justice programs. For example, a 1992 analysis of restorative justice programs in the United States, Canada, and Great Britain found that 64-100% of the reparation and compensation agreements generated by a restorative justice conference had been completed fully by the offenders.[59] Offenders are more likely to act in a positive manner subsequent to their offense when they perceive the criminal justice process as just, and it appears they perceive restorative justice programs as fairer than the traditional criminal justice process.[60]

Also, a noticeable reduction in the recidivism rates of offenders who have participated in a restorative justice program exists.[61] One study found that those offenders who apologized to their victims were three times less likely to be convicted of a subsequent crime during the next four years than those who had not.[62] This study also found that offenders who participated in conferences with their victims were more than four times less likely to be reconvicted over the next four years than when no victim had been present.[63] One commentator astutely writes:

> One of the great advantages of mediation is that in the confrontation between offender and victim, the offender who confesses his or her crime, is likely to recognize its consequences for the victim and therefore is able to accept responsibility for his actions. For the most part, the court/prison system encourages offenders to deny their responsibility, which may be one reason for the high rate of recidivism.[64]

Reintegration into the community also is an enhanced outcome of a restorative justice process. Offenders who participated in a restorative justice program were more likely to find jobs, pursue educational goals, or partner with community members and, when this occurred, were less likely to be convicted of

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[55] BRAITHWAITE, *supra* note 52, at 45.
[56] *Id.* at 46-47.
[57] *Id.* at 47.
[58] *Id.*
[59] *Id.* at 51.
[60] *Id.* at 54.
[61] *Id.* at 55.
[62] G. MAXWELL & A. MORRIS, UNDERSTANDING RE-OFFENDING (1999).
[63] *Id.* at 19.
[64] Scheff, *supra* note 53, at 100.

crimes subsequently.[65] In general, the ideological goals of restorative justice, namely, healing and restoration to the community, have been demonstrated empirically to be promoted by the implementation of a restorative justice program.

V. Combining Restorative Justice and Therapeutic Jurisprudence: Finding a Better Means to Respond to Offenders with a Mental Disorder

The potential for therapeutic jurisprudence and restorative justice to be welded together has received some, albeit limited, discussion.[66] One context where the two approaches can be usefully applied involves offenders with a mental disorder who are ensnared in the criminal justice system. Restorative justice techniques can promote the psychological well-being of these offenders without sacrificing other important social and legal goals. The principles of restorative justice may also provide a means to close or slow the "revolving door" in which many offenders with a mental disorder find themselves caught.[67]

The first step in a determination of whether an offender with a mental disorder can participate successfully in a restorative justice program is to examine the underlying charge to see if it is an offense that is appropriate for mediation. To limit potential public resistance to their involvement, most restorative justice programs only accept lesser crimes such as misdemeanors.[68] Like mental health courts, restorative justice involves a certain degree of "skimming" in that it chooses only certain cases for diversion and it may fail to encompass offenders that are most likely to suffer by inclusion within the traditional criminal justice system and that would benefit from a restorative justice approach.[69]

This is not an inherent barrier to the inclusion of offenders with a mental disorder because the majority of such offenders who end up in jail have been charged with relatively minor crimes.[70] In a 1992 survey of jail officials, the most common reasons for imprisoning offenders with a mental illness were assault, theft, disorderly conduct, alcohol or drug related charges, and trespassing.[71] Common forms of theft among offenders with a mental illness included shoplifting and failing to pay for restaurant meals.[72] These types of crimes, if there is a victim involved, would be appropriate for restorative justice conferencing.

In addition, crimes involving severe violence, such as rape, attempted homicide, and negligent homicide, are beginning to be referred to more advanced restorative justice programs, but these cases require much more preparation and mediators schooled in advanced training techniques.[73] The safety of the victim is a factor in deciding whether to allow an offender with a mental disorder who committed a violent crime to participate, but participation may be possible if the victim and offender are willing participants and protection for the victim can be assured.

A second prerequisite that could limit the participation of an offender with a mental

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[65] HEATHER STRANG & JOHN BRAITHWAITE, RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 20 (2000) (citing G. MAXWELL & A. MORRIS, UNDERSTANDING RE-OFFENDING (1999)).

[66] Scheff, *supra* note 53, at 97-98; Schopp, *supra* note 35, at 667.

[67] Kondo, *supra* note 30, at 374.

[68] Many programs also focus on a particular group of offenders (juveniles) or victims (victims of domestic violence) thought to have special needs. These programs, however, do not exclude juveniles/perpetrators of domestic violence merely because they have a mental disorder.

[69] Wolff, *supra* note 33, at 431, 434.

[70] Torrey, *supra* note 14, at 1612.

[71] *Id.* at 1612.

[72] *Id.*

[73] Mark S. Umbreit, *Restorative Justice Conferencing: Guidelines for Victim Sensitive Practice*, 6 (visited June 15, 2003) <http://ssw.che.umn.edu/rjp/Resources/Documents/CONFRNG.mn2.pdf>.

disorder in a restorative justice program is that the offender and the victim have to be able to participate in the program and embrace the results. The shame, apology, and forgiveness sequence will not occur if the parties are unwilling or unable to communicate with each other and to tell their stories. A current mental disorder at the time of conferencing may curtail the offender's ability to participate in the program. For example, the offender may not understand the nature and goals of the program, not feel the shame and responsibility necessary to make the process work, or be unable to express regret for his or her actions. Conversely, offenders with a mental disorder, such as individuals who suffer from depression, may feel an overwhelming sense of guilt and unhappiness that may make it difficult for them to accept forgiveness by the victim. A current mental disorder also may limit the victim's willingness to accept the offender's expressed apology as genuine, sincere, and enduring.

Thus, the offender with a mental disorder should be psychologically stable enough to function in the gathering. If the offender is experiencing a current disruptive psychological disorder, medication or participation in counseling sessions with a mental health professional may be required prior to conferencing. Some offenders with severe mental illness may not be able to reach this point without extended treatment. For this relatively small percentage of mentally ill offenders, restorative justice probably would not be an effective alternative to the conventional system because of the large gap in time between the offense and the conference; the damage to the victim by this point may be either permanent or moot. However, frequently an adjustment of medication or another form of treatment can enable even offenders with a severe mental disorder to participate actively in dialogue with their victims soon after the crime. At the same time, because a current mental disorder may influence communications in a variety of ways, the facilitator of the restorative justice program should be specially trained to work with such offenders and be prepared to design the program with the offender's mental disorder in mind. This preparation may include having discussions with the victim about the nature of mental disorders and the impact they may have.

Another potential barrier is that the offender with a mental disorder may need to disclose his or her mental disorder during the conference. In the traditional criminal justice system, an offender with a mental disorder may choose to reveal his or her disorder as part of an asserted defense or as a mitigating factor during sentencing. However, such disclosure is not required and, provided there has not been a finding that the offender is incompetent to stand trial, some offenders choose to remain silent about their condition because they feel ashamed or embarrassed or because they fear they may be stigmatized or otherwise harmed by this disclosure.

In a restorative justice context, offenders may need to discuss their mental disorder with the victim so that the victim can understand and forgive the offense. However, offenders may feel particularly uncomfortable doing so with a victim who is a relative stranger or with a victim unaware of the offender's mental disorder. Some offenders may be so unwilling to discuss their condition that they would rather forego the benefits of participation in a restorative justice program. For other offenders, the mental disorder may have little relevance to the offense, making its disclosure unnecessary. However, a third group of offenders may find it beneficial to discuss and reveal their mental disorder openly and to acknowledge the role that it may have played in the offense. Additionally, such a discussion may generate greater understanding and support from the victim. However, because offenders with a mental disorder tend to vary in how they perceive their disorder, only those offenders who feel comfortable sharing information concerning their mental disorder should be expected to do so in the course of a restorative justice program. At the same time, if the mental disorder played a central role in

the offense and if the restorative process is unlikely without a discussion of the mental disorder, disclosure may be necessary for the program to proceed.

There are other issues that may arise in connection with the use of a restorative justice program when the offender has a mental disorder. For instance, it may be difficult if not impossible for an offender to participate in this process and to take responsibility for his or her actions as restorative justice requires if the offender would be found incompetent to stand trial if the case went to trial. This raises the interesting question of whether a mentally disordered offender should be screened to determine whether he/she is competent to participate in the restorative justice proceedings and, if so, when and how.

A related problem that may arise when offenders with a mental disorder participate in a restorative justice program is that cognitive or attention disorders of the offenders may curtail their participation. If the thinking or speech of offenders is highly disorganized, it may be hard for victims and other participants in these meetings to understand and relate to the offenders. If the offenders cannot stay on task, the victims might become extremely frustrated or even frightened. The victims ultimately may perceive the crimes to have been spontaneous and uncontrollable and feel vulnerable to further violations. Although it is possible that victims could feel a sense of relief that they were not targeted intentionally, if an adequate explanation of the nature and manifestation of a mental disorder is not provided to victims, it may be difficult to obtain successful restorative justice outcomes. After learning more about the nature of a mental disorder, however, victims may choose to proceed with conferencing even if the offenders are inarticulate simply because they wish to be heard and to express their sense of injustice in being the target of a crime.[74]

[74] *Id.*

Restorative justice also fundamentally relies on the ability of the parties to empathize with each other, which is considered necessary to precipitate change. Some offenders with a mental disorder may not be sufficiently able to empathize with their victims. Offenders with anti-social personality features, for example, may be limited in their ability to be involved emotionally in this manner with their victims. This type of understanding has little relevance to the traditional criminal justice system but is vital to the success of restorative justice. One commentator has observed that "this [empathy] has implications for how successful conferencing may be with the presence of significant emotional or psychopathological conditions. Until there is some awareness of the feelings or emotions of . . . others, conferencing may be unlikely to alter behavior."[75]

Despite the difficulties associated with involving offenders with mental disorders in restorative justice conferencing, there are a number of reasons why this involvement should be encouraged. The restorative justice process strives to be holistic; it encourages participants to explore the interconnection and interdependence of events as well as to share and probe their personal stories. This kind of environment might help an offender to recognize his or her mental disorder and begin to address it. Instead of the threatening atmosphere of the courtroom with diametrically opposed sides, restorative justice programs attempt to promote respect and inclusiveness. An offender with a mental disorder who suffers from a heightened distrust and suspiciousness of others may feel much more relaxed and willing to speak in a mediation circle and more likely to accept the outcome.

Also, restorative justice may prompt offenders with a mental disorder to be more involved in their own process of restoration. They may

[75] Kenneth S. Levy, *The Australian Juvenile Justice System: Legal and Social Science Dimensions*, 18 QUINNIPIAC L. REV. 521, 551 (1999).

begin to understand the impact of their actions on victims and the community, to gain insights into the nature of their disorder, and to more fully commit themselves to rehabilitation. The offender may stop resisting medication or other forms of treatment. Participating in the process of apology and forgiveness can motivate an offender with a mental disorder to make positive changes in his or her attitude, behavior, and self-esteem.

In addition, allowing offenders with a mental disorder to participate in restorative justice programs could heighten community awareness of mental disorders in general. Links between the community and individuals with mental disorders who feel disconnected to society may be healed and the community may be prompted to develop new service and diversion programs for these offenders.

Another positive aspect of including offenders with mental disorders in these programs is that the resulting restitution targets the individual needs of the victims and offenders. During the meeting, participants hopefully can come to a mutual agreement on what needs to be done to heal the breach of society's norms. This may include identifying or developing services that specifically address the psychological needs of both offenders and victims.

VI. Potential Criticisms of Using a Restorative Justice Approach

Some judges and lawyers have objected to the adoption of restorative justice programs. One criticism is that restorative justice sanctions may lack proportionality and consistency.[76] Because the offender and the victim are free to adopt the outcome that they see fit, the sanctions and restitution imposed on the offender may seem disproportionate to the severity of the offense. In addition, offenders involved in similar crimes may end up with quite different sanctions. These critics are disconcerted that the wishes of the individual victims dictate the outcome rather than the principles of proportionality and consistency.[77] However, it should be noted that similar cases are not always treated alike in the traditional criminal justice system.[78] A number of factors contribute to these inconsistencies, including inappropriate considerations of gender, race, ethnicity, or socio-economic status.[79] Offenders with mental disorders may be particularly subject to discrimination and disparities in processing within the traditional criminal justice system. Inconsistent outcomes in restorative justice programs are at least the "result of genuine and uncoerced agreement between the key parties," which may be a suitable ground for a disparity in outcomes.[80] Also, it has been suggested that the traditional criminal justice approach is "silent on why equal justice for offenders should be a higher value than equal justice (or, indeed, any kind of justice) for victims."[81]

A second criticism is that restorative justice is a "soft" option and may fail to deter offenders. Empirical evidence contradicts this view. Being confronted by one's victim in a restorative justice conference is not an easy way out.[82] This approach prevents the offender from depersonalizing the victim and requires a level of accountability and

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[76] Allison Morris & Warren Young, *Reforming Criminal Justice: The Potential of Restorative Justice*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 21 (Heather Strang & John Braithwaite eds., 2000).

[77] *Id.* at 21 (citing M. Cavadino & J. Dignan, *Reparation, Retribution and Rights*, 4 INT'L REV. VICTIMOLOGY 237 (1996)).

[78] *Id.*

[79] *Id.* (citing R. HOOD, RACE AND SENTENCING (1992); HEDDERMAN & GELSTHORPE, UNDERSTANDING THE SENTENCING OF WOMEN (Home Office Research Study No. 170, 1997)).

[80] *Id.* at 21. As will be discussed, a critical component of a successful restorative justice program is that these agreements are truly genuine and not coerced. See *infra* notes 83-88 and accompanying text.

[81] *Id.* at 22.

[82] *Id.*

responsibility that is often not required by the traditional criminal justice system.

Third, critics argue that power imbalances between the offender and victim may result in the victims being "used" to benefit the offender. For example, the victim may feel pressured to agree to minor sanctions or retribution when ordinarily the penalty for the offense would involve incarceration.[83] It is quite important to insure that victims are not further victimized when they agree to engage in a dialogue with their offenders.[84] The victim must agree fully with the proposed outcome of the conference. In most restorative justice systems, victims are allowed to veto any proposed disposition.[85] Furthermore, well-trained facilitators of this approach recognize the potential pressures that victims may bring to bear on victims during conferencing and either take steps to shield the victims from this pressure or refuse to let the process proceed when the offender has or is likely to abuse the process.[86] For example, when the offense involves a violent man and his passive female partner, an additional party may be added to the conference to provide support for the woman.[87] Similarly, if the offender has a mental disorder and intimidates or frightens the victim, a mental health professional or someone else might be added to the gathering to provide support to the victim. Supporters of the restorative justice approach add that "criticisms about restorative justice 'using' victims also ignores the fact that conventional justice uses victims for its own (the State's) interests without offering any corresponding benefit."[88]

Fourth, opponents of restorative justice assert that legal rights are likely to be infringed in this informal conference type setting.[89] An offender with a mental disorder may be vulnerable to such an infringement as he or she may be incapable of independently asserting his or her legal rights in this context. Proponents of the restorative justice approach counter that individual legal rights may be protected by offering offenders legal advice before the conference takes place and they accept responsibility for the offense.[90] Such an offering may be particularly appropriate for offenders with a mental disorder. For example, an individual with a mental disorder may accept responsibility for an offense even though they lack culpability. If the offender refuses such advice, however, the facilitator of the conference may need to explore the reasons for this refusal as part of a larger determination of whether the offender is competent to participate in these proceedings.

Fifth, restorative justice has been equated by some with popular justice and vigilantism.[91] Popular justice can be repressive and overly retributive, particularly when offenders with a

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[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] The power imbalance criticism fails to take into account that in many domestic violence situations women do not rely on the criminal justice system at all because of perceived deficiencies in that system. *Id.* at 23. For example, a woman may want the behavior to stop but not necessarily want the partner to be criminalized or penalized. A restorative justice program can increase the woman's options significantly.

[88] *Id.* at 22.
[89] *Id.* at 23 (citing K. Warner, *The Rights of Young People in Family Group Conferencing and Juvenile Justice*, in FAMILY GROUP CONFERENCING AND JUVENILE JUSTICE (C. Alder & J. Wundersitz eds., 1994)).
[90] Potentially, lawyers could be allowed to attend the meeting itself but they would need to understand the difference in emphasis between restorative and conventional processes and hence their change in role. *Id.* at 23. In a conventional setting, lawyers speak for the offender and discourage the offender from talking directly with the victim; in a restorative setting, offenders must speak for themselves and a dialogue between victims and offenders must take place. The lawyer's primary purpose in this context would be to protect the offender's basic rights and not to minimize the offender's responsibility. *Id.*
[91] *Id.*

mental disorder are involved. Such offenders tend to generate considerable antipathy from the general public. However, such attitudes are deeply at odds with the themes of restorative justice and there are safeguards that can be applied to prevent such attitudes from prevailing. For example, it has been suggested that "if there are concerns about communities taking over this process for non-restorative purposes, checks could be introduced — for example, courts could provide some oversight of restorative justice outcomes for the purposes of ensuring that the outcomes are in accordance with restorative justice values."[92] Alternatively, when offenders with a mental disorder are involved in the restorative justice process, it may be necessary to employ facilitators who have been specially trained to take appropriate steps to defuse society's negative views about individuals and offenders with mental disorders.

A sixth criticism is that "restorative justice leaves untouched a 'hard core' of unrepentant offenders."[93] This is undeniable; there will be some offenders who scoff at the healing values of restorative justice and refuse to change. This will be true of offenders with a mental disorder as well. However, there will be many offenders for whom this is not the case and no system is likely to be successful universally. The restorative justice process has more potential than conventional processes to engage and hopefully reform offenders. Although empirical evidence is lacking on the amenability of offenders with a mental disorder to a restorative justice approach, research findings that offenders in general who have participated in a restorative justice program have lower recidivism rates indicate the ability of this approach to accomplish its goals.[94]

A final criticism of restorative justice is that it is costly.[95] The process of shame, repentance, and forgiveness does not occur instantly or automatically. The engagement of offenders, victims, supportive participants, and mediators takes time and effort. Multiple meetings may be necessary. The use of trained facilitators and obtaining a neutral location for these meetings may incur fees. It has been argued that "if [a restorative justice approach] is used for minor offenses where the impact upon the victim has been slight, then the costs might outweigh the potential benefits."[96] For example, a loitering offense might otherwise be resolved simply by the payment of a relatively small fine. In addition, minor offenses may seem to have little impact on their victims. Victim support agencies, however, argue that restorative justice practices should be available for any offense when the parties want to use them because impressions of victim impact by non-participants are not often accurate.[97] Even a relatively minor offense may be a significant event to those individuals who were involved. Furthermore, recognizing a victim's suffering and treating the offender as a human being have considerable value in and of themselves.[98] In addition, as discussed, restorative justice offers significant benefits to participating offenders. Instead of perceiving themselves as society's outcasts, they can obtain forgiveness from their victims and develop a plan for reparation. Offenders with a mental disorder may also obtain help, support, and services that address their disorder and diminish the likelihood of future criminal offenses. If a trial and incarceration are involved, the costs of the traditional approach multiply enormously.

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[92] *Id.* at 23.
[93] *Id.* at 24.
[94] *Id.* at 24 (citing G. MAXWELL & A. MORRIS, UNDERSTANDING RE-OFFENDING (1999)).

[95] *Id.* at 24.
[96] *Id.*
[97] *Id.*
[98] Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, REGULATION 36 (January/February, 1981).

VII. Conclusions

Traditionalists resist deviations from an impersonal justice system and criticize restorative justice as being a weak, New Age approach that relies too much on feelings and misplaced sympathy. In fact, restorative justice has deep historical roots in ancient culture.[99] In the past, restorative justice prevented endless blood feuds among clans. Today it provides the potential for the promotion of a sense of community and healing. Furthermore, offenders with a mental disorder should not be excluded from this community if they have the ability to participate in such programs.

A restorative justice approach coincides with the principles of mental health courts applying a therapeutic jurisprudence approach and can offer a number of psychological benefits to offenders with a mental disorder without sacrificing other a priori social and legal objectives. An offender with a mental disorder can engage in a healing dialogue with the victim and counselors rather than be caught up in a power struggle with the State. The holistic environment of a restorative justice conference is more conducive to this dialogue than an impersonal criminal trial. In addition, links between the community and the offender with a mental disorder can be fostered. A personal plan can be created to achieve restoration that addresses the offender's special needs such as counseling. The underlying values of restorative justice—understanding, forgiveness, and hope—also may motivate an offender with a mental disorder to reach new therapeutic goals. If such offenders are given a chance to participate in mending their failures, they may be more likely to *want* to make things better. Restorative justice is remarkable in that it facilitates forgiveness in offenders, victims, and communities. Received wisdom recognizes that forgiveness is divine and it should not be out of reach for offenders with a mental disorder suited to its undertaking.

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[99] JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 5 (2002).

Cases in the United States Supreme Court

Non-dangerous Defendants Who Have Been Found Incompetent to Stand Trial May Be Involuntarily Administered Antipsychotic Drugs Under Limited Circumstances

The U.S. Supreme Court ruled that the Constitution permits the forcible medication of a non-dangerous defendant who has been found incompetent to stand trial under limited circumstances. The Court established a number of requirements that must be met before the Government can involuntarily administer antipsychotic drugs to a mentally ill defendant. They include that the defendant must be facing serious criminal charges, the treatment must be medically appropriate and substantially likely to render the defendant competent, the treatment must be substantially unlikely to have side effects that may undermine the fairness of the trial or interfere with the defendant's ability to assist counsel in conducting a defense, and less intrusive treatment alternatives must be considered. In addition, less intrusive means for administering the drugs must be considered, such as a court order backed by the threat of being held in contempt.

The Court did not specify what constituted a "serious crime" but did indicate that it could include both crimes against a person and property crimes. The Court also suggested that forcible treatment should be less available if the defendant has already been confined for a significant amount of time or is likely to be confined for a lengthy period if he or she refuses the drugs. In determining whether forcible treatment would have an unacceptable impact on the fairness of the trial, the Court directed that attention be given to whether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions. Finally, the Court indicated that these cases should first address whether the defendant poses a danger to self or others and added that dangerousness can be established when a refusal to take these drugs puts the defendant's health "gravely at risk." Sell v. United States, No. 02-5664, 2003 WL 21372478 (U.S. June 16, 2003).

Sex Offender Registration Statutes Upheld

The U.S. Supreme Court upheld the Megan's Laws of Connecticut and Alaska in a pair of cases where it had been asserted that such laws violated the rights of the individuals required to register under them. Such laws are found in all fifty states and the District of Columbia.

In the Connecticut case, the Court held that persons required to register as sex offenders do not have a right to a hearing on whether they are currently dangerous. Individuals convicted or acquitted by reason of insanity of various sex offenses are required to register following their release back into the community even though a number of years may have passed since the crime was committed. The Second Circuit (271 F.3d 38) had previously held that because this registration resulted in public dissemination of information about these individuals, including the placement of their picture, home address, place of employment, and criminal offense on the Internet, such individuals were entitled to a prior individualized hearing establishing that they were currently dangerous. The Supreme Court, however, concluded that dissemination of this information was not intended to indicate the individual's current dangerousness but merely to report their prior conviction. Thus, the Court reasoned, an evaluation of the individual's current dangerousness was not relevant to inclusion in the registry and not required. The Court did note that because it had not been raised in the case before it, the Court was not addressing any substantive challenge to the statute, namely, whether it was improper to publicly disclose registry information on all sex offenders, currently dangerous or not. Connecticut Dep't of Pub.

Safety v. Doe, 123 S. Ct. 1160 (2003); 71(34) U.S. Law Week 1542-43 (Mar. 11, 2003).

In the Alaska case, the Supreme Court held that the reporting requirements associated with the sex offender registry did not constitute punishment and thus did not violate the ex post facto clause of the Constitution. This clause prevents states from punishing acts that were committed before the statute that made them a criminal violation was enacted. In this case, the Ninth Circuit (259 F.3d 979) had previously held that these reporting requirements did violate this clause when applied retroactively to registrants who committed their sex crimes prior to the enactment of Alaska's sex offender registration scheme. Under Alaska's scheme, persons convicted of sex offenses are required to register at local police stations at least once a year, they are photographed and fingerprinted, and they must provide an address, placement of employment, and other information to the police, with this information subsequently posted on the Internet. The Ninth Circuit determined that this scheme was punitive in effect and thus violated the ex post facto clause. However, the Supreme Court determined that the purpose of the scheme was to promote public safety by notifying the public of the presence of a convicted sex offender in the community and that the dissemination of truthful information in furtherance of a legitimate governmental objective is not punishment. The Court added that even though posting this information on the Internet has the potential for greater dissemination than by other means, this did not change the basic goals and nature of the scheme. Smith v. Doe I, 123 S. Ct. 1140 (2003); 71(34) U.S. Law Week 1542-43 (Mar. 11, 2003).

California's Three Strikes Sentencing Law Upheld

In a pair of cases, a sharply divided U.S. Supreme Court upheld California's three strikes sentencing law. Under California's law, an indeterminate term of life imprisonment is mandated for an individual convicted of a felony who has two or more prior convictions for "serious" or "violent" felonies. Any felony, including one for a property crime, can constitute the third "strike." In one case before the Court, the defendant had shoplifted three golf clubs whose total price was about $1,200 and was convicted of felony grand theft. In the other case, the defendant stole videotapes on two occasions worth a total of about $150 and was convicted of "petty theft with a prior conviction." Both offenses were "wobblers" in that they could have been classified as a felony or a misdemeanor but they were successfully prosecuted as felonies. Both defendants had a number of prior convictions, primarily for theft-related offenses. Both received a "three strikes" sentence of twenty-five years to life and were eligible for parole only after serving the minimum sentence. The Supreme Court upheld these convictions after concluding that three strikes laws like that of California reflect a policy choice that repeat offenders whose conduct has not been deterred by more conventional approaches to punishment must be isolated from society to protect the public safety. Ewing v. California, 123 S. Ct. 1179 (2003); Lockyer v. Andrade, 123 S. Ct. 1166 (2003); 71(34) U.S. Law Week 1541-42 (Mar. 11, 2003).

Maine Allowed to Proceed with Prescription Drug Rebate Plan

The U.S. Supreme Court allowed Maine to proceed with its proposed program to reduce prescription drug prices for state residents. Under the "Maine Rx" Program, Maine will attempt to negotiate rebates with drug manufacturers. If a company does not enter into a rebate agreement, its Medicaid sales of prescription drugs—a significant component of many drug manufacturers' sales in the state—will be subjected to a "prior authorization" procedure that requires state agency approval before a doctor's prescription of the drug will qualify for reimbursement. This required prior authorization is anticipated to act as a disincentive to the writing of prescriptions for these drugs and is expected to encourage drug manufacturers to agree to negotiated rebates. An association representing drug

manufacturers had obtained an injunction that prevented Maine from implementing the program. The Court lifted this injunction, concluding that the association had not carried its burden of showing that its arguments were likely to be successful. However, the Court did not foreclose other legal challenges to the program once it is implemented. Pharmaceutical Research & Mfrs. of Am. v. Walsh, 123 S. Ct. 1855 (2003).

Kentucky "Any Willing Provider" Law Upheld

The U.S. Supreme Court upheld a Kentucky "any willing provider" law that prohibits health maintenance organizations (HMOs) from excluding health care providers from their authorized networks who are willing to agree to the terms of participation established for the network. HMOs sometimes exclude providers as part of a proclaimed effort to control costs and to enhance the quality of services provided. Kentucky and seven other states have enacted such laws and assert these exclusions inappropriately limit the ability of the members of the plan to select the health care providers they desire and the ability of providers to practice their profession. A group of HMOs claimed the statutes were invalid because they were preempted by a federal law, the Employee Retirement Income Security Act (ERISA), that limits the ability of states to regulate managed care health plans in some respects in order to promote national uniformity in this regulation. The Court rejected this claim of preemption and ruled that Kentucky could enact such a law. Kentucky Ass'n of Health Plans, Inc. v. Miller, 123 S. Ct. 1471 (2003); 71(38) U.S. Law Week 1607-08 (Apr. 8, 2003).

Appeal Withdrawn of Holding That Denial of Medical License Due to Applicant's Mental Illness May Violate ADA

The U.S. Supreme Court removed from its docket a case that addressed whether the Americans with Disabilities Act (ADA) applies to a state medical board's decision to deny a license to practice medicine to a doctor who had experienced depression. The Ninth Circuit (279 F.3d 1167) had ruled that an applicant for a medical license who had been denied that license because of his mental illness could proceed against the California Medical Board with a lawsuit that claimed that this denial violated Title II of the Americans with Disabilities Act. The Medical Board appealed to the Supreme Court, which agreed to review the case in November 2002. However, on March 3, 2003, the Medical Board filed a motion to dismiss its request for review. The Supreme Court four days later cancelled oral arguments and on April 7 issued an order that dismissed the case without reviewing it and left the Ninth Circuit ruling intact. Reportedly the Medical Board dropped the suit because of concerns that its appeal could result in a broad ruling from the Supreme Court that would weaken the ADA. Medical Bd. of Cal. v. Hason, 2003 WL 1792116 (U.S. 2003); 12(11) BNA's Health Law Reporter 409-410 (Mar. 13, 2003).

Court Refuses to Reconsider Application of Death Penalty to Juveniles

The U.S. Supreme Court refused to hear an appeal of an Oklahoma decision that imposed the death penalty on Scott Allen Hain. He had been seventeen when he and an older friend abducted and killed a young couple by locking them in their car trunk and setting it afire. Last Fall, four of the nine justices on the Supreme Court indicated they believed the Court should reexamine a 1989 decision that permits individuals who are sixteen or older to be executed. Four votes are sufficient to accept a lower court opinion for review (i.e., to grant certiorari). It has been speculated that the refusal to grant certiorari in this case may signal that there is not a fifth vote to strike down juvenile executions, with Justice Sandra Day O'Connor speculated to be the critical swing vote. This case was closely watched in Virginia because seventeen-year-old sniper suspect Lee Boyd Malvo is expected to go on trial in Virginia this fall on capital-murder charges. Hain v. Mullin, 123 S. Ct. 993 (2003); 17(35) Virginia Lawyers Weekly 864 (Feb. 3, 2003).

Murder Confession of Fifteen-Year-Old Defendant Not Reviewed

The U.S. Supreme Court refused to accept for review a lower court opinion that found that a murder confession by a fifteen-year-old defendant was voluntary. The First District of the Illinois Court of Appeals (773 N.E.2d 682) determined the confession was admissible because the police did not prevent the defendant's father from speaking to him during the interrogation, it had not been shown that the juvenile or his family ever invoked his right to an attorney despite his receipt and understanding of his *Miranda* warnings, the interview lasted less than a half hour, and the juvenile subsequently repeated the confession in the presence of his father. Cunningham v. Illinois, 123 S. Ct. 1303 (2003); 71(32) U.S. Law Week 3541 (Feb. 25, 2003).

Ruling That Defendant Entitled to New Trial Because Judge Improperly Denied Motion for Insanity Examination Not Reviewed

The U.S. Supreme Court refused to review the ruling of the Seventh Circuit that a criminal defendant was entitled to a new trial as a result of the trial court's refusal to authorize an insanity examination. Two days before trial, the defendant's attorney filed a motion to have his client examined for fitness to stand trial. The next day, a court-ordered fitness examination was completed. That same day the defendant's attorney received from the prosecutor a previously requested letter from a licensed social worker who had examined the defendant six weeks earlier and who noted various symptoms and psychiatric history that could be indicative of a mental illness. In response, later in the day the defendant's attorney filed a motion for an evaluation of the defendant's sanity at the time of the crime. The next morning a fitness hearing was held and the judge ruled that the defendant was fit to stand trial. The judge also denied the defense's request for a sanity examination, asserting that inadequate notice had been given under Illinois law and that the testimony of the psychologist who had performed the fitness examination revealed no reasonable basis for an insanity defense.

On appeal, the Seventh Circuit held that an insanity examination should have been ordered. Schultz v. Page, 313 F.3d 1010 (7th Cir. 2002). The court noted that in *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court established that an indigent defendant is entitled to have a psychiatrist appointed to assist in his defense if the defendant shows that his sanity at the time of the crime will be a significant factor at trial. The Seventh Circuit ruled that the statutory notice period for raising an insanity defense is not determinative when counsel learns of relevant facts concerning the defendant's mental health status only days before the trial is scheduled to begin and immediately requests a sanity examination. The court also ruled that the fitness examination was not sufficient to determine whether the defendant was sane at the time of the crime because there is an inherent difference between the two examinations even though portions of a fitness examination may be repeated during a sanity examination. Finally, the Seventh Circuit found ample evidence in the record to suggest that the defendant's sanity at the time of the crime would be a significant factor at trial. Page v. Schultz, No. 02-1410, 2003 WL 1738192 (U.S. May 27, 2003).

Ruling That Reverses Capital Sentence Because Defendant's Attorneys Failed to Introduce Violent Childhood History Not Disturbed

The U.S. Supreme Court refused to review the ruling of the Eighth Circuit that a criminal defendant's trial attorneys provided ineffective assistance at the defendant's capital sentencing in Missouri. The Eighth Circuit determined that the attorneys failed to introduce relevant character and background information such as the beatings the defendant suffered as a child, his fear of his mother, his father's alcoholism, his parents' violent relationship, and the fact that he was assaulted and possibly raped when he ran away from home. Simmons v. Luebbers, 299

F.3d 929 (8th Cir. 2002). The Eighth Circuit concluded that the failure to introduce this potentially mitigating information entitled the defendant to a new penalty phase trial, a conclusion the Supreme Court did not disturb. Roper v. Simmons, No. 02-1057 (U.S. 2003); 71(36) U.S. Law Week 3604 (Mar. 25, 2003).

Ruling That Parole Can Be Denied to Inmates Who Do Not Divulge Prior Unprosecuted Sex Crimes During Sex Offender Treatment Programs Not Reviewed

The U.S. Supreme Court ruled in *McKune v. Lile*, 536 U.S. 24 (2002), that inmates could be denied certain privileges if they refused to disclose prior sexual activities, including sex crimes for which they had not been convicted, as part of a mandated sex offender treatment program. The First Circuit subsequently held that the Fifth Amendment privilege against compelled self-incrimination is not offended when parole is denied as a result. Ainsworth v. Stanley, 317 F.3d 1 (1st Cir. 2002). The Supreme Court denied a petition for certiorari and refused to review this decision. Ainsworth v. Stanley, 123 S.Ct. 1908 (U.S. 2003), 71(41) U.S. Law Week 3676 (Apr. 29, 2003).

Cases in Other Federal Courts

Admissibility of Fingerprint Identification and Handwriting Analysis Upheld by Fourth Circuit

In a decision that may be relevant to the admissibility of mental health evaluations in criminal cases, the Fourth Circuit upheld the use of expert opinions on fingerprint identification and handwriting analysis under the *Daubert* test. The defendant had asserted that the scientific bases for these analyses had not been sufficiently established as required by the U.S. Supreme Court's opinion in *Daubert v. Merrell Dow Pharms. Inc.* (1993). The Fourth Circuit focused on the fact that this evidence has long been accepted. The court asserted that the four new factors recognized in *Daubert* were established in addition to the traditional "general acceptance" standard for admitting expert testimony. The court determined that while the principles underlying fingerprint identification and handwriting analysis have not attained the status of scientific law, they have nonetheless received strong general acceptance, not only in the expert community but also in the courts. Without evidence that the general acceptance of this evidence has for decades been misplaced, the court concluded it was sufficiently reliable to be admissible. The court noted testimony that the expert community consistently vouches for the reliability of these techniques, that there are professional standards controlling the techniques' operation that provide adequate assurance of consistency among analyses, and that identifications have exceedingly low rates of error. The court added that its position was consistent with that of other circuit courts. In essence, the court placed the burden on the party attacking the use of long-used expert evidence to show it lacks sufficient reliability. United States v. Crisp, 324 F.3d 261 (4th Cir. 2003); 17(45) Virginia Lawyers Weekly 1122 (Apr. 14, 2003).

Fourth Circuit Finds Capital Defendant Was Competent to Stand Trial and to Plead Guilty and Received Adequate Assistance of Counsel on These Issues

The Fourth Circuit ruled that a defendant who was sentenced to death by a Virginia court was competent to stand trial, competent to plead guilty to the murder of three people, and received adequate assistance of counsel on these issues from the public defender who represented him. The court rejected information from witnesses and experts who had come forth since the trial to assert that Percy Levar Walton had been incompetent when he pled guilty, including claims that Walton wanted to be executed because this would enable him to return to life immediately

and resurrect other dead family members.

The court noted that a defendant making a competency claim is not entitled to a presumption of incompetency but must demonstrate his incompetency by a preponderance of the evidence. In dismissing Walton's claim, the court determined that throughout the trial proceedings Walton acted in a manner exhibiting competence, the trial court had conducted an extensive colloquy with Walton concerning his guilty pleas, Walton had repeatedly demonstrated his understanding of the charges and proceedings, there was no evidence to suggest the guilty pleas were rendered involuntary on account of incompetence, and Walton had been thoroughly evaluated by two mental health experts and neither had indicated that Walton was incompetent.

As for the ineffective assistance of counsel claim, the court cited the considerable steps defendant's counsel had taken to explore and establish the defendant's mental health. Also, the court concluded that counsel's decision not to request a different expert, notwithstanding the original evaluator's stringent views regarding mental illness and crime, was not unreasonable. The court determined that Walton had no constitutional right to insist on the appointment of any particular expert, the expert's views on the relationship between mental illness and crime had no effect on his evaluation of the defendant, and the evidence concerning Walton's mental illness was not logically consistent with the public defender's defense strategy and this defense strategy was an objectively reasonable one. Walton v. Angelone, 321 F.3d 442 (4th Cir. 2003).

Testimony of Professionals Who Conducted Competence to Stand Trial Exam Can Be Used to Defeat Claim Head Injury Left Defendant Susceptible to Entrapment

A criminal defendant attempted at trial to establish that his 1997 head injury had resulted in cognitive dysfunction and left him susceptible to entrapment. The defendant called a psychiatrist and a psychologist who both testified that the defendant was more susceptible to persuasion or suggestion than the average person due to the head injury. To rebut this testimony, the government called the mental health professionals who had conducted an examination of the defendant's competency to stand trial and they testified the defendant was pretending to have a mental condition. The defendant was found guilty and appealed. The Fourth Circuit ruled the government did not violate the defendant's Fifth Amendment right against self-incrimination when it introduced its mental health testimony. The court noted that, under the relevant federal statute, statements made by the defendant in the course of a court-ordered competency examination may not be used at trial except on issues regarding the mental condition of the defendant on which the defendant has introduced testimony. The court concluded that the testimony of the mental health professionals only addressed an issue on which the defendant had introduced mental health testimony, did not address his alleged criminal activity, and thus was properly admitted. United States v. Curtis, 328 F.3d 141 (4th Cir. 2003).

Malpractice Claim Against PPO for Inadequate Utilization Review of Discharged Psychiatric Patient Blocked by Fourth Circuit

The Fourth Circuit dismissed a malpractice claim that challenged the steps taken in response to the discharge of a psychiatric patient by the utilization reviewer of a preferred provider organization (PPO). A man who was a participant in the PPO had found his wife in bed with another man. After he attempted suicide he was involuntarily admitted to a hospital where he was diagnosed with adjustment disorder and depression. He was discharged four days later when his treating physician determined he was no longer a risk to himself or others and referred him to outpatient treatment. The man failed to keep his outpatient appointments and eight days later killed his wife and daughter

before taking his own life. In a suit brought by the man's estate, it was alleged that the PPO's utilization reviewer and case manager inadequately monitored the man's outpatient treatment, should have obtained his readmission to an inpatient facility, and should have warned his family members of his mental illness.

The Fourth Circuit ruled, however, that the lawsuit could not proceed because it was preempted by the federal Employee Retirement Income Security Act (ERISA). The court determined that the decisions made were plan administration (i.e., eligibility) decisions that can only be addressed under a federal ERISA claim, which substantially limits the remedies available. The court rejected the plaintiff's assertion that these were mixed treatment and eligibility decisions that fall outside the jurisdiction of ERISA and thus can be challenged as part of a state medical malpractice claim. The court concluded the responsibilities of the utilization reviewer were limited to determining whether to provide coverage and did not address what type of treatment should be provided. The court noted there was no evidence that the case manager even talked with the doctors who did treat the man nor that her eligibility decisions were "practically inextricable" from the treatment decisions made by the man's physicians. Marks v. Watters, 322 F.3d 316 (4th Cir. 2003); 12(12) BNA's Health Law Reporter 448-49 (Mar. 20, 2003).

Challenge to HIPAA Rejected

The Fourth Circuit rejected a lawsuit filed by a number of physicians and physician groups that challenged the constitutionality of the Health Insurance Portability & Accountability Act of 1996 (HIPAA) and regulations issued pursuant to it. The court ruled that the federal statute had not improperly delegated to the Department of Health and Human Services authority to implement regulations addressing the privacy of patient records, the promulgated regulations were not beyond the agency's scope of authority, and neither the statute nor the regulations were impermissibly vague. South Carolina Med. Ass'n v. Thompson, 327 F.3d 346 (4th Cir. 2003); 17(48) Virginia Lawyers Weekly 1221 (May 5, 2003).

Inmate's Constitutional Rights Not Violated When Deputy Reveals HIV Status Within Hearing Range of Other Inmates

The U.S. District Court for the Eastern District of Virginia ruled that a Virginia prison inmate's constitutional rights were not violated when a deputy revealed within earshot of other inmates that the inmate had HIV. The court determined that neither the U.S. Supreme Court nor the Fourth Circuit have established that an individual's confidential medical information falls within a constitutionally protected "zone of privacy." Although acknowledging that there is a "privacy interest" in personal medical information, the court stated that this interest may be overcome by the public interest in secure prisons and inmate rehabilitation. In dismissing the inmate's lawsuit, the court noted that the privacy protection accorded to an individual's medical information is better determined by either federal or state legislators and not by turning to the content of the U.S. Constitution. Sherman v. Jones, No. CIV.A. 02-1801-AM, 2003 WL 1956317 (E.D. Va. Apr. 22, 2003); 17(50) Virginia Lawyers Weekly 1267 (May 19, 2003).

Admissibility of Eyewitness Expert Testimony Limited by Virginia Federal Court

The U.S. District Court for the Eastern District of Virginia issued a pair of opinions that limited the admissibility of expert testimony in general and testimony regarding the accuracy of eyewitnesses in particular. The case centered on the eyewitness testimony of two convenience store employees. They briefly saw what they determined was the armed defendant, who was a regular patron of the store. Each of the eyewitnesses was of a different race than the defendant. The expert, Dr. Brian Cutler, was prepared to testify about limits on cross-race recognition, the impact of

exposure time and retention interval, the phenomenon of weapon focus, the effect of stress on identification, and the lack of correlation between an eyewitness' confidence about an identification and the accuracy of that identification. The expert had previously testified as an expert on fifteen occasions. Initially, the motion to admit the expert's testimony was denied when the court concluded that the proffered testimony failed the test established in *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). The court asserted that a detailed explanation of the research on which the expert relied in coming to his various conclusions had not been provided and thus there was not a sufficient showing of its scientific validity. United States v. Lester, 234 F. Supp. 2d 595 (E.D. Va. 2002).

At a second *Daubert* hearing designed to correct this defect, the court ruled that the reliability of the proposed testimony was sufficiently established by subsequent testimony regarding the research of the expert and others, although the court added it "retains a healthy skepticism of the oftentimes malleable conclusions in the social science fields." However, the court then proceeded to a second set of potential barriers to the admissibility of this testimony. The court stated that trial courts must scrutinize expert testimony for its potential to mislead or confuse a jury. The court noted that expert testimony often carries "a certain aura" that might lead a jury to attach more significance to it than is reasonably warranted. Similarly, the court determined such testimony should be excluded if it merely reiterates facts already "within the common knowledge" of jurors or provides information that could be readily obtained by means of skillful cross-examination and argument. Finally, the expert was required to quantify to some extent the impact of the factor being addressed.

Applying this approach, the court excluded expert testimony pertaining to the impact of exposure time and retention interval, asserting that these are matters of common sense and thus not appropriate to be raised via expert testimony. The court also excluded testimony regarding cross-race recognition because the expert had not sufficiently quantified the impact of this factor on eyewitness identification. However, the court admitted expert testimony on the effects of weapon focus and stress and the lack of correlation between eyewitness confidence and accuracy of identification. The court ruled this testimony fell outside the common sense of the average juror and their impact would be established with sufficient clarity. United States v. Lester, 2003 WL 1786226 (E.D. Va. 2002).

First Circuit Requires Massachusetts to Provide Specialized Services to Residents in Nursing Homes Who Are Mentally Retarded

The First Circuit ruled that Massachusetts can be required to provide specialized services to mentally retarded and developmentally disabled individuals residing in nursing homes. Massachusetts had argued that it was not required to provide specialized services to "dual need residents"—those who need both nursing home care and specialized services. The court, however, determined that the Nursing Home Reform Amendments to the Medicaid Act, passed in 1987, obligated the state to provide training, therapies, and other services designed to improve functioning of these residents when mandatory preadmission or annual resident review screenings deem them necessary. Rolland v. Romney, 318 F.3d 42 (1st Cir. 2003); 12(6) BNA's Health Law Reporter 193-94 (Feb. 6, 2003).

Second Circuit Rules Commercial Trucking Firm Can Reject Applicants Seeking to Be Drivers Who Take Prescription Drugs for Depression Without Violating the ADA

The Second Circuit ruled that the nation's largest publicly held motor carrier, which employs roughly 10,000 over-the-road drivers in North America, could reject driver applicants who take certain prescription drugs without violating the Americans with Disabilities Act. The court determined these

rejections were not based on the applicants' disability but stemmed from a permissible safety-based concern that the medications could impair the ability to drive. The firm had a "drug review list" that includes 836 medications and applicants could not drive for the firm while taking medications on the list. The targeted conditions included depression, epilepsy, migraines, and Parkinson's disease. Equal Employment Opportunity Comm'n v. J.B. Hunt Transp. Inc., 321 F.3d 69 (2d Cir. 2003); 71(31) U.S. Law Week 1494-95 (Feb. 18, 2003).

EMTALA Suit Alleging Discharge from Hospital Emergency Room Before Mental Health State Adequately Stabilized Allowed to Proceed by Seventh Circuit

The Seventh Circuit held that a lawsuit could proceed that claimed that a patient taken to a hospital's emergency room had been prematurely discharged before her psychiatric state was adequately stabilized in violation of the Emergency Medical Treatment and Labor Act (EMTALA). The patient had been brought to the emergency room on a Friday evening by her husband after she exhibited strange behavior, including crying profusely, driving recklessly, and talking rapidly and incoherently.

She was evaluated by a staff social worker specializing in psychiatric assessments who noted she showed manic-like symptoms, was deeply agitated, and was extremely paranoid towards her husband. The social worker concluded the patient suffered from a psychosis induced by a steroid she was taking for treatment of respiratory distress and posed a threat of harm to her husband. The social worker recommended hospitalization on a scale of 5.5 out of 10. When he learned the hospital's psychiatric ward had no beds available, the social worker recommended the patient either be admitted to another part of the hospital or be transferred to another facility.

The attending emergency room physician agreed with the social worker's diagnosis but disagreed that the patient posed a threat of harm to herself or others. The hospital offered the patient voluntary commitment but she declined the offer. Before discharging the patient around midnight, the physician advised the patient to discontinue the steroid, to make an appointment as soon as possible with her personal physician, and to return to the emergency room if her condition worsened. The following Monday the patient saw her personal physician who recommended a sedative and instructed her not to drive. That evening she was killed when she struck a light pole while driving her car at high speeds. The hospital contended the patient was stable when she was discharged as required under EMTALA.

The Seventh Circuit ruled that the proper test for whether a psychiatric patient has been sufficiently stabilized is if the patient is no longer a threat to herself or others. The court rejected as too exclusive the lower court's position that a psychiatric patient was only unstable if the patient was suicidal or homicidal. It reasoned that psychiatric patients could pose a threat to others without being suicidal or homicidal and cause great destruction without intending to do so simply because they were unaware of or could not control their own actions. The court concluded that the lower court's dismissal of the case was premature because there were sufficient facts recognized by the hospital staff at the time of discharge that the patient may have been unstable.

On remand, the lower court was directed to address more fully whether the patient was a threat to herself or to her husband at the time of discharge. In particular, the lower court was instructed to determine whether adequate steps had been taken to address a steroid-induced psychosis simply by telling the patient to stop immediately taking the steroid, the extent of the efforts, if any, of the hospital to transfer the patient to a psychiatric hospital, and whether the hospital's actions (or lack of) were causally related to the patient's death. Thomas v. Christ Hosp. & Med. Ctr., 328 F.3d 890 (7th Cir. 2003).

Psychiatrist Not Liable for Involuntary Short-Term Emergency Commitment

The Ninth Circuit rejected a claim for damages resulting from an involuntary short-term mental health emergency commitment in Oregon. The plaintiff had been arrested for driving erratically and brandishing a pistol and had then been referred for a mental health evaluation. The evaluating psychiatrist signed an order authorizing a five-day emergency commitment. The plaintiff argued he should have been released two days earlier than he was after the psychiatrist determined he was not psychotic. While the psychiatrist was held to not be entitled to qualified immunity for his actions, the court also concluded that the plaintiff failed to show that the psychiatrist had firmly made a determination at that point that the plaintiff was not mentally ill; the psychiatrist was acting on a personal motive to treat the plaintiff differently from other persons assigned for his examination; or the psychiatrist's determination violated the generally accepted standard of care for an involuntary short-term emergency commitment. Jensen v. Lane County, 312 F.3d 1145 (9th Cir. 2002); 31(4) Health Law Digest 11 (Apr. 2003).

Lawsuit Against Manufacturer of Ritalin for Over-Promotion Allowed to Proceed But Claims Against APA Dismissed by Ninth Circuit

The Ninth Circuit ruled that a class action lawsuit could proceed with its claims against Novartis Pharmaceuticals Corp. for the alleged over-promotion of Ritalin, a stimulant used to treat attention deficit disorders (ADD) and attention deficit hyperactivity disorders. The complaint charges Novartis failed to disclose fully information about the side effects of Ritalin and its limited effectiveness. However, claims against the American Psychiatric Association that it conspired and colluded in this over-promotion through its diagnostic criteria for ADD in its Diagnostic and Statistical Manual of Mental Disorders were dismissed for a failure to provide specific details of when, where, or how the alleged conspiracy occurred. Vess v. Ciba-Geigy Corp., 317 F.3d 1097 (9th Cir. 2003); 12(8) BNA's Health Law Reporter 265-67 (Feb. 20, 2003).

Criminal Defendants in Oregon Who Have Been Found Incompetent to Stand Trial Must Be Transferred Within Seven Days from Jail to State Hospital

The Ninth Circuit held that criminal defendants in Oregon who have been found incompetent to stand trial (IST) must be transferred within seven days of this finding from the county jails where they had been housed to Oregon's state mental hospital for treatment designed to restore their competency. Defendants who had been found IST were spending on average a month, and in many cases two to five months, in county jails before the hospital accepted them for evaluation and treatment. The State of Oregon argued it was the county jails that were responsible for accommodating the needs of these defendants until the state hospital had an open bed.

The Ninth Circuit responded that the adequate treatment required by the federal constitution and state law could not be provided in a jail setting and that the defendants were being harmed by the failure to transfer them to the state hospital. The trial court had detailed the harms suffered by defendants who wait in jails until the state hospital has room for them, noting that jails cannot administer medication involuntarily, cannot provide treatment designed to restore the defendant's competency, and rely on disciplinary approaches that may be ineffective for persons with a mental illness or potentially harmful. Noting that the state did not "seriously contest" that jails are inferior to the state hospital in their ability to evaluate and treat defendants with a mental illness, the Ninth Circuit upheld the trial court's findings. The court determined that because such defendants have not been convicted of any crime, they have a constitutional right to be free from incarceration and to receive restorative treatment. Furthermore, the duty to treat such individuals did not shift to county

jailers simply because the hospital lacked adequate space. The court added that holding incompetent defendants for weeks or months in jail bore no reasonable relation to the evaluative and restorative purposes for which courts commit these individuals and undermines the state's fundamental interest in bringing the accused to trial. Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101 (9th Cir. 2003); 12(12) BNA's Health Law Reporter 458-59 (Mar. 20, 2003).

Qualified Mental Health Advocates Entitled to Confidential Patient Care Records

The Tenth Circuit ruled in a pair of cases that qualified mental health advocates are entitled to a range of records pertaining to the care provided a patient with a mental disorder and that would ordinarily be considered confidential.

In the first case, the court ruled that the advocates were entitled to mental health facility peer review and quality assurance records notwithstanding state laws that prohibit the disclosure of such records. The court held that the federal Protection and Advocacy for Mentally Ill Individuals Act (PAMII) preempts these state laws and that a federal regulation to the contrary was invalid. Under the statute, qualified mental health advocates must be independent organizations whose purpose is to investigate incidents of abuse and neglect of mentally ill individuals and to protect and advocate their rights. This case involved an investigation into four suicides and an attempted suicide at a state mental health facility in Colorado. The court rejected the argument that these were hospital records rather than patient records. The court noted the Third Circuit has reached the same conclusion in a Pennsylvania case. Center for Legal Advocacy v. Hammons, 323 F.3d 1262 (10th Cir. 2003); 71(38) U.S. Law Week 1606-07 (Apr. 8, 2003).

In the second case, the Tenth Circuit ruled that federal regulations did not prevent a mental health and patient advocacy group from seeking the medical records of a homeless man who died after being treated in the emergency room of a Denver hospital. The man entered after a fall and later died of either acute alcohol poisoning or the improper use of restraints and tranquilizers by hospital staff. The hospital had cited federal regulations on the confidentiality of alcohol and drug abuse patient records as a basis for withholding the records. The court determined that the confidentiality protections provided by these regulations only apply to "programs" that diagnose and treat drug and alcohol abuse and that the hospital's emergency room was not a covered "program" even though the hospital also operated a drug and alcohol treatment program. The court rejected a lower court ruling that had asserted the emergency room was encompassed because it provided initial treatment and referrals to the hospital's drug and alcohol treatment program. The Tenth Circuit held that the privacy safeguards only applied to distinct alcohol and drug abuse treatment units and not to the general medical facilities in which they may be found and that the hospital had not established that the emergency room primarily provided alcohol and drug abuse treatment. Center for Legal Advocacy v. Earnest, 320 F.3d 1107 (10th Cir. 2003); 12(12) BNA's Health Law Reporter 457 (Mar. 20, 2003).

Lawsuit Settled that Challenged Colorado Facility Housing Insanity Acquittees

A lawsuit was settled that challenged how insanity acquittees were housed in a Colorado state psychiatric facility. The lawsuit alleged that the housing and care provided patients at the Colorado Mental Health Institute were unconstitutional. The allegations included that the facility was over-crowded and understaffed, that the facility was antiquated and dangerous, that patients had been denied certain rights, and that patients did not get the treatment they needed to get better, thereby prolonging the length of their commitment. The settlement calls for the facility to maintain an average daily census of 278, for specified staff-to-patient ratios, and for the implementation and review of guidelines regarding community placement and plans of

care. The settlement did not impose federal court supervision but did provide for an award of attorneys' fees of $850,000. Neiberger v. Schoenmakers, No. 99-B-1120 (D. Colo. 2003); 12(8) BNA's Health Law Reporter 284 (Feb. 20, 2003).

Probationers Can Obtain Confidential Drug Program Treatment Records

Persons undergoing drug treatment in a federally-funded program as a condition of probation may obtain copies of their otherwise confidential treatment records if they can show a need for the specific information contained in them according to the U.S. District Court for the Northern District of Illinois. A probationer wanted to release such records to her attorney in the hope that they would contain information that would combat allegations that she had violated the conditions of her release by using drugs and failing to submit to drug tests. The court did reject the petitioner's argument that she was entitled to simply waive the confidentiality of the records. Because the drug counseling was a condition of probation crafted in response to her criminal conviction, the court concluded that the probationer was required to submit to the court a written request identifying the information sought to be disclosed and stating the probationer's particular need for the information. United States v. Asia, No. 00 CR 967 (N.D. Ill. Feb. 19, 2003); 12(15) BNA's Health Law Reporter 576-77 (Apr. 10, 2003).

Employee Who Was Fired While Recovering from Suicide Attempt Can Sue Employer for Intentional Infliction of Emotional Distress

A federal court has ruled that an individual who was fired while in a hospital recovering from a suicide attempt can pursue an intentional infliction of emotional distress claim against her former employer. The U.S. District Court for the Northern District of Illinois determined that the essence of the claim was that the employer had not only fired her but had purposefully concocted a reason for firing her knowing that the fictitious reason would exacerbate her already fragile mental condition. The court concluded that, if proven, such a claim would permit recovery under Illinois law. Daleidan v. DuPage Internal Med. Ltd., 2003 WL 76863 (N.D. Ill. 2003); 12(5) BNA's Health Law Reporter 149-50 (Jan. 30, 2003).

Cases in Virginia State Courts

Jury Hearing Ordered to Determine if Atkins Is Mentally Retarded and Ineligible to Be Executed

The Virginia Supreme Court ruled that a jury must decide whether Daryl Atkins is mentally retarded and thus cannot be executed for a murder that he committed. A year ago the U.S. Supreme Court (USSC) reviewed Atkins' case and held that mentally retarded offenders cannot be executed. However, the USSC did not define mental retardation in its ruling and left it to the states that impose the death penalty to determine the requisite standards. Furthermore, the USSC did not rule on whether Atkins was mentally retarded but returned the case to the Virginia Supreme Court for further consideration. The Virginia legislature subsequently enacted a definition of when mental retardation excludes a defendant from execution. The definition provided was: "'Mentally retarded' means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and

practical adaptive skills." VA. CODE § 19.2-264.3:1.1(A) (2003).

In revisiting the Atkins case, the Virginia Supreme Court determined that the question of Atkins' mental retardation had not been resolved during any prior proceedings. The court noted that prior testimony had been conflicting and that the jury had not been required to reach a definitive determination. The court rejected Atkins' argument that the USSC had implicitly concluded that he is mentally retarded. The court responded that the USSC had only addressed the broader issue of whether the Eighth Amendment proscribes the execution of mentally retarded offenders in general. The court concluded that because the question of Atkins' mental retardation has thus far not been answered, the case must be returned to the trial court for a jury hearing on the sole issue of whether Atkins is mentally retarded. Atkins v. Commonwealth, No. 000395, 2003 WL 21349816 (Va. June 6, 2003).

Automatic Transfer of Fourteen-Year-Old Juvenile Charged with Murder Upheld and Confession Ruled Not Coerced

The Virginia Court of Appeals upheld the second-degree murder conviction of a juvenile who was fourteen years old at the time of the offense. The court rejected the juvenile's claim that his automatic transfer without a hearing to the Virginia Circuit Court where he was tried as an adult was unconstitutional. In Virginia, automatic transfers occur for juveniles who are fourteen years or older at the time of the crime and who have been charged with murder or aggravated malicious wounding. The court determined that there was not a constitutional right to a transfer hearing. The court ruled it was the General Assembly's prerogative to conclude that juveniles fourteen years of age and older who commit certain specified serious crimes will not benefit from remaining within the juvenile system and to take this decision out of the hands of the juvenile court.

The court also refused to suppress statements the juvenile made during a custodial interrogation. Although noting that it is desirable to have an interested adult present when a juvenile waives fundamental constitutional rights, the court ruled it is only one factor to consider when determining whether a *Miranda* waiver was knowing, intelligent, and voluntary. The court added this absence carries less weight when the juvenile was provided, as here, the option of contacting such a person but declined to do so. The court did note that the defendant's age dictated special caution because although a deficient mental condition is not, without more, enough to render a waiver or confession involuntary, the degree of unacceptable coercion by law enforcement officials is lower when the suspect's level of susceptibility is higher. However, the court determined that this juvenile's susceptibility to coercion was minimal and that the police had not engaged in misconduct. The court also rejected the juvenile's contention that the police had a duty to explain to him before his *Miranda* waiver that he could be charged with first-degree murder and that such a charge would result in automatic transfer to adult court where he could receive a sentence of life in an adult prison. Rodriguez v. Commonwealth, 578 S.E.2d 78 (Va. Ct. App. 2003); 17(43) Virginia Lawyers Weekly 1081-82 (Mar. 31, 2003).

Test for Obtaining Judicially Authorized Treatment of Person Lacking Decision-Making Capacity Clarified

A treating psychiatrist sought judicial authorization under Va. Code § 37.1-134.21 to conduct a series of diagnostic tests, including a bone marrow biopsy, colonoscopy, and broncoscopy, on a patient at the Southwest Virginia Mental Health Institute. The patient, who suffers from schizophrenia, was involuntarily committed to the facility in 1995 and has continued to reside there since then. The patient claimed that the trial court was required to find that the proposed treatment is necessary to prevent death or a serious irreversible condition before ordering

treatment. However, the Virginia Court of Appeals ruled that such a finding was required only when a preponderance of the evidence showed that the proposed treatment was contrary to the person's basic values. The appeals court determined that when no evidence on this issue was presented to the trial court, the trial court was only required to find that the proposed treatment is in the patient's best interest by clear and convincing evidence, which it did. Mullins v. Commonwealth, 576 S.E.2d 770 (Va. Ct. App. 2003); 17(39) Virginia Lawyers Weekly 983 (Mar. 3, 2003).

Reinstatement of Physician at Psychiatric Hospital Over Objection of Hospital Director and State Agency Reversed

The Virginia Court of Appeals reversed a lower court opinion and ordered the employment termination of a physician working at Western State Hospital. A lower court had ruled that a physician who was fired by a state psychiatric hospital can be reinstated by his immediate supervisor over the objection of the hospital director and the state agency that oversees the hospital. The physician, an internist, had received three "Group II" disciplinary notices, with dismissal warranted on the accumulation of two such notices. The physician contested the last two notices pursuant to Virginia law, which provides for up to three levels of management review for all non-exempt, non-probationary state employees. At the first level of review, the physician's immediate supervisor, who was also a physician, called for reversal of the two disciplinary notices being challenged and concluded that the physician should be reinstated. However, the next two levels of management review, the medical director and the overall facility director, overturned the supervisor's reinstatement ruling. Four more hearings were held and all upheld the termination. The lower court ruled that the determination of the immediate supervisor settled the matter. The Court of Appeals stated that the lower court's interpretation would essentially provide a lower-level supervisor with more authority on disciplinary matters than an agency director and was contrary to the intention of the grievance procedure. Department of Mental Health, Mental Retardation & Substance Abuse v. Horner, 579 S.E.2d 372 (Va. Ct. App. 2003); 17(10) Virginia Lawyers Weekly 233 (2002); 17(47) Virginia Lawyers Weekly 16 (Apr. 28, 2003).

Will and Deed Upheld Even Though Individual Was Cognitively Impaired and Being Treated for Alzheimer's Disease at Time Documents Executed

Even though it was "without question" that an individual was cognitively impaired at the time he executed a will and deed of gift, the Fairfax County Circuit Court refused to set them aside. The court acknowledged that the individual had memory problems, got lost occasionally, had difficulty processing matters and verbalizing his thoughts, and was taking Cognex for his Alzheimer's disease. Instead, the court placed considerable weight on the notes of the individual's attorney that the individual had the necessary capacity to execute the documents. The court noted that at the meeting with the lawyer the individual appeared to understand the nature of the transactions he was there to accomplish, was cognizant of his property and how he wanted to dispose of it, and that he loved his daughter and wanted to take care of her through these arrangements. The court disregarded the facts that he may not have understood the details of how to avoid Medicaid liens, noting that few do, and that much of the family now regrets the arrangement as family relationships had since altered. The court stressed the importance of not whittling away the ability of the "old and helpless" to make such arrangements. Jeffries v. Thaiss, 2002 WL 31188544 (Fairfax Cir. Ct. 2002); 17(37) Virginia Lawyers Weekly 920 (Feb. 17, 2003).

Law Enforcement Officer's Fear of AIDS Suit Rejected

A Virginia jury returned a verdict for the defense in a fear of contracting AIDS case. An inmate who was HIV-positive was being

transported from an adult detention center to a doctor's office. The inmate broke away from a deputy sheriff who had removed the inmate's restraints to permit him to use the rest room. The deputy cornered the inmate in the reception area of the U.S. Treasury Department, which was in the same building as the doctor's office. As the deputy attempted to throw the inmate to the ground, a special agent with the Treasury Department stepped in to assist. As the agent attempted to apply a chokehold on the inmate, the inmate bit him on the forearm. The agent subsequently underwent standard prophylactic treatment, taking three medications for one month, and he obtained periodic blood tests for six months. He tested negative each time. The single parent of a four-year-old child, the agent sued the sheriff's department responsible for transporting the inmate on a negligence theory seeking damages for his fear of contracting AIDS. The defense called an expert to establish that the plaintiff breached the standard of care by seeking to use lethal force, the choke hold, when such force was not required and that by so doing he put himself at risk of being bitten. The defense also called an infectious disease expert who testified that because the plaintiff underwent prophylactic treatment and had tested negative over an almost two-year period, there was to a reasonable degree of medical probability no chance that he would contract AIDS as a result of the incident. Martel v. Arthur, No. 195278 (Fairfax Circ. Ct. 2003); 17(40) Virginia Lawyers Weekly 1015 (Mar. 10, 2003).

Attorney Settles Legal Malpractice Suit for Failure to Explore Client's Educational and Intellectual Handicaps in Preparing Juvenile's Criminal Defense

A Virginia attorney settled for $3 million a legal malpractice claim brought against him for his failure to adequately represent a fifteen-year-old client who was charged with and ultimately convicted of malicious wounding. The legal malpractice suit claimed, among other things, that the attorney failed to interact with his client long enough to conclude that he was educationally and intellectually handicapped and failed to seek assistance in presenting the client's educational and intellectual status to the juvenile and domestic relations district court where his client initially appeared or to the circuit court where the client's case was subsequently transferred for trial as an adult. Cullipher v. Smith, No. CL02-2422 (Norfolk Circ. Ct.); 17(40) Virginia Lawyers Weekly 1014-15 (Mar. 10, 2003).

Wrongful Discharge and Defamation Suit Brought on Behalf of Nursing Home Supervisors Who Engaged in Whistle Blowing Activities Settled

A lawsuit was settled that focused on the alleged wrongful discharge and defamation of the former director of nursing at a skilled nursing facility in Essex County and the facility's former administrator because of whistle blowing activities that focused on the violation of patient-care regulations at the facility. The director of nursing received $630,000 and the administrator $1.5 million under the terms of the settlement. The plaintiffs claimed that the defendants had not only fired them but had engaged in a campaign to destroy them economically for reporting to the authorities. The plaintiffs also claimed that they sustained severe psychological injuries as a result of the defendant's activities. During discovery, the defendant's employees admitted that corporate officers had authorized a campaign against the facility administrator. On the day the facility administrator had been discharged, the defendants called the police who searched her and escorted her from the office, subsequently caused her to be charged with assault and battery, engaged in a protracted effort to block unemployment benefits, and "blacklisted" her in her attempts to obtain other employment. 17(48) Virginia Lawyers Weekly 1230 (May 5, 2003).

Involuntary Intoxication Defense Used to Defeat DUI Charge

In a relatively rare case, an "involuntary intoxication" defense was used to defeat a

DUI charge against a man who claimed he was unaware that the drug Paxil would make him unusually susceptible to intoxication from the consumption of alcohol. There was no question the man had had a few drinks before driving, that his subsequent driving was highly erratic, and that when stopped he was visibly intoxicated. Nevertheless, at trial the defendant presented evidence that he had not been told by his physician or pharmacist that he could become intoxicated by drinking alcohol while taking Paxil, which had been prescribed to combat stress, and apparently there was no warning label to this effect on the medication container. The defendant had a toxicologist testify that Paxil, taken with alcohol, has an additive effect in only a small percentage of the population and the result in this case was unexpected. The court ruled the defendant had not knowingly violated the DUI statute. Commonwealth v. Moore (D. Ct. Fairfax Co. 2003); 17(36) Virginia Lawyers Weekly 884, 896 (Feb. 10, 2003).

Parents Sentenced to Eight Years in Jail For Supplying Alcohol to Teenagers in Their Home Attending Son's Birthday Party

A husband and wife received eight-year sentences for providing $360 worth of beer and wine coolers to sixty to eighty high school students who attended a birthday party in their home for their son. After pleading guilty to sixteen misdemeanor counts of contributing to the delinquency of minors, prosecutors had sought a sentence of ninety days for each of the parents. However, the party occurred exactly one month after a local sixteen-year-old high school student was killed in a drunken driving accident on her way home from another party where underage drinking had taken place. Citing this death, the district court judge for Albemarle County sentenced the parents to six months in jail on each of the sixteen counts and ordered that the sentences be served consecutively. The sentence was being appealed as excessive. 17(37) Virginia Lawyers Weekly 911 (Feb. 17, 2003).

Cases in Other State Courts

California Elder Abuse Statute Used to Pursue Claim of Inadequate Pain Relief Against Physician and Nursing Home

A California lawsuit accusing a doctor and a nursing home of elder abuse for refusing adequate pain relief to a lung cancer patient has been filed by family members of the patient. The lawsuit contends the doctor did not visit the patient for sixteen days after the patient was transferred to the nursing home, ordered insufficient pain medications, left the patient screaming in pain for the last weeks of his life, and in response to requests from family members for an increase in the dosage of pain medications instead increased the dosage of an anxiety drug. The lawsuit represents the relatively novel use of an elder abuse statute to pursue a claim of inadequate pain relief against a physician and a nursing home providing care to the patient. This theory was first used a year ago in a case in which a doctor was ordered to pay $893,888 to the family of a deceased lung cancer patient who alleged undertreatment of pain amounted to elder abuse. Joyce E. Cutler, *Trial Date Set in Abuse Case Alleging Doctor Refused Adequate Pain Relief,* 12(15) BNA's Health Law Reporter 579-80 (Apr. 10, 2003).

Patient in D.C. Awarded $250,000 from Hospital for Breach of Confidentiality in Disclosure of HIV-positive Status Despite Lack of Direct Evidence of Wrongdoing

A jury award of $250,000 to a man who sued after a hospital receptionist told the man's co-workers that he was HIV-positive has been upheld by the District of Columbia's highest court. After the alleged disclosure, the man's co-workers "teased, ridiculed, pitied and scorned" him and made his life a "living hell." The jury found the hospital liable for breach of a confidential relationship, a finding that was

upheld on appeal. The appellate court concluded that there was substantial evidence of the routine failure of hospital employees to comply with the hospital's protocols concerning intra-departmental access to medical records, even though there was no direct proof of how the receptionist obtained the confidential information or of any specific breaches by the hospital of its protocols in this case. Doe v. Medlantic Health Care Group Inc., 814 A.2d 939 (D.C. 2003); 12(7) BNA's Health Law Reporter 241-42 (Feb. 13, 2003).

Florida Prosecutor Cannot Subpoena Employee of Federally Funded Drug Treatment Center to Compel Testimony About Crime Observed at Center

A Florida court ruled that a prosecutor could not subpoena an employee of a federally funded drug treatment center to compel testimony about a crime reportedly observed at the center. Police had received a report that a client at the center had illegally possessed drugs but one of the employees of the center who had allegedly witnessed the crime and had been subpoenaed refused to testify. The court ruled that such observations qualified as "records" under a federal law that mandates that the records of such facilities be kept confidential and thus the employee was not required to testify. Although the federal law contains an exception that permits disclosure if the crime committed is "extremely serious," the court concluded that the drug possession crime involved here was not "extremely serious." 12(15) BNA's Health Law Reporter 576-77 (Apr. 10, 2003).

Evaluation Obtained by State in Anticipation of Defendant's Expected Capital Sentencing Phase Mental Health Testimony May Be Sealed in Georgia Pending Completion of Guilt Phase

The Georgia Supreme Court joined a number of other courts in ruling that the defendant in a capital criminal trial could have the State's mental health examination of the defendant made in preparation for the sentencing phase of the trial sealed until the completion of the trial's guilt phase. Under Georgia law, as in a number of states, the defendant can be prohibited from presenting expert mental health testimony as mitigation evidence during the sentencing phase of a death penalty trial unless the defendant also submits to a court-ordered examination by a mental health expert whose report is made available to the prosecution. The defendant is thereby essentially required to waive the privilege against self-incrimination. This mandated cooperation is considered justified because it enables the State to respond to the defendant's expert mental health testimony and to combat fraudulent mental health defenses. Unless the defendant raises a mental health defense during the guilt phase of the trial, however, the State can only use the information gathered by the mental health expert during the sentencing phase and cannot use it during the guilt phase. To ensure that the latter did not happen, the defendant sought to seal the report until a guilty verdict was returned. Generally the sentencing phase begins almost immediately upon the returning of such a verdict and the prosecution argued that this did not permit it sufficient time to make use of the report in preparing for the sentencing phase. The court rejected the prosecution's argument, asserting that the defendant's waiver of the constitutionally-protect right to remain silent must be no greater than is necessary to serve the purpose mandating the behavior and that there had been no evidence presented to demonstrate the likelihood of unfair prejudice to the State stemming from a sealing of the results of the State's expert examination until the conclusion of the guilt phase. State v. Johnson, 576 S.E.2d 831 (Ga. 2003).

Illinois State Facility Professionals Not Protected by Sovereign Immunity from Malpractice Claim After Releasing Patient They Screened for Involuntary Commitment Who Committed Suicide an Hour Later

An Illinois Appeals Court ruled a psychiatrist and a psychologist were not entitled to the defense of sovereign immunity that often

protects state employees from liability for actions taken in the course of their duties. A patient entered a state mental health center after being diagnosed as acutely psychotic and exhibiting suicidal behavior. While there, the psychiatrist and the psychologist evaluated him and, after referring him for outpatient treatment, released him. An hour after being released, the patient committed suicide. The patient's wife sued the psychiatrist and the psychologist for medical malpractice. The defendants argued that as employees of the state mental healthcare facility they were entitled to sovereign immunity from this claim. The appeals court rejected this argument, determining that the duty of care here arose out of the relationship between the patient and the mental health professionals and not out of the defendants' status as state employees. The court found that this case fell under an exception to sovereign immunity that disallows it when the duty alleged to have been breached was not owed to the public generally. The court also rejected the defendants' assertion that no patient-provider relationship existed between them and the patient because they acted merely as screeners to determine whether to involuntarily commit him. A dissenting opinion asserted that such screening decisions were part of their duties as state employees and thus they were entitled to sovereign immunity. Jinkins v. Lee, 785 N.E.2d 914 (Ill. App. Ct. 2003); 31(4) Health Law Digest 53-54 (Apr. 2003).

Missouri Nursing Home Executive Given Jail Term for Failure to Report Elder Abuse

A nursing home executive in Missouri was sentenced to one year in jail for failing to report elder abuse of a patient to state authorities. The patient died a few days after he had been badly beaten in his room, apparently by an aide at the facility. Despite the fact the patient died from the injuries suffered in the beating, the home did not report the patient's death to state authorities as required under the Missouri elder-abuse statute. An administrator at the nursing home had told the executive but the executive made no report to state officials. State officials began their investigation after funeral-home officials brought the suspicious nature of the death to their attention. Missouri v. Kaiser, No. CR100-861-MX (Mo. Cir. Ct., sentencing 2/6/03); 12(9) BNA's Health Law Reporter 315 (Feb. 27, 2003).

New Jersey Court Limits Sanctions That Can Be Imposed on Inmates Refusing to Divulge Prior Unprosecuted Sex Crimes as Part of Sex Offender Treatment

The U.S. Supreme Court ruled in *McKune v. Lile*, 536 U.S. 24 (2002), that inmates could be denied certain privileges if they refused to disclose prior sexual activities, including sex crimes for which they had not been convicted, as part of a mandated sex offender treatment program. However, courts have subsequently split on what sanctions can be imposed on inmates who refuse to make such disclosures. The First Circuit has held that the Fifth Amendment privilege against compelled self-incrimination is not offended when parole is denied as a result. Ainsworth v. Stanley, 317 F.3d 1 (1st Cir. 2002). In contrast, an appellate court in New Jersey held that a loss of good-time and work credits, sanctions that like the denial of parole effectively lengthen the time a prisoner must serve, did violate the Fifth Amendment. Bender v. New Jersey Dep't of Corrections, No. A-4858-98T3 (N.J. Super. Ct. App. Div. 2003), 71(29) U.S. Law Week 1472 (Feb. 4, 2003).

New Jersey Claim for Injuries Suffered in Attempt to Assist Alzheimer's Patient Rejected

An appellate court in New Jersey rejected a claim brought by a nurse after she was injured trying to help an aggressive patient back to his room. The patient had been admitted with a diagnosis of senile dementia, Alzheimer's type, to the hospital's long-term care unit. He had been transferred to the psychiatric unit because of his aggressive behavior and was being returned to the long-term care unit after being medicated. The nurse sued the patient's daughter, who was also his legal guardian, for

allegedly failing to disclose her father's violent tendencies. The appellate court rejected this claim, noting that guardians are only liable when the injury flows directly from an omission of the guardian. Here, the court determined, the daughter/guardian was not liable because she was not the proximate cause of the nurse's injuries as the hospital had adequate notice and reports of the patient's behavior. The court noted that other jurisdictions have consistently refused to impose liability on guardians in similar situations.

The nurse also attempted to sue the patient for her injuries. However, the court rejected this claim as well. In judging the potential liability of a patient with a mental disability, the court ruled that a special standard needed to be applied that reflected the patient's disability. Therefore, the patient was not subject to the typically-applied "reasonable person" standard but "that of a reasonable prudent person who has Alzheimer's disease." Thus the trial judge had properly instructed the jury to consider the patient's mental disability when determining his liability and could not find the patient negligent if the jury determined that the patient lacked the capacity to understand the consequences of his action. Berberian v. Lynn, 809 A.2d 865 (N.J. Super. Ct. App. Div. 2002); 31(2) Health Law Digest 29 (Feb. 2003).

Pennsylvania Psychiatrist Cannot Be Terminated from MCO Provider Network for Refusing Broad Request by MCO for Treatment Records

A Pennsylvania state court has ordered that a psychiatrist be reinstated to the provider network of a managed care organization (MCO) because the MCO had acted improperly when it attempted to terminate the psychiatrist from its provider network for refusing to comply with its request for patient records. The MCO had sought to review five treatment records, including three open cases and two closed cases, as part of its recredentialing process. The psychiatrist expressed concern about patient confidentiality when he refused to disclose the records. The court determined that Pennsylvania rules governing the confidentiality of mental health records limit the access of MCOs to such records to quality control purposes and the review of five complete records exceeded the access contemplated by the Pennsylvania Code. The court, however, also noted that if certain information was blacked out of the treatment records their release to the MCO was permissible and could be required by the MCO as a condition of inclusion in the provider network. That information included the patient's name and items such as guardianship information, process notes, and psychological constructs including dreams, wishes, fantasies, transferences, and countertransferences. Shrager v. Magellan Behavioral Health, No. G.D. 00-015809 (Pa. Ct. Com. Pl. 2003), 12(12) BNA's Health Law Reporter 457-58 (Mar. 20, 2003).

Texas Patient Bill of Rights Does Not Waive State Immunity from Lawsuits for Harms Incurred by Patients Within State's Mental Health Hospitals

The Texas Supreme Court ruled that the patient's bill of rights enacted by the Texas legislature did not waive the state's immunity from lawsuits for damages for harms incurred by patients placed within the state's mental health hospitals. Thus, the court concluded that a Texas mental health facility was immune from being sued for wrongful death in the case of a patient who committed suicide the day he was released from the hospital. The patient had been involuntarily committed for severe mental illness and committed suicide when he was discharged four days later. His wife, who brought the suit, claimed that the hospital and a psychiatrist at the hospital had failed to properly diagnose and treat his mental illness. The court's ruling reversed the conclusions to the contrary of two lower courts. Wichita Falls State Hosp. v. Taylor, No. 01-01491, 2002 WL 32029019 (Tex. Mar. 6, 2003); 12(12) BNA's Health Law Reporter 460 (Mar. 20, 2003) (judgment withdrawn May 13, 2003 but holding cited and applied in Beaumont State Ctr. v. Kozlowski,

No. 02-0243, 2003 WL 21290976 (Tex. June 5, 2003)).

Three Patients in West Virginia Awarded $2.3 Million from Hospital for Employee's Disclosure of Information in Mental Health Treatment Records

Three women were awarded compensatory damages of roughly $750,000 each by a West Virginia jury after a hospital clerk employed by West Virginia University's School of Medicine took their mental health treatment records to his home and to local bars, where he shared details with unauthorized individuals. The damages were awarded even though the clerk was purportedly fired after the improper handling of the records was discovered. Punitive damages were not allowed. C.L.A. v. West Va. Univ. Med. Corp., No. 99-C-509 (W. Va. Cir. Ct. 2003); 12(7) BNA's Health Law Reporter 239 (Feb. 13, 2003).

Other Legal Developments

Virginia Lawyer Admonished for Having Sex with Client Known to Be Receiving Treatment for Mental Health Problems Related to Sexual Abuse

A Richmond, Virginia, lawyer was admonished by the Virginia State Bar Disciplinary Board for having sex with a client he knew to be under treatment for mental health problems related to sexual abuse. The board found that the lawyer had violated a disciplinary rule that prohibits wrongful acts that affect the lawyer's ability to practice law. The two had sexual encounters on two occasions when they were working on the client's case in the attorney's office at night. The client testified the attorney initiated the sex, while the attorney claimed that she forced him both times and threatened to accuse him of rape if he did not engage in sexual intercourse. After these incidents, the attorney settled his client's sexual abuse claim against her former employer for $150,000. The board determined the attorney had acted from a selfish motive and that the client was particularly vulnerable. However, the board also took note of the attorney's lack of a prior record, the likely impact of this finding on his personal and professional life, his cooperation and remorse, and his subsequent pursuit of counseling. The Disciplinary Board is reported to have first addressed the issue of lawyers having sex with clients in 1998. 17(48) Virginia Lawyers Weekly 1215 (May 5, 2003).

Recommendations Made to Change Magistrate System in Virginia

A committee established by the Virginia Supreme Court has recommended significant changes to the state's magistrate system. Magistrates in Virginia issue criminal and civil warrants, subpoenas, and orders for temporary mental health detention, emergency protection, and emergency custody. They also set bail and commit people to jail. There are 401 full-time equivalent magistrate and chief magistrate positions in Virginia. Magistrates are currently only required to have a bachelor's degree or equivalent management experience. A survey conducted by the committee raised concerns about the competence of magistrates. For example, it was noted that magistrates take their legal questions to the Commonwealth's attorney and that this approach was unsatisfactory because the prosecutor is not a neutral party. In response, the committee recommended that the chief magistrate in each of the thirty-two judicial districts be an attorney and be charged with resolving legal issues. It was reported that a large minority of the committee wanted an all-lawyer magistrate system. Another expressed concern was that law enforcement officers have problems with obtaining warrants in a timely manner. In response, the Committee recommended that all magistrate and chief magistrate slots be converted to full-time, videoconferencing be used to ensure

magistrate services are available around the clock, magistrates' hub offices be continually staffed, and the use of an on-call approach be eliminated. Dawn Chase, Study: Chief Magistrates Should Be Attorneys, 17(43) Virginia Lawyers Weekly 1068, 1092 (Mar. 31, 2003).

California Medical Board Sanctions Doctors Who Prescribe Medications by Telephone and Internet

The Medical Board of California took two steps to curtail the issuance of prescriptions without a personal exam of the individual to whom the prescription is given. In the first action, the Medical Board revoked the license of a doctor who prescribed drugs to patients based on phone interviews and Internet questionnaires. The Medical Board concluded that the doctor, who specialized in addiction and pain management, had written 11,000 prescriptions for drugs such as Vicodin, Valium, and Xanax without examining the patients in person. *In re* Opsahl, No. 23-2001-127009 (Cal. Med. Bd. 2003), 12(5) BNA's Health Law Reporter 158-59 (Jan. 30, 2003). In the second action, the Medical Board imposed more than $48 million in fines against six out-of-state doctors for illegally issuing a total of 1,952 prescriptions over the Internet to California residents. The Medical Board claimed that the fines are the largest ever issued by a state medical board. Prescriptions were issued for a variety of drugs but many were for so-called lifestyle drugs such as the sexual dysfunction drug Viagra, the hair loss drug Propecia, and weight loss drugs such as Xenical and Phentermine. 12(7) BNA's Health Law Reporter 223-24 (Feb. 13, 2003).

Colorado Passes "I Am Sorry" Law That Shields Health Care Provider Apologies

Colorado joined California and a few other states in passing an "I Am Sorry" law that makes any health care provider's apology or admission of fault inadmissible in a medical malpractice case. Proponents of such bills argue that this protection will encourage health care providers and patients or patients' families to sit down and openly talk about what happened with the expectation that it will lead to corrected behavior and reduce the number of medical malpractice lawsuits filed. Opponents of such bills respond that it is incongruous for a health care provider to admit a mistake and then to later argue that he or she did not do anything wrong and necessitate that expensive expert witnesses be hired to prove what the provider has already admitted. 12(17) BNA's Health Law Reporter 663 (Apr. 24, 2003).

CMS Policy to Permit States to Limit Access to ERs by Medicaid Beneficiaries Rescinded

The Centers for Medicare & Medicaid Services rescinded its recent decision to allow states to limit broad access to emergency room services by Medicaid beneficiaries enrolled in managed care programs. The agency had previously stated that states had the authority to set limits on how much and how often Medicaid would pay for someone to get care in an emergency room. However, key members of Congress and leading hospital groups responded that such limits would undermine access to essential emergency services for people with low incomes. 12(5) BNA's Health Law Reporter 160-61 (Jan. 30, 2003).

EEOC Indicates Employers Not Allowed to Ask Disability-Related Questions Before Making a Conditional Job Offer

The federal Equal Employment Opportunity Commission (EEOC) has indicated that under the Americans with Disabilities Act (ADA) it is not permissible for an employer to ask disability-related questions before making a conditional job offer. In an advisory letter that was characterized as an informal discussion and not an official EEOC opinion, the EEOC reviewed a medical history questionnaire that was included as part of an employment application. The EEOC stated that it was not permissible to ask before a job offer is made whether the candidate had been refused employment in the past due to a health

problem, the number of days an applicant was absent previously because of illness or injury, whether the applicant is taking, or has taken in the past, any prescription drugs, or whether the applicant has in the past been addicted to illegal drugs or has participated in a rehabilitation program. Such questions were considered likely to elicit information on a disability and thus violated the ADA. An employer could ask such questions after it extends an offer, but if the employer uses the results to screen out an applicant because of a disability, the employer must show that the exclusion is job-related and consistent with business necessity. EEOC Advisory Letter, 12/10/01; 71(32) U.S. Law Week 2536 (Feb. 25, 2003).

New Ethical Principles for Psychologists Go Into Effect the First of June

The American Psychological Association has adopted a new code of ethics that went into effect on June 1, 2003. The APA's ethical code was last updated roughly ten years ago. A number of the changes pertain specifically to forensic assessments. The new code and comparisons to the old code can be found at http://www.apa.org/ethics/code.html.

National Increase in Nursing Home Litigation Found

A national survey of plaintiff and defense attorneys specializing in nursing home litigation found a large increase in nursing home litigation since the mid-1990s, especially in Florida and Texas. The survey found that about eighty-five percent of plaintiffs receive at least some compensation, about triple the average rate for medical malpractice claims in general. The average recovery was determined to be about $406,000 per claim, also quite large relative to medical malpractice claims in general and striking considering that these suits could not generally establish that the nursing home residents had suffered a loss of wages or had suffered a diminishment in their ability to support their financial dependents, such as children, which typically help drive large recoveries. Children of residents were the instigators of more than sixty percent of the lawsuits. The authors of the study expressed concern that the high volume of litigation diverted resources that would otherwise be devoted to the care of nursing home residents. 12(11) BNA's Health Law Reporter 411 (Mar. 13, 2003).

JCAHO to Rely Exclusively on Unannounced Accreditation Surveys

The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) has announced its intent to begin conducting all regular accreditation surveys on an unannounced basis beginning in January 2006 after pilot testing this approach on a voluntary basis during 2004 and 2005. This approach was attributed to a desire to ensure that each accredited organization is in compliance at all times and not simply at the time of a previously announced survey. JCAHO will continue to conduct one-day, random, unannounced surveys in an annual five percent of the health care organizations it accredits through the end of 2005. 12(15) BNA's Health Law Reporter 584 (Apr. 10, 2003).

Nation's Largest Managed Care Behavioral Health Organization Files for Chapter 11 Financial Reorganization

The nation's largest managed care behavioral health organization, Magellan Health Services Inc., filed for financial reorganization under chapter 11 of the U.S. Bankruptcy Code in March. The customers of the Maryland-based organization include health plans, government agencies, unions, and corporations and it covers approximately 68 million individuals. Magellan indicated it believes it can complete the restructuring and emerge from chapter 11 by the end of the third quarter of this calendar year, has sufficient cash flow to fund all ongoing operations, and intends to continue operating as usual without interruption. Magellan also announced that it had renewed an agreement with Aetna to continue providing behavioral health care to Aetna's

members. 12(12) BNA's Health Law Reporter 436 (Mar. 20, 2003).

One of Nation's Largest Health Insurers Settles Class Action Lawsuit Brought by 700,000 Physicians Over Confusing and Slow Payment Practices

Aetna, one of the nation's largest health insurers, has agreed to settle a class action lawsuit brought against it and other insurers by over 700,000 physicians for allegedly engaging in unlawful business practices. In addition to an estimated $100 million in payments to physicians, the company will provide clearer information on coverage, speed payments, and reduce red tape. Joseph B. Treaster, *Aetna Agreement With Doctors Envisions Altered Managed Care*, N.Y. TIMES, May 23, 2003, at A1.

Owner of American Behavior Modification Program in Costa Rica Jailed for Purported Civil Liberty Violations of Housed American Youths

The owner of an American behavior modification program in Costa Rica that housed nearly 200 American youths was jailed after accusations that students had been deprived of their civil liberties. Allegations included that the children were held against their will and physically abused, and that punishments included emotional abuse, isolation, and physical restraints. The program is affiliated with a Utah organization, the World Wide Association of Specialty Programs and Schools (Wwasps). Tim Weiner, *Owner of Private Discipline Academy in Costa Rica Is Arrested*, N.Y. TIMES, May 24, 2003, at A2.

GAO Report Finds Large Number of Parents Placing Children in Juvenile Justice or Child Welfare Systems So Children Can Receive Mental Health Services

The General Accounting Office released a Congressionally-requested report that found that parents in nineteen states in fiscal year 2001 placed more than 12,700 children in the juvenile justice or child welfare systems so that the children could receive mental health services. This outcome was linked to "limitations on both public and private health insurance, inadequate supplies of mental health services, limited availability of services through mental health agencies and schools, and difficulties meeting eligibility rules for services." The report can be found at www.gao.gov. 12(17) BNA's Health Law Reporter 652-53 (Apr. 24, 2003).

Federal Defendants Convicted of Sex Offenses No Longer Eligible for Downward Departures from Sentencing Guidelines Because of Their Diminished Capacity

In a change to the federal sentencing guidelines, Congress has established that defendants convicted of kidnapping minors, sex abuse, and offenses related to pornography and prostitution will be ineligible for a downward departure from the guideline range based on their diminished capacity. 71(40) U.S. Law Week 2664-66 (Apr. 22, 2003).

Submission Guidelines

Developments in Mental Health Law encourages the submission of articles on timely and interesting topics in the area of mental health law.

The typical article is ten to fifteen pages long, without substantial footnoting. The reading audience is multi-disciplinary, typically with legal or mental health training but not necessarily both. Therefore, *Developments* seeks articles that are useful to a general audience interested in mental health law.

How to contact *Developments in Mental Health Law*:

1) The preferred method of submitting articles is to submit a short query by e-mail, describing the topic and general thesis. Send e-mail to: th4n@virginia.edu with a subject line of "*Article Query,*"

or

2) Query letters can be mailed to the attention of the Editor, *Developments in Mental Health Law,* P.O. Box 800660, Charlottesville VA 22908-0660. The street address is: 1107 Main Street.

It is not necessary to initially send a copy of your article. The editor of *Developments* will contact authors if there is an interest in using or developing your piece. The quickest way for the editor to contact you is by e-mail, so please include an e-mail address, if possible.

Developments in Mental Health Law
Institute of Law, Psychiatry & Public Policy
University of Virginia Law School
UVA Health System Box 800660
Charlottesville, VA 22908-0660