Northern Illinois University Law Review

Volume 29 | Issue 3 Article 6

7-1-2009

Vol. 29, no. 3, Summer 2009: Table of Contents

Northern Illinois University Law Review

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Law Review

Volume 29 Summer 2009 Number 3

SYMPOSIUM: MEETING THE NEEDS OF PERSONS WITH MENTAL ILLNESS: BEST PRACTICES AND REMAINING ISSUES IN THE LAW

FOREWORDS

Mental Health and the Law: Where Necessity Is the Mother of Invention (Patent Pending)
William W. Wood, M.D. 469

Mental health professionals, most notably the psychiatrists and other clinicians who work in the State of Illinois Operated Inpatient Psychiatric Treatment Facilities, are often frustrated by an inability to treat individuals who have been admitted to the state hospital. Recent changes to the Illinois Mental Health Code have made admission, but not treatment, easier for persons who have a severe mental illness. As treatment innovations develop, the interface of the legal system with the mental health system becomes increasingly important in balancing the often seemingly disparate and opposing goals of both treating persons with mental illnesses and ensuring that their civil rights are protected and maintained at all times.

Confronting the Challenges of Persons Who Are Mentally Ill: A Judge's Perspective
Justice Kathryn E. Zenoff 477

In the last fifty years, persons with serious mental illnesses have gone from being institutionalized in psychiatric hospitals to being institutionalized in our county jails. The phenomenon has been called the "criminalization of the mentally ill" and has had adverse consequences both for our communities and for those persons with mental illnesses. This foreword discusses one judge's experiences in attempting to rise to the challenge of meeting the needs of persons with mental illnesses in the criminal justice system. The discussion extends to local, state, and national initiatives. These include the Therapeutic Intervention Program Court in Winnebago County, Illinois, and the national Judges' Leadership Initiative for Criminal Justice and Mental Health Issues, the resources and activities of which are available to any judge in the nation.

ARTICLES

"A Change Is Gonna Come": The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law

Michael L. Perlin 483

As recently as fifteen years ago, disability was not broadly acknowledged as a human rights issue. Although there were prior cases decided in the United States and in Europe that, retrospectively, had been litigated from a human rights perspective, the characterization of "disability rights" (especially the rights of persons with mental disabilities) was not discussed in a global public, political, or legal debate until the early 1990s. Instead, disability was seen only as a medical problem of the individual requiring a treatment or cure. By contrast, viewing disability as a human rights issue requires us to recognize the inherent equality of all people, regardless of abilities, disabilities, or differences, and obligates society to remove the attitudinal and physical barriers to equality and inclusion of people with disabilities. The recent ratification of the United Nations Convention on the Rights of Persons with Mental Disabilities (CRPD) has the potential to create the most significant tectonic plate shift in mental disability law since the United States Supreme Court, finally, in 1972, agreed that the Due Process Clause of the U.S. Constitution applied to persons institutionalized because of mental disability. I believe that this new international law truly has the potential to force us to reconceptualize everything that we have thought of as the "accumulated truths" of mental disability law.

The Psychotherapist-Patient Privilege in the Family Court: An Exemplar of Disharmony Between Social Policy Goals, Professional Ethics, and the Current State of the Law

Deborah Paruch 499

The mental health community recognizes the importance of confidentiality in the psycho-therapeutic relationship and the resultant impact on the effectiveness of treatment. This is embodied in professional ethical standards that prescribe confidentiality of information obtained in treatment. A psychotherapist-patient testimonial privilege is recognized by common law in federal courts, and by statute in all fifty states. However, state laws provide uncertain protection of this privilege in child custody disputes and virtually none in child abuse and neglect cases. In such cases, mental health professionals are commonly required to provide courts with confidential information obtained in psychotherapy sessions—often against their patients' interests. This abrogation of the psychotherapist-patient privilege is widely believed to be necessary for the protection of children. This article examines whether evidence in this manner is reliable, meaningful, or necessary to fulfill the courts' obligation to protect children. It demonstrates that abrogation of the psychotherapist-patient privilege significantly reduces the likelihood of successful therapy and only contributes a

minor evidentiary benefit. It considers the U.S. Supreme Court's seminal decision in Jaffee v. Redmond, *which recognized the privilege in federal courts. It also considers the results of an important series of empirical studies that support the need for confidentiality in the therapeutic relationship and a sample of Michigan Court of Appeals opinions that demonstrate the minimal value of evidence derived from therapists' compelled testimony. The article concludes that policy objectives, professional ethical requirements, and legal constraints are at odds with each other in cases involving the welfare of children. In such cases, the psychotherapist-patient privilege is abrogated by the courts, but with little or no resulting protection for children due to the minimal evidentiary benefit derived from the compelled disclosure. Finally, the author endorses an alternative to these current practices, which synchronizes the need to protect children with a procedure that guards the confidentiality of the therapeutic relationship.*

COMMENT

Protective Privilege Versus Public Peril: How Illinois Has Failed to Balance Patient Confidentiality with the Mental Health Professional's Duty to Protect the Public

Mary I. Wood 571

Mental health professionals face conflicting duties when their patients make threats of violence toward readily identifiable third parties: the duty to protect intended victims and the duty to maintain the confidentiality of patients. The seminal 1976 case, Tarasoff v. Regents of University of California, *underscored the tension between these duties—unnecessary breaches of confidentiality may erode the therapeutic doctor/patient relationship and lead to liability for the doctor, but lack of action may cause devastating consequences for the victim. In the wake of the* Tarasoff *decision, most states enacted statutes codifying a mental health professional's duty to protect third parties from potentially dangerous patients. Analysis of case law interpreting the Illinois "duty to protect" statutes makes it clear that there is confusion regarding the specific elements of the duty, the events that trigger the duty, and the acceptable methods of satisfying the duty. This lack of clarity has led to extreme consequences varying from a complete lack of protection of classes of potential victims at one end of the spectrum, to unnecessary breaches of a patient's right to confidentiality at the other end. Improvements in both the wording and the application of the Illinois laws could help the state achieve its goal of balancing the conflicting duties of patient confidentiality and public protection.*

NOTE

What the Hell[er]? The Fine Print Standard of Review Under *Heller*
Jason Racine 605

This casenote introduces the reader to District of Columbia v. Heller, *in which the United States Supreme Court held that the Second Amendment protects an individual right, unconnected to militia duty, to keep and bear arms, thus finally answering the interpretive question of what the meaning of the Second Amendment truly is. After providing a thorough discussion of the majority's opinion, an analysis of both the historical nature and limited scope of* Heller *is provided. Next, the note argues that a workable analytical framework can be extracted from the Court's opinion by examining the fine print within the language and reasoning. Specifically, it will be asserted that from the Court's language and reasoning, a workable three-step test can be extracted: first, asking whether a Second Amendment challenge is being brought by an individual afforded constitutional protection; second, asking whether the challenge involves a weapon afforded constitutional protection; and third, evaluating the challenged law under a locality scheme called the HPS Test. Finally, the note will implement the proposed three-step test to conceal carry and licensing laws, which were two issues the Court did not fully address in* Heller.