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When Treatment Is Punishment: Eighth Amendment Limits on Mental Health and Correctional Therapy

By Bruce J. Winick*

This article analyzes the extent to which the Eighth Amendment's ban on cruel and unusual punishment can serve as a limitation on intrusive forms of mental health treatment and correctional rehabilitation. It examines when treatment can be considered "punishment" within the meaning of the Eighth Amendment, and if so, when it may be considered "cruel and unusual." It also discusses whether the Eighth Amendment can apply in mental hospitals. Several specific treatment contexts are examined in detail, including treatment administered to rehabilitate criminal offenders; treatment administered to death row inmates in order to restore competency for execution; treatment imposed as a means of institutional discipline in prisons and hospitals; and behavior modification techniques used in correctional contexts.

When a society determines that an individual is mentally ill or a criminal offender, it engages in a particularly strong form of deviance labeling.[1] Such labeling often has the effect of depriving individuals so labeled of basic liberty. People determined to be mentally ill frequently are committed to psychiatric hospitals, and those convicted of crime often are sentenced to prison. But so socially deviant are those we label as mentally ill and as criminals that we do not stop at labeling them and taking away their liberty. In addition, we try to change them through imposition of often unwanted treatment or "rehabilitation." Modern mental health treatment techniques[2] have evolved considerably beyond

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[1] See Howard Becker, Studies in the Sociology of Deviance (1963); Edwin M. Lemert, Human Deviance, Social Problems, and Social Control (2d ed. 1972).

[2] For an analysis of the various types of mental health treatment ranked on a rough continuum of intrusiveness, see Bruce J. Winick, "The Right to Refuse Mental Health Treatment: A First Amendment Perspective," 44 U. Miami L. Rev. 1, 63–90 (1989).

verbal psychotherapy, and now encompass various types of behavior modification (or behavior therapy),[3] psychotropic medication,[4] electroconvulsive therapy,[5] and even psychosurgery—the direct surgical intervention into the brain itself as a means of altering mood, cognition, and behavior.[6] Although psychosurgery is rarely used today, and electroconvulsive therapy is rarely used without consent, psychotropic drugs, behavior therapy, and verbal psychotherapy and counseling approaches are frequently administered on an involuntary basis in mental hospitals, prison, jails, and increasingly in the community as a condition for release or diversion from these institutions.[7]

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[3] See Bruce J. Winick, The Right to Refuse Mental Health Treatment ch. 4 (forthcoming 1996). See infra notes 151–156 and accompanying text (discussing positive reinforcement techniques); infra notes 157–159 and accompanying text (discussing aversive conditioning techniques). While aversive techniques have fallen into disfavor and now are more rarely used, see Nathaniel J. Pallone, Rehabilitating Criminal Sexual Psychopaths: Legislative Mandates, Clinical Quandaries 100–102 (1990), positive reinforcement is in widespread use in institutional settings, juvenile facilities, and facilities for people suffering from mental retardation.

[4] See Winick, supra note 3, ch. 5. Psychotropic drugs are compounds that affect the mind, behavior, intellectual functions, perception, moods, and emotions, used to therapeutically influence psychological conditions. Harold E. Kaplan et al., Synopsis of Psychiatry: Behavioral Sciences and Clinical Psychiatry 410 (1994). Although they have been found effective in the treatment of mental illnesses, these drugs also cause adverse side effects. See, e.g., Philip G. Janicak et al., Principles and Practice of Psychopharmacology 164–183, 271–280 (1993). Psychotropic medication is the most commonly used treatment modality for various mental illnesses. Id. at 164. Moreover, in light of the Supreme Court's endorsement of the use of these drugs in prison settings, see Washington v. Harper, 491 US 210 (1990), it can be anticipated that these drugs will receive increasing use in correctional facilities. E.g., Sullivan v. Flannigan, 8 F3d 591 (7th Cir. 1993).

[5] See Winick, supra note 3, ch. 6. Electroconvulsive therapy (ECT) consists of the passage of electrical current through the brain by means of electrodes applied to the patient's temples in order to produce convulsions resembling the grand mal seizure in epilepsy. See Janicak, supra note 4, at 293. Although found effective in the treatment of depression and other mental diseases refractory to psychotropic medication, ECT may have serious side effects including confusion and loss of memory. American Psychiatric Ass'n Task Force Report, The Practice of Electroconvulsive Therapy: Recommendations for Treatment, Training and Privileging 6–8, 10, 61 (1990) (hereinafter APA Rep). While ECT fell into disfavor during the 1970s and 1980s, there has been a resurgence in its use in more recent years. See Richard D. Weiner et al., "Electroconvulsive Therapy in the United States," 27 Psychopharmacological Bull. 9, 10 (1991).

[6] See Winick, supra note 3, ch. 8; Thomas G. Bolwig, "Biological Treatments Other Than Drugs (Electroconvulsive Therapy, Brain Surgery, Insulin Therapy, and Phototherapy)," in Treatment of Mental Disorders: A Review of Effectiveness 112 (Norman Sartorius et al. eds., 1993). See infra note 87.

[7] See, e.g., Washington v. Harper, 494 US 210 (1990) (forcible administration of antipsychotic drugs in state prison); Green v. Baron, 879 F2d 305 (8th Cir. 1989) (tier program in security and mental facility); In re Blodgett, 510 NW 2d 910 (Minn.),

A number of constitutional bases have been posited as foundations for a right of mental patients and criminal offenders to refuse such mental health treatment when the government seeks to impose it.[8] These include substantive due process,[9] a First Amendment right to be free from government interference with mental processes,[10] the First Amendment right to the free exercise of religion in the case of religious-based objection[11] and the Eighth Amendment prohibition on cruel and unusual punishments.[12] While the Supreme Court has recognized a qualified right to refuse antipsychotic medication grounded in substantive due process,[13] the contours of this right are by no means clear, and the Court has never addressed other purported constitutional bases for such a right. This article analyzes the extent to which the Eighth Amendment can serve as a limitation on intrusive forms of mental health treatment and correctional rehabilitation.

The Eighth Amendment to the Constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment,[14] prohibits the infliction of "cruel and unusual punishments."[15] Can this phrase be read to apply to the involuntary administration of mental health treatment to patients and offenders? To the extent that at least some of the more intrusive treatment techniques are experienced as painful and distressing, they may be regarded as "punishments" by their recipients.

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cert. denied sub nom., Blodgett v. Minnesota, 115 S. Ct. 146 (1994) (upholding Minnesota statute authorizing civil commitment for treatment of individuals with "psychopathic personality").

[8] See Bruce J. Winick, "The Right to Refuse Psychotropic Medication: The Current State of the Law and Beyond," in The Right to Refuse Antipsychotic Medication 7, 8–16 (David Rapoport & John Parry eds., 1986).

[9] See, e.g., Riggins v. Nevada, 504 US 127, 134 (1992) (antipsychotic medication); Bruce J. Winick, "New Directions in the Right to Refuse Mental Health Treatment: The Implications of *Riggins v. Nevada*," 2 Wm. & Mary Bill of Rts. J. 205 (1993).

[10] E.g., Bee v. Greaves, 744 F2d 1387 (10th Cir. 1984), cert. denied, 469 US 1214 (1985) (psychotropic drugs); Winick, supra note 2.

[11] E.g., Winters v. Miller, 446 F2d 65 (2d Cir.), cert. denied, 404 US 985 (1971); In re Boyd, 403 A2d 744 (DC App. 1979).

[12] Knecht v. Gillman, 488 F2d 1136 (8th Cir. 1973) (aversive conditioning program); Mackey v. Procunier, 477 F2d 877 (9th Cir. 1973) (aversive conditioning program).

[13] See supra note 9.

[14] E.g., Ford v. Wainwright, 477 US 399 (1986); Estelle v. Gamble, 429 US 97 (1976).

[15] U.S. Const. amend. VIII.

Indeed, aversive conditioning, one behavioral treatment technique, involves the systematic administration of painful stimuli—such as drugs that cause nausea or apnea, or electric shocks—in an effort to extinguish or reduce the frequency of inappropriate or maladaptive behavior.[16] Can these treatments, however, be considered "punishments" within the meaning of the Constitution? And if so, are they "cruel and unusual?"

If the Eighth Amendment applies to treatment administered in prisons, does it also apply to treatment administered in mental hospitals? Does the Eighth Amendment apply when the government's purpose is to rehabilitate offenders rather than to inflict retribution by subjecting them to painful stimuli or conditions designed to make them suffer for their offenses? Does it apply to treatment administered over objection to death row inmates found to be incompetent to be executed in order to restore their competence so that capital punishment may be imposed? Should the use of forced treatment administered for the purpose of institutional discipline in the prison or the hospital implicate the Eighth Amendment? Should the Eighth Amendment be read to limit the expanding array of behavior modification techniques—increasingly used in clinical practice—when used in correctional contexts?

The Evolving Meaning of Cruel and Unusual Punishment

The Cruel and Unusual Punishment Clause, which originated in the English Bill of Rights,[17] initially was interpreted to require a showing that the punishment in question would have been regarded as cruel and unusual by the Framers in 1791.[18] In 1910, however, the Supreme Court rejected this strictly historical approach, recognizing instead the "expansive and vital character" of the clause.[19] The Court found that the

[16] See Stanley Rachman & John Teasdale, Aversive Therapy and Behavior Disorders: An Analysis 13 (1969).

[17] Bill of Rights, 1 W&M Sess. 2, ch. 2 (1689); see Ingraham v. Wright, 430 US 651, 664 (1977); Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning," 57 Cal. L. Rev. 839, 852–853 (1969). Although the English version apparently was designed to prohibit unauthorized punishments and those beyond the power of the sentencing court, see Gregg v. Georgia, 428 US 153, 169 (1976), Granucci, supra at 859–860, the framers of the American version were mainly concerned with outlawing tortures and other "barbarous" forms of punishment. Granucci, supra at 842.

[18] See Furman v. Georgia, 408 US 238, 265 (1972) (Brennan, J., concurring); Arthur J. Goldberg & Alan M. Dershowitz, "Declaring the Death Penalty Unconstitutional," 83 Harv. L. Rev. 1773, 1785–1786 (1970).

[19] Weems v. United States, 217 US 349, 376–377 (1910).

prohibition "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[20] Although the clause initially was construed to prohibit only outright torture and physical cruelty,[21] under this evolving standard it was soon read to ban excessive or disproportionate penalties,[22] as well as those which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain. . . ."[23] Capital punishment, a common criminal sanction in 1791,[24] has since been found to be cruel and unusual if imposed for certain crimes[25] or pursuant to statutes making it mandatory upon conviction,[26] or if administered in an arbitrary way[27] or under procedures found to be unfair.[28]

Under the approach applied by the modern Court, the Eighth Amendment is interpreted in a "flexible and dynamic manner,"[29] and read to "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[30] At its core, the Eighth Amendment prohibits "the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for

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[20] Id. at 378.

[21] See In re Kemmler, 136 US 436, 446–448 (1890) (electrocution found constitutional); Granucci, supra note 17, at 842.

[22] Se Solem v. Helm, 463 US 277 (1983); Weems v. United States, 217 US 249 (1910).

[23] Whitley v. Albers, 475 US 312, 319 (1986). "Among 'unnecessary and wanton' infliction of pain are those that are 'totally without penological justification.' " Rhodes v. Chapman, 452 US 337, 346 (1981).

[24] *Gregg*, 428 US at 177.

[25] See Enmund v. Florida, 458 US 782 (1982) (unconstitutional for felony murder when defendant neither committed the murder himself, attempted to do so, nor intended to take life), modified, Tison v. Arizona, 481 US 137, 146–158 (1987) (execution permissible if felony murderer is shown to have acted with recklessness concerning the possibility of fatality); Coker v. Georgia, 433 US 584, 599–600 (1977) (plurality opinion) (unconstitutional for rape).

[26] See Sumner v. Shuman, 483 US 66 (1987); Roberts v. Louisiana, 431 US 633 (1977) (per curiam).

[27] See Furman v. Georgia, 408 US 238 (1972).

[28] Gilmore v. Taylor, 113 S. Ct. 2112, 2117 (1993) ("[T]he Eighth Amendment requires a greater degree of accuracy and fact finding [in a capital case] than would be due in a noncapital case."); see, e.g., Booth v. Maryland, 482 US 496 (1987). The Court, however, has rejected the contention that the death penalty is inherently cruel and unusual punishment. E.g., Gregg v. Georgia, 428 US 153 (1976).

[29] Rhodes v. Chapman, 452 US 337, 345 (1981); Gregg v. Georgia, 428 US 153, 171 (1976).

[30] Rhodes v. Chapman, 452 US at 346; Trop v. Dulles, 356 US 86, 101 (1958) (plurality opinion).

their intrinsic worth as human beings. A punishment is 'cruel and unusual' therefore, if it does not comport with human dignity."[31]

The Eighth Amendment was originally regarded as a limitation on criminal sentences. However, it now is read to apply as well to the treatment received by offenders in correctional facilities and to the conditions of their confinement generally.[32] The Supreme Court recently reiterated such broadened Eighth Amendment protection over the vigorous dissents of Justice Thomas, who argued that the prohibition should be limited to criminal sentences, and should not apply to conditions of confinement.[33]

The Eighth Amendment in Mental Hospitals

Several of the early lower court right-to-refuse-treatment cases had applied the Eighth Amendment to involuntary treatment. These cases involved challenges to the use of drugs in hospital and prison aversive conditioning programs,[34] and the involuntary administration of psychotropic medication in state hospitals and juvenile facilities.[35] More recent cases, however, have rejected an Eighth Amendment basis for a right to refuse treatment.[36]

There are two threshold problems with applying the Eighth Amendment to the right to refuse treatment question, at least when it arises in

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[31] Furman v. Georgia, 408 US 238, 270 (Brennan, J., concurring); Trop v. Dulles, 356 US 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards").

[32] See, e.g., Farmer v. Brennan, 114 S. Ct. 1970, 1977 (1994) (holding that prison officials may be held liable under the Eighth Amendment for prison conditions when they disregarded substantial risk of serious harm to inmates); Helling v. McKinney, 113 S. Ct. 2475, 2480 (1993) ("It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."); Melvin Gutterman, "The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement," 48 SMU L. Rev. 373 (1995).

[33] Helling v. McKinney, 113 S. Ct. 2475, 2484 (1993) (Thomas, J., joined by Scalia, J., dissenting); Hudson v. McMillan, 503 US 1, 17 (1992) (Thomas, J., joined by Scalia, J., dissenting).

[34] Knecht v. Gillman, 488 F2d 1136 (8th Cir. 1973); Mackey v. Procunier, 477 F2d 877 (9th Cir. 1973).

[35] Souder v. McGuire, 423 F. Supp. 830, 832 (MD Pa. 1976); Nelson v. Heyne, 355 F. Supp. 451, 455 (ND Ind. 1972), aff'd, 491 F2d 352 (7th Cir.), cert. denied, 417 US 976 (1974).

[36] Lojuk v. Quandt, 706 F2d 1456, 1464–1465 (7th Cir. 1983) (electroconvulsive therapy); Rennie v. Klein, 653 F2d 836, 844 (3d Cir. 1981 (en banc), aff'g, 462 F. Supp. 1131, 1143 (DNJ 1978) (psychotropic medication).

the hospital rather than the prison context. First, does the Eighth Amendment apply to a mental hospital that is not part of a prison? Second, can treatment be considered "punishment" within the meaning of the Eighth Amendment?

Is the Cruel and Unusual Punishment Clause applicable to hospital confinement? Traditionally, Supreme Court Eighth Amendment cases have concerned criminal punishments.[37] In *Ingraham v. Wright*,[38] the Supreme Court considered an Eighth Amendment challenge to the use of disciplinary corporal punishment in the public schools. Rejecting application of the Eighth Amendment in the school context, the Court construed the proscription against cruel and unusual punishments narrowly as a limitation applicable only to criminal punishments.[39] However, the Court limited its holding by suggesting in a footnote that "[s]ome punishments, though not labelled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment."[40] Significantly, the Court left open the question of "whether or under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment."[41]

How should this open question be resolved? The Court's analysis in *Ingraham* is instructive. In finding the Eighth Amendment inapplicable in the public schools, the Court stressed the history of the amendment as traditionally protecting only convicted criminals.[42] The Court also emphasized the safeguards existing in public schools, as contrasted with prisions, that protect children from abuses of corporal punishment—the openness of the schools, community supervision of the public school system, and the availability of common-law civil and criminal sanctions for abuses.[43] While these factors may distinguish public schools from prisons, they do not necessarily distinguish mental institutions

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[37] See Ingraham v. Wright, 430 US 651, 666–667 (1977) (citing cases).

[38] 430 US 651 (1977).

[39] Id. at 664, 671 n.40; accord Whitley v. Albers, 475 US 312, 319 (1986).

[40] 430 US at 669 n.37.

[41] Id. A number of lower federal courts had previously applied the Eighth Amendment in these contexts. E.g., United States v. Solomon, 563 F2d 1121, 1124 (4th Cir. 1977) (dicta) (state mental retardation facility); Nelson v. Heyne, 491 F2d 352 (7th Cir.), cert. denied, 417 US 976 (1974) (state school for boys).

[42] *Ingraham*, 430 US at 664–668.

[43] Id. at 669–671.

from prisons. At the time of the adoption of the Eighth Amendment, those with mental illness were treated as criminals and were frequently confined in the same facilities as criminals.[44] In addition, the safeguards existing in the public schools are largely absent even in modern mental hospitals.[45] Hospitals, often located in remote areas, are closed institutions, largely cut off from public scrutiny. Unlike public school students, who return home to concerned parents each day, mental patients typically are not permitted to leave the institution, and may only rarely be visited by family or friends. Although civil and criminal remedies for abuse may exist in principle, many patients do not have access to lawyers and are unaware of their rights. Finally, like prisoners, but unlike students in public schools, mental patients (at least those committed to hospitals) are in custody. When the state places an individual in custody, "the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . "[46] As a result, the considerations cited by the Court in *Ingraham v. Wright* to justify denying Eighth Amendment protection to punishment administered in public schools do not apply as clearly to mental hospitals, which in these respects seem more analogous to prisons.

The arguments for applying the Eighth Amendment to mental hospitals thus seem strong.[47] On the other hand, the Supreme Court has declined to apply the Eighth Amendment in cases challenging the conditions of pretrial detention in jails, on the basis that pretrial detainees have not yet been convicted of crime.[48] Jails, mental hospitals, and prisons all share a high potential for abuse. If jails are not subject to Eighth Amendment scrutiny, how can mental hospitals be? This may be largely an academic question, however, in view of the holding in the jail cases that an alternative constitutional limitation—substantive due process—

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[44] See Nicholas N. Kittrie, The Right to be Different: Deviance and Enforced Therapy 57 (1971); Kay Rigling Gill, "Nothing Less Than the Dignity of Man: The Eighth Amendment in Mental Institutions," 28 A. U. L. Rev. 109, 117–124 (1978).

[45] See *Halderman*, 446 F. Supp. at 1320–1321; Gill, supra note 44, at 117–124; Elizabeth Symonds, "Mental Patients' Rights to Refuse Drugs: Involuntary Medication As Cruel and Unusual Punishment," 7 Hastings Const. LQ 701, 722–727 (1980).

[46] Helling v. McKinney, 113 S. Ct. 2475, 2480 (1993) (quoting DeShaney v. Winnebago Country Dep't Social Servs., 489 US 189, 200 (1989)).

[47] See Rennie v. Klein, 462 F. Supp. 1131, 1143 (DNJ 1978) (assuming that the Eighth Amendment applies in mental hospitals), aff'd on other grounds, 653 F2d 836 (3d Cir. 1981); *Halderman*, 446 F. Supp. at 1320–1321 (distinguishing *Ingraham* on the basis of the lack of safeguards in mental institutions similar to those in public schools).

[48] Block v. Rutherford, 468 US 571 (1984); Bell v. Wofish, 441 US 520 (1979).

"requires that a pretrial detainee not be punished."[49] Punishment, under this analysis, may constitutionally be applied only after "an adjudication of guilt" in a criminal prosecution.[50] Because civil mental patients, as well as criminal defendants hospitalized as incompetent to stand trial or following an acquittal by reason of insanity, have not been adjudicated guilty of a crime, they too may not be subjected to punishment consistent with due process.[51] As a result, the critical question becomes identifying the meaning of "punishment" under the Constitution, for once it is determined that punishment has been imposed, it is subject to constitutional scrutiny wherever it has occurred—under the Eighth Amendment if in prison, and under due process if elsewhere. Because a punishment that is sufficiently inhumane to be deemed cruel and unusual if imposed on a convicted criminal offender also would violate due process if imposed on a patient,[52] the question of the applicability of the Eighth Amendment to mental hospitals seems largely academic. Whichever constitutional tool is used, the result should be the same.

Therapy as Punishment

A second difficulty with applying the Eighth Amendment as a basis for a right to refuse treatment is whether therapy can be considered "punishment." A fairly clear case was presented in *Knecht v. Gillman*,[53] in which the vomit-inducing drug apomorphine was employed in an involuntary aversive conditioning program. Inmates were injected with the drug for such "undesirable behavior patterns" as "not getting up, for giving cigarettes against orders, for talking, for swearing, or for lying."[54] After injection, the inmates were exercised. The drug induced vomiting for a period lasting from fifteen minutes to an hour, and produced a temporary cardiovascular effect. The Court of Appeals for the

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[49] *Wolfish*, 441 US at 535 n.16. See also City of Revere v. Massachusetts Gen. Hosp., 463 US 239, 244 (1983).

[50] *Wolfish*, 441 US at 535.

[51] See Jones v. United States, 463 US 354, 369 (1983) ("As . . . [the insanity acquittee] was not convicted, he may not be punished.").

[52] City of Revere v. Massachusetts Gen. Hosp., 463 US 239, 244 (1983) ("[T]he due process rights . . . [of a person not adjudicated guilty of a crime to be free of punishment] are at least as great as the Eighth Amendment protections available to a convicted prisoner.").

[53] 488 F2d 1136 (8th Cir. 1973).

[54] Id. at 1137.

Eighth Circuit rejected the state's contention that the program was "treatment," and as such was insulated from Eighth Amendment scrutiny.[55] The court held that, when administered without informed consent, the program constituted cruel and unusual punishment without regard to its characterization as "treatment." The court relied on the Supreme Court's 1958 opinion in *Trop v. Dulles*[56] for the proposition that the government's characterization of an act as non-penal cannot be conclusive for purposes of resolving the Eighth Amendment question, and that a court should look behind the classification and conduct an "inquiry . . . directed to substance."[57]

Similarly, in *Mackey v. Procunier*,[58] the Ninth Circuit Court of Appeals applied the Eighth Amendment to prohibit the use of succinylcholine—a paralyzing "fright drug" that produces sensations of suffocation and drowning—on fully conscious prisoners in a prison aversive conditioning program.[59] The same approach was used by the Seventh Circuit Court of Appeals in a case involving psychotropic drugs administered involuntarily in a juvenile correctional institution "not as part of an ongoing psychotherapeutic program, but for the purpose of controlling excited behavior."[60]

Under this approach, the use of psychotropic medication for control or institutional discipline that is not part of a treatment program could be deemed punishment for Eighth Amendment purposes, at least in the absence of an emergency.[61] The same would be true of the electroconvulsive therapy or any of the other intrusive therapies, or of behavioral approaches utilizing painful stimuli. When these treatments are used for therapeutic purposes, however, the Eighth Amendment may be deemed inapplicable even though the effects on subjects may be identical.

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[55] Id. at 1139.

[56] 356 US 86 (1958) (plurality opinion).

[57] Id. at 95. The court also relied, for the same proposition, on Vann v. Scott, 467 F2d 1235, 1240 (7th Cir. 1972) (Stevens, J.).

[58] 477 F2d 877 (9th Cir. 1973).

[59] Id. at 878.

[60] Nelson v. Heyne, 491 F2d 352, 356 (7th Cir. 1974), cert. denied, 417 US 976 (1976). See also Souder v. McGuire, 423 F. Supp. 830, 832 (MD Pa. 1976).

[61] See Bee v. Greaves, 744 F2d 1387, 1395 (10th Cir. 1984), cert. denied, 469 US 1214 (1985). A parallel analysis is possible using principles of substantive due process. See Riggins v. Nevada, 504 US 127, 135 (1992) (forced administration of antipsychotic medication that was not medically appropriate would violate due process) (dicta); Winick, supra note 9, at 225.

The Supreme Court's opinion in *Bell v. Wolfish*[62] suggests that, at least in nonprison contexts and for impositions that are not unambiguously punishments, the Eighth Amendment inquiry may turn not on the effect of the intervention, but on the intent with which it is administered. The Court in *Wolfish* scrutinized the conditions of confinement to which pretrial detainees were subjected. Although noting that under the due process clause a pretrial detainee may not be punished prior to an adjudication of guilt,[63] the Court held that not every disability imposed during pretrial detention amounts to "punishment" within the meaning of the Constitution:

> A Court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. . . . Absent a showing of an express intent to punish on the part of detention facility officials, that determination generally will turn on "[w]hether an alternative purpose to which [the restriction] may rationally be connected is assignable for it and whether it appears excessive in relation to the alternative purpose assigned [to it]." . . . Thus, if a particular condition or restriction . . . is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of governmental action is punishment. . . .[64]

Under this approach, virtually all administration of psychotropic drugs,[65] electroconvulsive therapy,[66] behavior therapy,[67] or other therapies as part of a treatment program will be immune from Eighth Amendment challenge. Unless punitive purposes can be demonstrated,[68] or

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[62] 441 US 520 (1979).

[63] Id. at 535 & n.16; see supra note 49 and accompanying text.

[64] 441 US at 538–539 (citations omitted); accord United States v. Salerno, 481 US 739, 746 (1987) (applying this approach to reject contention that preventive detention was punishment, because it furthered the regulatory purpose of community protection).

[65] See, e.g., Gilliam v. Martin, 589 F. Supp. 680, 682 (WD Okla. 1984); Osgood v. District of Columbia, 567 F. Supp. 1026, 1032–1033 (DDC 1983).

[66] See, e.g., Lojuk v. Quandt, 706 F2d 1456, 1464 (7th Cir. 1983); Price v. Sheppard, 239 NW2d 905, 908–909 (Minn. 1976).

[67] See, e.g., Green v. Baron, 879 F2d 305 (8th Cir. 1989) (tier program).

[68] For examples of punitive use of psychotropic drugs in institutional settings, see United States ex rel. Wilson v. Coughlin, 472 F2d 100 (7th Cir. 1972); Welsch v. Likens, 373 F. Supp. 487, 503 (D. Minn. 1974), aff'd in part and vacated in part, 550 F2d 1122 (8th Cir. 1977); Jack Henry Abbot, In The Belly of the Beast 42 (1982) (describing the use of tranquilizers for disciplinary purposes in prison); Mary C.

unless the medication dosage administered is excessively high[69] or the drug or other therapy used is totally ineffective as treatment,[70] invocation of an Eighth Amendment basis for a right to refuse treatment will be difficult.[71] This would seem true of therapies administered for the treatment of mental disorders in hospitals and civil outpatient programs as well as those provided prisoners in prison facilities and offenders in community programs and forensic facilities, with two exceptions that merit separate analysis. These exceptions involve the state's use of treatment for purposes of offender rehabilitation and for restoring death row inmates found incompetent to be executed to competence so that capital punishment may be imposed.

Rehabilitation of Offenders as Punishment

When the purpose of administering therapy to a convicted offender is not the treatment of a specific mental disorder from which the individual suffers, but is the desire to change the offender's antisocial personality so that the individual will not commit crime in the future,[72] the Eighth Amendment should be implicated. Such "rehabilitation" is one of the traditional aims of criminal punishment,[73] and therefore may be considered "part of the penalty that criminal offenders pay for their offenses against society."[74] Where the legislature has authorized such

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McCarron, "The Right to Refuse Antipsychotic Drugs: Safeguarding the Mentally Incompetent Patient's Rights," 73 Marq. L. Rev. 477, 496–497 (1990). For examples of punitive use of electroconvulsive therapy, see, e.g., Robitscher, supra note 6, at 12–13 (referring to punitive use of electroconvulsive therapy in state mental hospitals).

[69] See Alexander D. Brooks, Law, Psychiatry and the Mental Health System 877 (1974); George E. Crane, "Clinical Psychopharmacology in Its 20th Year," 181 Science 124, 125 (1973).

[70] See, e.g., Donald F. Klein, "Who Should Not Be Treated With Neuroleptics, But Often Are," in Rational Psychopharmacotherapy and the Right to Treatment 1 (Frank J. Ayd ed., 1975) (describing inappropriate uses of antipsychotic drugs); Robitscher, supra note 6, at 12 (describing inappropriate uses of ECT).

[71] See Bruce J. Winick, "Legal Limitations on Correctional Therapy and Research," 65 Minn. L. Rev. 331, 348–350 (1981).

[72] See, e.g., In re Young, 857 P2d 989 (Wash. 1993) (treatment program for sexually violent predators); Sundby v. Fiedler, 827 F. Supp. 581 (WD Wis. 1993) (treatment program for sex offenders).

[73] See, e.g., Jones v. United States, 463 US 354, 368 (1983); Pell v. Procunier, 417 US 817, 822–823 (1974). See generally, Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose (1981).

[74] Whitley v. Albers, 475 US 312, 319 (1986); Rhodes v. Chapman, 452 US 337, 347 (1981).

offender rehabilitation as part of the criminal penalty, then it clearly would constitute punishment within the meaning of the Eighth Amendment.[75] But even when the legislative intent is not so clear, or when correctional administrators seek to apply such rehabilitative treatment absent legislative authorization, such rehabilitation is sufficiently associated with criminal punishment that the presumption should be that punishment rather than some alternative purpose was intended.

The government could contend that under the "alternative purpose" approach of *Bell v. Wolfish*,[76] such rehabilitation is not imposed as punishment but rather for an alternative regulatory purpose, such as community protection. Such an argument would find support in the Supreme Court's decision in *United States v. Salerno*,[77] upholding the facial validity of the pretrial detention provisions of the Bail Reform Act of 1984.[78] In *Salerno*, the Court decided that pretrial detention without bail was permissible regulation rather than impermissible punishment in violation of substantive due process.[79] The Court stressed the clarity of the legislative history indicating that Congress did not authorize pretrial detention as punishment, but rather to solve the "pressing societal problem" of preventing danger to the community by defendants released on bail.[80]

If preventing danger to the community is a regulatory rather than a punitive purpose, can it be contended that because offender rehabilitation is designed to prevent danger to the community, it therefore is not punishment? The problem with this argument is that its acceptance would immunize virtually all punishment from Eighth Amendment scrutiny. All punishment seeks to accomplish community protection, by incapacitating offenders and deterring them and others from committing such offenses in the future. *Salerno* should not be read broadly to apply to the postconviction Eighth Amendment context the approach it used in the preconviction substantive due process context. The Court in *Salerno* dealt with pretrial detention applied prior to conviction, not a

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[75] See United States v. Salerno, 481 US 739, 747 (1987) ("To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent.").

[76] 445 US 520 (1979); see supra notes 63–65 and accompanying text.

[77] 481 US 739 (1987).

[78] 18 USC § 3142 (1993).

[79] 481 US at 746–752.

[80] Id. at 747. See also Schall v. Martin, 467 US 253 (1984) (upholding under a similar analysis the constitutionality of the pretrial detention of juveniles).

restriction on liberty imposed after conviction and because of it. Restrictions on liberty imposed on convicted offenders that are traditionally associated with punishment must be deemed punishment within the meaning of the Eighth Amendment, even if a regulatory purpose can be asserted as an alternative justification. Given the substantive due process injunction against punishment without an adjudication of guilt, a more narrow definition of "punishment" is warranted in the nonprison context (the *Wolfish-Salerno* approach) than should apply in the prison, where punishment (although not cruel and unusual punishment) is permitted. If a convicted criminal defendant sentenced to a lengthy term of imprisonment challenges the sentence imposed as excessive or disproportionate to the offense, and hence cruel and unusual,[81] any justification of detention based on community protection, which always could be asserted, could not be accepted without defeating all Eighth Amendment challenges to criminal sentences.

Pretrial detention or other restrictions on liberty imposed on defendants who have not been convicted of crime, such as crowded conditions of pretrial confinement, in appropriate cases can be seen as nonpunitive attempts by government to accomplish legitimate societal goals, which on balance will justify the restrictions imposed. This is the holding of *Salerno* and *Wolfish*. But when the imposition follows conviction, and is of the kind traditionally associated with criminal punishment, Eighth Amendment review should not be eluded so easily . When the rehabilitation of criminal offenders is the purpose of administering correctional therapy to convicted offenders, the limitations imposed by the Eighth Amendment should therefore apply.[82]

Determining that correctional rehabilitation is punishment within the meaning of the Eighth Amendment does not, of course, resolve the constitutional inquiry. To offend the Eighth Amendment, the punishment in question must be deemed cruel and unusual, for example, excessive and disproportionate, or indecent and inhumane. Correctional therapies imposed for rehabilitation that involve excessive pain or are unnecessarily degrading can thus be considered cruel and unusual.[83]

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[81] See cases cited in supra note 22.

[82] See James J. Gobert, "Psychosurgery, Conditioning, and the Prisoner's Right to Refuse 'Rehabilitation,' " 61 Va. L. Rev. 155, 182 (1975). A parallel analysis can be made for the imposition of intrusive forms of mental health therapy designed to rehabilitate individuals confined in various special offender categories, such as mentally disordered sex offenders or individuals acquitted by reason of insanity.

[83] Cf. Hudson v. McMillan, 503 US 1, 6–7 (1992) (excessive force as cruel and unusual punishment).

Indeed, the Supreme Court has suggested that the use as punishment of techniques outside the scope of traditional penalties—a category that presumably is limited to fines, imprisonment, and execution—" is constitutionally suspect."[84]

In the unlikely even that a legislature authorized psychosurgery for those committing certain sex offenses, for example, it could be invalidated under the Eighth Amendment either as disproportionate to the offense,[85] or given its experimental character[86] and serious and irreversible negative effects on personality,[87] as indecent and inhumane[88] or as insufficiently related to the goal of transforming the offender into a law-abiding and well-adjusted member of society.[89] If psychosurgery (or for that matter any therapeutic approach) were found to be ineffective as rehabilitation or treatment, it would certainly be subject to Eighth Amendment scrutiny, even if defended as treatment of a specific mental disorder.[90] Ineffective techniques are "arbitrary or purposeless" and "not reasonably related to a legitimate goal [other than punishment]," which under the Supreme Court's analysis in *Bell v. Wolfish* would justify the inference that the government's purpose was punishment rather than treatment.[91] Given the painful, degrading, and dehumanizing effects of psychosurgery, such punishment should easily be deemed cruel and unusual.

If psychosurgery were to be imposed on offenders even though not explicitly authorized by the legislature, this lack of authorization would itself raise Eighth Amendment problems. If imposed by correctional rehabilitators without legislative approval, such psychosurgery could

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[84] Trop v. Dulles, 356 US 86, 100 (1958) (plurality opinion).

[85] See, e.g., Solem v. Helm, 463 US 277 (1983).

[86] See Nat'l Comm'n for the Protection of Human Subjects of Biomedical and Behavioral Research. Report and Recommendations: Psychosurgery (DHEW Pub. No. (OS) 77-0001 1977) (hereinafter Psychosurgery) (concluding that psychosurgery must be regarded as an experimental procedure).

[87] Elliot S. Valenstein, "The Practice of Psychosurgery: A Survey of the Literature (1971–1976)," in Psychosurgery, supra note 86, at 1–80 (describing negative emotional and behavioral effects).

[88] See Ingraham v. Wright, 430 US 651, 670 (1977) (" 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment"); Knecht v. Gillman, 488 F2d 1136, 1140 (8th Cir. 1973) (aversive conditioning program using vomit-inducing drugs).

[89] See Knecht v. Gillman, 488 F2d at 1139–1140 (invalidating use of unproven drug in aversive conditioning program); Winick, supra note 71, at 350.

[90] See supra note 88.

[91] 441 US 520, 539 (1979); see supra note 73 and accompanying text.

be viewed as an unauthorized sentence. The precursor of the Eighth Amendment, the English Bill of Rights, was especially concerned with imposition of penalties not authorized by statute.[92] As a result, unauthorized "rehabilitation" imposed on offenders can be considered to violate the Eighth Amendment.[93]

The courts should subject to especially strict scrutiny offender rehabilitation using any of the more intrusive treatments when not specifically authorized by legislation. Even if the statute authorizing the criminal sentence imposed, or the one delegating authority to correctional officials, should mention "rehabilitation" or "correctional treatment,"[94] a substantial question would exist as to whether intrusive mental health treatments like psychosurgery or surgical interventions like the castration of sex offenders were contemplated. In deciding whether a punishment is inconsistent with "the evolving standards of decency that mark the progress of a maturing society,"[95] and hence cruel and unusual, the Supreme Court has paid special attention to the evidence provided by the actions of legislatures[96] and juries.[97] Legislatures and juries are reflectors of contemporary community attitudes on the limits of acceptable punishment, but correctional administrators—appointed officials who are not directly responsive to the political process—are not. The judicial deference owed to specific legislative judgments about appropriate punishments is thus unwarranted in considering the constitutionality of punishments selected by correctional officials applying vague delegations of authority.

The Courts may avoid the Eighth Amendment analysis just discussed by utilizing an alternative doctrinal approach to invalidate such arguably unauthorized treatments. When a governmental agency purports to have authority to infringe on fundamental rights, courts in other contexts have often invoked the ultra vires doctrine to insist on an explicit legislative expression of that authority.[98] In *Kent v. Dulles*,[99] for ex-

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[92] Granucci, supra note 17, at 860.

[93] See Gobert, supra note 82, at 182.

[94] See, e.g., Del. Code tit. 11, §§ 6531(e)–6531(f) (1993); Kan. Stat. § 75-5210(a) (1993); Minn. Stat. § 244.03 (1993); RI Gen. L. § 42-56-31 (1993); see also ALI Model Penal Code § 7.01(1)(b) (Proposed Official Draft, 1962).

[95] See supra note 30 and accompanying text.

[96] See, e.g., Gregg v. Georgia, 428 US 153, 173, 179–180 (1976) (plurality opinion); Bruce J. Winick, "Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis," 81 Mich. L. Rev. 1, 3–4 (1982).

[97] See, e.g., Enmund v. Florida, 458 US 782, 794–796 (1982); Coker v. Georgia, 423 US 584, 596 (1977) (plurality opinion); Winick, supra note 96, at 4, 79.

[98] See Regents of the Univ. of Cal. v. Bakke, 438 US 265, 308–309 (1978) (opinion of Powell, J.); James O. Freeman, Crisis and Legitimacy 83–85 (1978).

[99] 357 US 116 (1958).

ample, the Supreme Court held that the Passport Act of 1926, which delegated to the Secretary of State the authority to "grant and issue passports . . . under such rules as the President shall designate and prescribe,"[100] was insufficient authority for a regulation prohibiting issuance of passports to members of the Communist Party. Finding that the regulation impinged upon the constitutionally protected right to travel, the Court held that "[w]here activities or enjoyment, natural and often necessary to the well-being of an American citizen . . . are involved, we will construe narrowly all delegated powers that curtail or dilute them."[101] Referring to the Passport Act, the Court could not "find in this broad generalized power an authority to trench so heavily on the rights of the citizen."[102] Thus, when faced with correctional therapy that raises serious Eighth Amendment concerns, courts may well avoid deciding the Eighth Amendment question by holding that a general legislative delegation[1032] is insufficient to support the agency's assertion of authority to impose such treatment. This approach allows courts to avoid unnecessary constitutional adjudication, and in effect remands the underlying policy question to the legislature for decision with an awareness that its choice will implicate fundamental values and will be subjected to searching constitutional scrutiny.[104]

The Eighth Amendment principles discussed previously will not be limited to highly controversial therapies like psychosurgery or castration of sex offenders. A similar analysis can be made for other intrusive treatment techniques imposed to rehabilitate offenders. If excessively painful and degrading, or ineffective as rehabilitation, or disproportionate to the offense, or unauthorized by statute, other intrusive treatments could also be deemed cruel and unusual punishments. Moreover, if such treatments are imposed for purposes other than rehabilitation that themselves are traditionally associated with punishment, they should similarly be subject to Eighth Amendment scrutiny. For example, the use of long-acting psychotropic drugs implanted beneath the skin, or of electronic stimulation of the brain in conjunction with radio telemetry

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[100] Act of July 3, 1926, ch. 772, § 1, 44 Stat., pt. 2, 887, quoted in Kent v. Dulles, 357 US 116, 123 (1958).

[101] *Kent* at 129.

[102] Id.

[103] See, e.g., statutes cited in supra note 94.

[104] See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 111–198 (1962); Bruce J. Winick, "Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It," 43 U. Miami L. Rev. 765, 839–843 (1989).

devices that are surgically implanted, have both been suggested as means of incapacitating criminal offenders as an alternative to prison.[105] Because incapacitation is a traditional aim of punishment, subjecting offenders to these treatment techniques should be considered punishment within the meaning of the Eighth Amendment.

Treatment of Death Row Inmates to Restore Competence for Execution

Another area in which treatment administered to individuals suffering from mental illness may be considered punishment within the meaning of the Eighth Amendment involves treatment of death row inmates designed to restore their competence for execution. Under the Supreme Court's 1986 decision in *Ford v. Wainright*,[106] a state may not administer capital punishment to a prisoner on death row who becomes incompetent to be executed. When death row inmates are found to be incompetent for execution, the state may attempt to treat them in order to restore their competency so that the death penalty may be administered. When the incompetent death row inmate seeks to refuse such treatment, which typically will be psychotropic medication, can the state impose it over objection?

Ford did not address this issue. In 1990, the Court granted certiorari in the case of *Perry v. Louisiana*[107] to consider this unresolved question. After oral argument, however, the Court decided to avoid resolution of the constitutional question, at least for the time being, and remanded the case to the state court for reconsideration in light of the Supreme Court's intervening decision in *Washington v. Harper*.[108] *Harper* had upheld a state prison's authority to administer medically indicated antipsychotic drugs to a prisoner who was found, when not taking medication, to be dangerous to other inmates and prison staff. Although recognizing that such involuntary medication invaded a liberty interest protected by due process, the Court rejected a challenge to the practice, applying a relaxed standard of review rather than traditional strict scru-

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[105] Marlene W. Lehtinen, "Controlling the Minds and Bodies of Prisoners—Without Prisons," 6 Barrister 11, 11–12, 59 (1979); Marlene W. Lehtinen, "Technological Incapacitation: A Neglected Alternative," 2 Q. J. Corrections 31, 35–36 (1978).

[106] 477 US 399 (1986); see Bruce J. Winick, "Competency to be Executed: A Therapeutic Jurisprudence Perspective," 10 Behav. Sci. & L. 317 (1992).

[107] 494 US 1015 (1990).

[108] 494 US 210 (1990).

tiny.[109] The *Harper* Court used a reasonableness approach applied generally in prison cases in deference to the special needs of prison authorities to safeguard the security of inherently volatile institutions.

The Supreme Court's remand in *Perry* raised the substantive due process question of whether the state's interest in restoring the death row inmate to competence so that he could be executed would outweigh the prisoner's constitutionally protected liberty interest in avoiding such intrusive treatment.[110] An issue separate from the due process question is whether the imposition of psychotropic medication in this context would constitute punishment within the cognizance of the Eighth Amendment, and if so, whether it would be deemed "cruel and unusual." Treating the death row inmate with medication in this situation may be medically appropriate for the prisoner's mental disorder. However, the state's predominant purpose in imposing such treatment is not to benefit the individual, but rather, to restore him to sufficient competence so that it may end his life. As a result, such treatment is a necessary predicate for the administration of capital punishment, and can be seen as an essential part of the punishment scheme.

Such treatment therefore arguably should be deemed punishment within the meaning of the Eighth Amendment. Treatment designed to restore competence for execution can be distinguished for this purpose from treatment designed to restore competence to stand trial. Defendants found incompetent to stand trial typically are sent to state hospitals and subjected to involuntary antipsychotic medication in order to restore their competence so that they may be tried.[111] Although in a causal sense, such involuntary treatment can be seen as a necessary predicate to any punishment that a defendant restored to competence and found guilty ultimately may face, the state's purpose in imposing such treatment is not a punitive one. At the point at which treatment is imposed, the defendant has been charged with a crime; however, he has not been convicted and must, in our system, be presumed innocent. At this point, therefore, the state's purpose in imposing treatment is to further the "central goal of the criminal justice system"—the "accurate

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[109] See id. at 223–234.

[110] Following remand, the Louisiana Supreme Court distinguished *Harper* and found that such involuntary treatment would be unconstitutional. State v. Perry, 610 So. 2d 746 (La. 1992).

[111] See generally Bruce J. Winick, "Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie," 85 J. Crim. L. & Criminology 571 (1995).

determination of guilt and innocence."[112] Although punishment may follow in the case of those defendants later determined to be guilty, the desire to restore competence to permit a fair resolution of the charges is not in itself a punitive purpose. By contrast, incompetent death row inmates already have been found guilty and sentenced to death. The state's purpose in imposing treatment, even if that treatment is medically appropriate, is to enable it to carry out that sentence. Treatment is imposed not to ameliorate the individual's suffering, but to deprive him of his life in furtherance of the deterrent and retributivist policies underlying the state's capital punishment scheme. Because the state's essential purpose in imposing treatment on incompetent death row inmates it to facilitate their punishment,[113] under the *Wolfish-Salerno* approach to defining punishment for constitutional purposes, such treatment should be considered punishment within the meaning of the Eighth Amendment.

Even if such treatment constitutes punishment, the question remains whether it is "cruel and unusual." The Supreme Court's rejection of the contention that the death penalty itself is not cruel and unusual punishment[114] does not resolve the issue. The question is whether imposition of intrusive psychotropic medication, not to benefit the individual but to facilitate his execution, is uncivilized, inhumane, and inconsistent with our evolving standards of decency. Because our experience with forced treatment in the competence-for-execution context has been so limited,[115] it may be difficult to reach a conclusion concerning whether societal attitudes would condemn this practice as inconsistent with our shared standards of decency. Some significant evidence, however, is provided by the consistency with which the legal and clinical literature has condemned this practice as unethical,[116] and the conclusion of the American Medical Association and the American Psychiatric Associa-

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[112] Brecht v. Abrahmson, 113 S. Ct. 1710, 1729 (1993).

[113] See State v. Perry, 610 So. 2d 746, 752 (1992) (holding such imposed treatment unconstitutional, although not on Eighth Amendment grounds, finding that *Harper* had strongly implied that "forced administration of antipsychotic drugs may not be used by the state for the purpose of punishment").

[114] E.g., Gregg v. Georgia, 428 US 153 (1976).

[115] Despite much scholarly attention to this issue, the number of cases in which death row inmates have been found to be incompetent to be executed and in which the state has attempted to impose involuntary treatment has been extremely small. See Robert Miller, "Evaluation of and Treatment to Competency to be Executed: A National Survey and Analysis," 16 J. Psychiatry & L. 67, 73–74 (1988); Winick, supra note 106, at 318 n.8.

[116] See Winick, supra note 106, at 318 n.9 (citing literature).

tion that medical ethics bar physicians from participating in it.[117] The use of intrusive medical treatment as an aspect of punishment is inconsistent with our traditions and seems inconsistent with the Eighth Amendment's injunction against modes of punishment that do not treat those to be punished "with respect for their intrinsic worth as human beings."[118] Although it may be easier to resolve this issue on due process rather than Eighth Amendment grounds,[119] a strong argument thus exists that administration of involuntary medication to restore competence for execution "does not comport with human dignity,"[120] and therefore should be deemed cruel and unusual punishment.

Treatment as Institutional Discipline

The use of treatments such as psychotropic drugs, electroconvulsive therapy, or behavior therapy for institutional discipline[121] also should be considered punishment within the meaning of the Eighth Amendment. This conclusion is especially clear for such treatment applied in the prison, but it may also apply to such treatment when administered in civil hospitals. Prison discipline was recognized by the Supreme Court to constitute punishment within the meaning of the Eighth Amendment in *Hutto v. Finney*.[122] Language in two subsequent Supreme Court cases involving restrictions imposed in pretrial detention, however, may support an argument that discipline in furtherance of the goal of maintaining institutional security serves a legitimate regulatory purpose other than punishment, and thus should not constitute punishment within the meaning of the Constitution.[123] Moreover, the approach taken by the Supreme Court in *United States v. Salerno*,[124] upholding pretrial detention without bail, may also be invoked to support this contention. But

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[117] Id.

[118] Furman v. Georgia, 408 US 238, 270 (1972) (Brennan, J., concurring).

[119] See State v. Perry, 610 So. 2d 746 (La. 1972) (finding practice unconstitutional on due process grounds); Winick, supra note 106, at 329–337 (criticizing practice as unconstitutional and antitherapeutic).

[120] *Furman*, 408 US at 270 (Brennan, J., concurring).

[121] Psychotropic drugs, perhaps because they are so easily administered, seem to be the treatment technique most frequently used for disciplinary purposes. See, e.g., Nelson v. Heyne, 491 F2d 352, 356 (7th Cir. 1974), cert. denied, 417 US 976 (1976).

[122] 437 US 678, 682, 685 (1978).

[123] See Block v. Ruhtherford, 468 US 571, 586 n.8 (1984); Bell v. Wolfish, 441 US 520, 546 (1979).

[124] 481 US 739 (1987); see supra notes 75–80 and accompanying text.

the language in the two cases just mentioned was dicta as neither case involved discipline for the violation of institutional rules. The issues in the cases concerned the validity of a jail prohibition on contact visits,[125] and a jail rule against receipt of hard-cover books unless mailed directly from publishers or bookstores.[126]

Discipline for the infraction of institutional rules can certainly be related to the need to maintain institutional security, which is not itself a punitive purpose. However, when such discipline follows a rule violation and is imposed because of it—to rehabilitate the inmate or deter him from repeating his behavior, to deter others from misbehavior, and possible for retribution as well—it constitutes punishment in every meaningful sense of the word,[127] even though it serves the regulatory purpose of maintaining institutional security. Thus, the holding of *Hutto v. Finney*, that "punitive isolation" in correctional facilities constitutes punishment within the meaning of the Eighth Amendment,[128] and its recognition that other punishments such as lashing with a strap and the administration of electrical shocks to the body, for prison misconduct, were also within the coverage of the Eighth Amendment,[129] must be read to survive the dicta in these subsequent cases.

Hutto, of course, involved the prison, the traditional bastion of the Eighth Amendment and a context in which the "alternative purpose" approach of *Bell v. Wolfish*,[130] reapplied in *Salerno*,[131] has not been invoked.[132] The extension of *Hutto* to hospital discipline is not as clear, particularly because, like the jail in *Wolfish* and *Salerno*, the hospital does not house convicted offenders or (ordinarily at least) even those under criminal indictment. But discipline for past infractions in any context seems punitive, even if an alternative regulatory purpose can be asserted. The school paddling administered for disciplinary purposes in *Ingraham v. Wright*[133] was denied Eighth Amendment protection not because it failed to meet the definition of "punishment," but because the locus of its imposition was a school. Pretrial detention without bail,

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[125] *Block*, 468 US at 585–589.

[126] *Wolfish*, 441 US at 544–562.

[127] See Ingraham v. Wright, 430 US 651, 685–686 (1977) (White, J., dissenting).

[128] 437 US at 682, 685.

[129] 437 US at 682, ns. 4–5.

[130] 441 US 520 (1979); see supra notes 62–64 and accompanying text.

[131] 481 US 739 (1987); see supra notes 75–80 and accompanying text.

[132] See text following supra note 81.

[133] 430 US 651 (1977); see supra notes 37–41 and accompanying text.

upheld in *Salerno*, simply does not seem inherently punitive, while institutional discipline does. The Court in *Ingraham* specifically left open the applicability of its holding to involuntary hospitalization,[134] and its analysis stressed the safeguards existing in public schools,[135] which are largely absent in hospitals.[136] Moreover, the *Ingraham* Court had only an Eighth Amendment contention before it, and did not consider whether school discipline could be deemed punishment in violation of substantive due process.[137] If the Eighth Amendment extension from prison to hospital is accepted, paddling in the prison or any other kind of discipline in the hospital would seem to be punishment subject to Eighth Amendment scrutiny. If we have come this far, *Salerno* would not seem to disqualify institutional discipline from being considered punishment within the meaning of the Eighth Amendment.

In any event, even if not all hospital discipline is deemed punishment, discipline using intrusive treatment techniques should be. Such techniques seem "excessive"[138] in light of other disciplinary alternatives available to maintain institutional security—segregation, transfer to more secure hospital wards, and possibly even physical restraints—supporting the inference that punishment was actually intended.

Treatment methods imposed for institutional discipline should thus be deemed punishment within the cognizance of the Eighth Amendment. Treatment used as punishment cuts against the grain of constitutional values.[139] Treatment, and particularly medical treatment, should generally be left to the individual under a central value of our constitutional heritage—the promotion and preservation of individual autonomy.[140] Only in rare cases should government be permitted to impose treatment, especially when it is intrusive and medical in character. Government should be permitted to impose such treatment over the individual's objection, if at all, only when it can be justified medically.[141]

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[134] See supra notes 40–41 and accompanying text.

[135] See supra note 43 and accompanying text.

[136] See supra note 45 and accompanying text.

[137] See *Ingraham*, 430 US at 659.

[138] See United States v. Salerno, 481 US 739, 747 (1987); Bell v. Wolfish, 441 US 520, 538–539 (1979); supra note 64 and accompanying text.

[139] See Winick, supra note 106, at 330.

[140] See generally Bruce J. Winick, "On Autonomy: Legal and Psychological Perspectives," 37 Vill. L. Rev. 1705 (1993).

[141] See Riggins v. Nevada, 504 US 127, 135 (1992); Washington v. Harper, 494 US 210, 223–227 (1990); Bruce J. Winick, "Ambiguities in the Legal Meaning and Significance of Mental Illness," 1 Psychol., Pub. Pol'y & L. 535, 549–554 (1995).

When intrusive treatment is defended, not on medical grounds, but as a means of punishment, it is subject to special scrutiny under the Eighth Amendment, the provision of our Constitution that places explicit limits on punishment. Medical punishment therefore should be deemed presumptively unconstitutional under the Eighth Amendment. At a minimum, such treatment should be considered cruel and unusual punishment in violation of the Eighth Amendment, as well as violative of substantive due process, if excessively painful and dehumanizing or disproportionate to the infraction involved.

Moreover, such treatments administered for disciplinary purposes also would be unconstitutional if unnecessary, and thus excessive punishments, given the availability of alternative means at the disposal of correctional and hospital authorities for dealing with offender or patient misbehavior—the techniques mentioned earlier in connection with hospital discipline, as well as prison transfers or forfeiture of good-time credit or other prison privileges in the case of offenders. In view of these alternatives, the use of such intrusive treatments as psychotropic drugs or electroconvulsive therapy to deal with troublemakers for whom therapeutic considerations alone would not have mandated such approaches would seem unnecessarily degrading and excessive punishments in violation of the Eighth Amendment.

How should we treat treatments used for institutional management or the maintenance of institutional security, if not imposed in a disciplinary context?[142] Should they avoid Eighth Amendment scrutiny on the basis that these are legitimate governmental purposes other than punishment?[143] If the treatments used are excessive for the accomplishment of these purposes, they may be deemed punishments under than approach suggested in *Bell v. Wolfish*.[144] Electroconvulsive therapy or psychosurgery, if used for institutional management or maintenance security, certainly would be excessive in this sense and would thus violate the Eighth Amendment. Psychotropic drugs present a harder case. Perhaps the use of psychotropic drugs to restore order in an emergency can be defended as a means of achieving the governmental interest in

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[142] See, e.g., Rogers v. Commissioner of Dep't of Mental Health, 458 NE2d 308, 318 n.19 (Mass. 1983) ("[T]he temptation to engage in blanket prescription of such drugs to maintain order and compensate for such personnel shortages may be irresistible.").

[143] *Wolfish*, 441 US at 538–539; see supra note 64 and accompanying text.

[144] 441 US at 538–539; see supra note 64 and accompanying text.

institutional security, and thus considered not be punishment. The availability in the circumstances of alternative means of responding to such an emergency,[145] however, may render medication for this purpose excessive, particularly if the drugs used were highly intrusive and imposed the risk of severe negative side effects, like the antipsychotic drugs.[146] This contention, however, may conflict with the Supreme Court's deferential approach in the area of prison security,[147] although the Court seems inclined not to extend this approach beyond the prison.[148] Absent an emergency, however, the use of such drugs to maintain control does not seem " 'reasonably related' . . . to the concededly legitimate goals of . . . [institutional] safety and security,"[149] and arguably should be deemed punishment within the cognizance of the Eighth Amendment. Because the use of most drugs for this purpose would violate contemporary standards of decency, it should be invalid as cruel and unusual.[150]

Behavior Modification in Corrections

Behavioral approaches in prison contexts raise especially interesting Eighth Amendment questions. Two of the positive reinforcement techniques, the token economy[151] and the tier system,[152] have been used frequently in adult and juvenile correctional institutions as well as in alternative community-based programs for offenders. In the token economy, the subject receives tokens as rewards for instances of de-

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[145] See Winick, supra note 2, at 102 (citing literature dealing with the uses of seclusion, restraints, and behavioral techniques for the treatment of violent institutionalized persons).

[146] See Winick, supra note 2, at 70–73.

[147] See Washington v. Harper, 494 US 210 (1990).

[148] See Riggins v. Nevada, 504 US 127 (1992); Winick, "Implications of *Riggins*," supra note 141, at 690–698.

[149] Bee v. Greaves, 744 F2d 1387, 1395 (10th Cir. 1984), cert. denied, 469 US 1214 (1985) (quoting *Wolfish*, 441 US at 539).

[150] See Nelson v. Heyne, 491 F2d 352, 356 (7th Cir. 1974), cert. denied, 417 US 976 (1976); Welsh v. Likens, 373 F. Supp. 487 (D. Minn. 1974), aff'd in part, vacated and remanded in part, 550 F2d 1122 (8th Cir. 1977). It may also abridge substantive due process. Winick, supra note 9, at 221–223; supra note 141.

[151] See Teodoro Ayllon & Nathan Azrin, The Token Economy, a Motivational System for Therapy and Rehabilitation (1968); Alan E. Kazdin, The Token Economy, A Review and Evaluation (1977); David B. Wexler, "Token and Taboo: Behavior Modification, Token Economies, and the Law," 61 Cal. L. Rev. 81 (1973).

[152] See Green v. Baron, 879 F2d 305 (8th Cir. 1989); Canterino v. Wilson, 546 F. Supp. 174 (WD Ky. 1982).

sired behavior and the tokens may be exchanged for various items or privileges that otherwise are unavailable. Inappropriate behavior results in the loss of tokens. A 1974 survey revealed that fourteen states utilized token economy systems in their prisons.[153] The Federal Bureau of Prisons has also used token economies in the treatment of delinquents at two of its facilities.[154]

A variation on the token economy, the tier system, grants privileges on the basis of the prisoner's place in a system of tiers. Inmates earn their way from an orientation level, where privileges are scant or nonexistent, upwards through a ranked series of tiers with increasingly more desirable privileges and conditions. This model was utilized in the controversial Federal Bureau of Prisons' Project START. In that program the prisoners at entry level were denied such basic privileges as daily showers, exercise, visitors, reading materials, personal property, and commissary privileges—all of which could be regained only by behaving in conformity with program goals.[155] Project START, although discontinued by the Federal Bureau of Prisons, has been used as a model for other prison programs.[156]

The 1974 survey previously referred to indicated that at least seven state prison systems used aversive conditioning in their correctional therapy programs.[157] More extreme examples have been the use of succinylcholine, a paralyzing drug, in a California prison program,[158] and a program for child molesters in a Connecticut prison, paired electric shocks to the prisoner's groin area with arousal experienced while viewing slides of naked children.[159]

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[153] See Helen Blatte, "State Prisons and the Use of Behavior Control," 4 Hastings Ctr. Rep. 11 (Sept. 1974). See generally E. Scott Geller et al., "Behavior Modification in a Prison," 4 Crim. Just. & Behavior 11 (1977).

[154] See Norman A. Carlson, "Behavior Modification in the Federal Bureau of Prisons," 1 New Eng. J. on Prison L. 155, 158–159 (1974).

[155] See Clonce v. Richardson, 379 F. Supp. 338, 344 (WD Mo. 1974); Carlson, supra note 154, at 159–163.

[156] E.g., Green v. Baron, 879 F2d 305 (8th Cir. 1989); Canterino v. Wilson, 546 F. Supp. 174 (WD Ky. 1982); see Willard Gaylin & Helen Blatte, "Behavior Modification in Prisons," 13 Am. Crim. L. Rev. 11, 25 (1975).

[157] Blatte, supra note 153, at 11. It may be that, in response to the bad publicity these techniques received in the 1970s, aversive programs are rarely used today in prison programs.

[158] See Mackey v. Procunier, 477 F2d 877, 877–878 (9th Cir. 1973).

[159] See Roger W. Wolfe & Dominic R. Marino, "A Program of Behavior Treatment for Incarcerated Pedophiles," 13 Am. Crim. L. Rev. 69, 77–78 (1975).

To the extent these behavioral approaches are carefully designed, serious attempts to extinguish maladpative behavior patterns, phobias, compulsive behavior, or other pathologies, they may be deemed treatment as opposed to punishment. On the other hand, if they are inappropriately designed behavioral programs that constitute punishment disguised as treatment, they should be deemed punishment within the meaning of the Eighth Amendment.[160] In addition, if they are designed to extinguish behavior patterns that led to incarceration in order to avoid recidivism, such as the Connecticut prison program for child molesters, they may be considered "rehabilitation" and thus an aspect of punishment. Even if considered punishment within the meaning of the Eighth Amendment, however, they may be considered constitutionally permissible punishments. If authorized by the legislature for rehabilitative purposes, although arguably punishments within the meaning of the Eighth Amendment, they may not sufficiently shock the conscience to receive Eighth Amendment condemnation. Of course, if deemed ineffective,[161] or if unnecessarily painful and degrading in light of alternative reinforcers,[162] these programs could be deemed cruel and unusual. This is especially true for those aversive techniques that inflict serious damage to subjects, including "pain, frustration, increased aggressiveness, arousal, general unspecific anxieties, somatic and physiological malfunctions, and development of various unexpected and often pathological operant behaviors."[164] Several aversive techniques could well constitute cruel and unusual punishment to the extent they are identical to prohibited punitive sanctions.[165] Social isolation, for example, is the functional equivalent of the strip-room and solitary confinement, the abusive use of which has been condemned as violating the Eighth

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[160] See Green v. Baron, 879 F2d 305 (8th Cir. 1989) (upholding tier program in security and medical facility to which jail detainee was transferred to stabilize his behavior so he could later attend his criminal trial and assist in his defense).

[161] See, e.g., Converse v. Nelson, No. 95-16776 (Mass. Super. Ct. (Suffolk Co.) 1995) (attacking the Bridgewater State Hospital's Phase System, a tier program). "Because the Phase program does not exhibit any of the characteristics of a competently designed and implemented behavior management program, it is not likely to produce any therapeutic goals and must be viewed as a punishment program." Affidavit of Joel Dvoskin, filed in *Converse*, at 12 (July 1995).

[162] See text accompanying supra note 70.

[163] Bertram Brown et al., Behavior Modification: Perspectives on a Current Issue 3, 16 (DHEW Pub. No. (ADM) 1975).

[164] Bradley Bucher & O. Ivar Lovaas, "Use of Aversive Stimulation in Behavior Modification," in Miami Symposium on the Prediction of Behavior, 1967; Aversive Stimulation 77, 78 (Marshall R. Jones ed., 1968).

[165] See supra note 16.

Amendment in a number of cases involving prison and juvenile institutions.[166] The administration of electric shocks to the body, sometimes used in aversive programs, also has been considered cruel and unusual when used for prison discipline.[167] The mild slapping used in some aversive programs seems little different than the corporal punishment held to be cruel and unusual punishment in prison and juvenile cases.[168] Some of these techniques are thus sufficiently offensive to prevailing standards of decency to implicate Eighth Amendment concerns. If employed exclusively for therapeutic purposes, however, they may not, under the Supreme Court's "alternative purpose" approach invoked in *Bell v. Wolfish*,[169] be considered "punishment" in the constitutional sense,[170] at least if not excessive in view of the availability of less drastic conditioners. On the other hand, aversive conditioning in correctional facilities is highly controversial, and some commentators have contended that it is ineffective as treatment within the prison and constitutes little more than the disguised infliction of punishment.[171] To the extent this criticism is valid, such programs would, of course, merit Eighth Amendment scrutiny.[172]

If properly designed, most of the positive reinforcement programs—for example, token economies or tier approaches—will not raise Eighth Amendment concerns, with one exception. Positive reinforcement procedures involving substantial entry-level deprivations may trigger Eighth Amendment scrutiny. When token economy or tier programs start offenders off in a situation of severe deprivation that may be remedied only by behaving in conformity with program goals, the reinforcers used may raise special concerns.[173] To the extent that courts have held

[166] See, e.g., Hutto v. Finney, 437 US 678 (1978); LaReau v. McDougal, 473 F2d 974, 978 (2d Cir. 1972), cert. denied, 414 US 878 (1973).

[167] See, e.g., *Hutto*, 437 US at 682 & n.5; Gates v. Collier, 349 F. Supp. 881, 900 (ND Miss. 1972), aff'd 501 F2d 1291 (5th Cir. 1974).

[168] See, e.g., *Hutto*, 637 US at 682 & n.4; Jackson v. Bishop, 404 F2d 571, 579–580 (8th Cir. 1968) (Blackmun, J.).

[169] 441 US 520 (1979); see text accompanying supra notes 63–65.

[170] E.g., Green v. Baron, 879 F2d 305, 309 (upholding tier program as an appropriate treatment program to stabilize detainee's behavior so that he could attend his criminal trial).

[171] See, e.g., Albert Bandura, "The Ethics and Social Purposes of Behavior Modification," in 3 Annual Review of Behavior Therapy: Theory and Practice 13, 15–16 (Cyril M. Franks & Gerald Wilson eds., 1975); Edward M. Opton, "Institutional Behavior Modification as a Fraud and Sham," 17 Ariz. L. Rev. 20 (1975).

[172] See supra notes 70, 161 and accompanying text.

[173] See Saleem A. Shah, "Basic Principles and Concepts," in Correctional Classification and Treatment 123, 127 (Am. Correctional Ass'n Comm. on Classification & Treatment 1975).

that prisons, to avoid Eighth Amendment condemnation, must provide certain minimum conditions and meet minimum standards,[174] these cases may limit the use of these basic rights and privileges as reinforcers in positive reinforcement programs.[175] With this exception, however, the positive reinforcement techniques would not seem to implicate the Eighth Amendment, at least if well designed, therapeutically appropriate programs.

Verbal approaches like psychotherapy, counseling, and educational programs,[176] as well as such behavioral approaches as systematic desensitization, shaping, modeling, contingency contracting, and cognitive behavior therapy,[177] would seem to present no Eighth Amendment concerns, even if applied in prison rehabilitation programs or for other punitive purposes. These approaches, even if deemed punishments, would not qualify as "cruel and unusual."[178] Even if experienced by some patients and offenders as unpleasant,[179] these programs are not "so bad as to be shocking to the conscience of reasonably civilized people."[180]

Conclusion

The Eighth Amendment may thus play a role, although somewhat more limited than the First Amendment[181] or substantive due process,[182] in restricting mental health and correctional treatment. The Eighth Amendment clearly will apply to treatment that can be considered punishment when administered in correctional facilities to convicted offenders, and arguably would apply also to such treatment when

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[174] E.g., Hutto v. Finney, 437 US 678 (1978); Ramos v. Lamm, 639 F2d 559 (10th Cir. 1980), cert. denied, 450 US 1041 (1981).

[175] Wexler, supra note 151, at 93–95.

[176] See Winick, supra note 2, at 83–90.

[177] See Winick, supra note 2, at 80–82.

[178] Winick, supra note 71, at 356–357.

[179] See Whitley, v. Albers, 475 US 312, 319 (1986) ("Not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny, however. "After incarceration, only the 'unnecessary and wanton infliction of pain" . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment."); Rhodes v. Chapman, 452 US 337, 349 (1981) (prisons "cannot be free of discomfort").

[180] See Holt v. Sarver, 309 F. Supp. 362, 372–373 (D. Ark. 1970), aff'd, 442 F2d 304 (8th Cir. 1971).

[181] See Winick, supra note 2.

[182] See Winick, supra note 9.

administered in mental hospitals. Most treatments will not meet the constitutional definition of punishment, but those that do will be scrutinized under an Eighth Amendment standard that will prohibit them if excessive, ineffective, disproportionate to the offense, unnecessarily painful and degrading, or unauthorized as punishments. Treatment imposed as rehabilitation of offenders would meet the test for punishment because, although the state's purpose may be considered community protection, correctional rehabilitation is a traditional aspect of punishment for criminality. Treatment imposed on death row inmates to restore their competence so that they may be executed also should qualify as punishment. Even if medically appropriate for the prisoner's condition, the purpose of such treatment is punitive—to allow capital punishment to be imposed; it is not administered to benefit the individual, but to facilitate his execution. In addition, treatment imposed as institutional discipline, whether in the prison or the hospital, also should be deemed to meet the constitutional standard of punishment, thereby triggering Eighth Amendment scrutiny.

The Eight Amendment ban on cruel and unusual punishments thus will serve as an independedent constitutional limitation on unwanted mental health and correctional treatment that is intrusive and degrading to human dignity. While few treatments will qualify, the Eighth Amendment stands as a useful constitutional bulwark in this context, and as a reminder that medical punishment cuts strongly against the constitutional grain. Treatment as punishment is alien to our American constitutional heritage. Treatment in our tradition is a consensual process. In contexts in which the courts have upheld involuntary treatment, although such treatment was imposed to accomplish overriding public purposes, it also has been therapeutically appropriate for the individual.[183] When we have encountered examples of medical experimentation that were not therapeutically appropriate to the research subject, we have recoiled in horror.[184] The specter of coercive psychiatry used to punish and "re-

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[183] See, e.g., Washington v. Harper, 494 US 210, 227 (1989) (Psychotropic medication); Jacobson v. Massachusetts, 197 US 11 (1905) (compulsory vaccination for small pox); see Winick, supra note 9, at 221–223 (therapeutic appropriateness principle); supra note 141.

[184] See United states v. Karl Brandt, (The Medical Case), in "*I and II* Trials of War Criminals Before the Nuremberg Military Tribunals" (1949), reprinted in Jay Katz, Experimentation With Human Beings 292 (1972) (hereinafter "Nuremberg Code") (trial of twenty-three German physicians for medical experimentation with prisoners of war and civilians during World War II); Alan M. Brandt, "Racism and Research: The Tuskegee Syphilis Study," 8 Hastings Ctr. Rep. 21–29 (Dec. 1978) (discussing the Tuskegee Study, where 399 black persons affected with syphilis in the United States were purposely misinformed by U.S. Public Health Service physi-

habilitate" political dissidents in the former Soviet Union met with similar condemnation.[185] Evolving principles of customary international law to which we subscribe condemn nonconsensual human experimentation[186] and involuntary mind control.[187] Treatment as punishment also would violate basic principles of medical ethics.[188] Our evolved standards of decency and human dignity thus would be offended by the imposition of intrusive forms of treatment administered not as therapy, but as punishment. Like the rack and the screw and boiling in oil, medical punishment is repugnant to fundamental human values and our conception of the individual, and thus should be condemned under the Eighth Amendment.

In the case of treatments that are found to implicate the First Amendment or substantive due process, the constitutionality of involuntary treatment will turn on scrutiny of governmental purposes for their imposition and the availability of alternative means for accomplishing them.[189] Treatments found to violate the Eighth Amendment standard, however, if imposed involuntarily, will be condemned as unconstitutional without such further scrutiny.[190] While intrusive treatment found to be necessary to the attainment of compelling governmental interests thus may not violate the First Amendment or the Due Process Clauses, the Eighth Amendment will prevent its involuntary imposition if it would constitute a form of punishment so shocking to the conscience as to violate our basic concepts of human dignity. Although these other con-

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cians throughout the course of the study); Jay Katz, "Human Experimentation and Human Rights," 38 St. Louis U. LJ 7 (1993) (discussing Tuskegee study).

[185] See Winick, supra note 2, at 52.

[186] "Nuremberg Code," supra note 184.

[187] See Universal Declaration of Human Rights, United Nations Gen. Assembly Res. 217, 3 GAOR (Alsio), at 71, Dec. 10, 1948. See also "Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care," G.A. Res. 119, U.N. GAOR, 46th Sess., Supp. No. 49, Annex, at 188–192, U.N. Doc. A/46/49 (1991).

[188] The Hippocratic Oath, which is at the core of medical ethics, imposes a duty of benevolence and non-malevolence on the physician that is inconsistent with the administration of treatment for punitive purposes or any other reason that is not in the patient's best interests. See Washington v. Harper, 494 US 210, 222–223 (1990) (quoting Hippocrates c. 460–400 B.C., Stedman's Medical Dictionary 647 (4th Unabridged Lawyer's ed. 1976)); see Winick, supra note 106, at 332 (discussing Hippocratic Oath).

[189] See Winick, supra note 9, at 19–33 (substantive due process); Winick, supra note 2, at 90–101 (First Amendment).

[190] See, e.g., Estelle v. Gamble, 429 US 97 (1976); Furman v. Georgia, 408 US 238 (1972) (per curiam); Robinson v. California, 370 US 660 (1962); Trop v. Dulles, 356 US 86 (1958) (plurality opinion).

stitutional protections require courts to engage in a balancing of relevant interests, the Eighth Amendment stands as an absolute barrier to imposed treatment that constitutes punishment that is cruel and unusual.

Applying the Eighth Amendment as a barrier to treatment that is punishment would further not only the constitutional values underlying the amendment, but also the desire to promote therapeutic values.[191] Placing an absolute barrier between treatment and punishment would be therapeutic for several reasons. If therapists are required to participate in the imposition of what they and their patients see as punishment, talented clinicians will refuse to work in public mental hospitals and correctional facilities.[192] This will further compromise the therapeutic potential of such facilities, which already suffer from a scarcity of clinical resources. Indeed, the ethical dilemmas that blurring the distinction between punishment and treatment will create for therapists may discourage talented individuals from even pursuing a career in the mental health field, producing antitherapeutic consequences for society as a whole.

Blurring this distinction can also have a negative effect on the willingness of patients and offenders to seek mental health treatment or to accept it with the positive attitude that may be essential to its success.[193] To succeed, mental health treatment requires a high degree of trust and confidence by the patient in the therapist. Permitting treatment to be used as punishment can undermine such trust and confidence in the therapist and in the therapeutic process,[194] reducing positive expectancies that play an important role in producing positive treatment outcomes.[195] Moreover, allowing mental health treatment to be used as punishment will give treatment a bad name, discouraging people generally from seeking mental health treatment when needed.

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[191] See generally David B. Wexler & Bruce J. Winick, Essays in Therapeutic Jurisprudence (1991) (analyzing law's role as a therapeutic agent); Bruce J. Winick, Therapeutic Jurisprudence Applied: Essays on Mental Health Law (forthcoming 1996) (therapeutic jurisprudence analysis of mental health law); Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence (David B. Wexler & Bruce J. Winick eds., forthcoming 1996) (applying therapeutic jurisprudence to analyze legal issues cutting across varied legal areas).

[192] See Winick, supra note 106, at 334 (suggesting that requiring clinicians to participate in treatment to restore competence for execution will have this effect).

[193] See Bruce J. Winick, "The Right to Refuse Mental Health Treatment: A Therapeutic Jurisprudence Analysis," 18 Int'l J. L. & Psychiatry 99, 102–103 (1994).

[194] Id. at 109, 111–115.

[195] See id. at 106–107.

In a society riddled with poverty and social pathology, it is not surprising that the number of people society labels as deviant because of mental illness or criminality has grown considerably. The numbers are much too large for us to rely on institutionalization in mental hospitals and prisons as a solution. Mental health treatment and offender rehabilitation hold much promise for the task of redeeming those we have ostracized and reducing the risk of their continued antisocial behavior. Allowing treatment to be confused with punishment will only frustrate achievement of this goal. Constitutional and therapeutic considerations thus combine to support a view of the Eighth Amendment that would prevent the use of treatment as punishment.

American Law in the Garden of Eden: A Legal Whimsy

By Joel Cohen* and Michele L. Pahmer**

The story of Adam and Eve in the Garden of Eden and the temptation visited upon them by the serpent raises questions for humanity of "biblical" proportions. This article takes a new tack on the ancient tale and applies modern American legal principles and analysis to various factual issues raised in the Eden scenario. Among the issues discussed are entrapment, vicarious entrapment, entrapment by estoppel, inconsistent defenses, Miranda *warnings, overreaching government misconduct, joint trials in the face of confessions and consent recordings.*

Adamo and Eva were a fiercely devoted couple—rumor had it, Adamo never even looked at another woman. They lived in a pristine, crime-free, libertarian town resplendent in nature: the closest thing to Paradise.[1] In fact, the only *malum prohibitum* on the books was the ban, astonishingly enforceable by the death penalty, for drinking the narcotic *"Knowledgina,"* an hallucinogenic juice from the fruit of a single tree in the heart of the town's garden. There was no recorded case of its use but, drinking *Knowledgina* allegedly gave the user superhuman, godlike insights.

Adamo, having lived in the town since he came into being, had direct knowledge of the ban. The level of Eva's awareness, however, was unclear. She mysteriously arrived years later from Tardaymah, a sleepy neighboring community. Some jokingly said it was as if she sprang from Adamo's rib, although she apparently was urged on him at a gathering by the town's lone policeman, Chief Lord. So, if Eva, who kept to herself when not with Adamo, knew of the ban, it could only have been through pillow talk with Adamo.

One day, the treacherous Rex Cobra, as much snake as man, appeared on the scene. For no apparent reason (although some speculated

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[1] Adapted from *Genesis*, Ch. 2-3. This article is dedicated to the memory of Jerome Berger, a fine man and inspiration to creativity.

he was envious of Eva's love for Adamo) and without any discernible relationship with police authorities, he outfitted himself with a recording device and approached Eva who lay facing eastward near the town garden sunning her nude body—the town actually encouraged nudism—while reading her favorite novel.

His recording device switched on, Cobra sate beside his quarry. Beckoning to Eva, who thus far had been totally drug-free, he coaxed, "how about trying a little *Knowledgina*, Eva—nobody's looking." Eva, still trying to be friendly, replied, "No thanks. There's a death penalty for drinking *Knowledgina*." Curiously, she added that the death penalty applied even for "touching" the fruit. Cobra, the consummate seducer, tried to persuade her otherwise. "Don't worry," he said, "don't believe all that stuff about a death penalty for drinking *Knowledgina*. Drink it. The buzz'll 'open your eyes.' Make you a seer. You'll be like G-d himself."

This time, Eva couldn't resist. Just inhaling the nectar's aroma from a distance, she was drawn to it. Intoxicated by the mystical charm of the fruit, she sipped from its juice, and then experienced the ecstacy of divine insight.

Wanting to share it with her beloved, she ran to Adamo, who was busy feeding the local animals. Adamo could deny Eva nothing. So with no hesitation, having observed the angelic look on her face, Adamo promptly drank the hallucinogenic nectar. The eyes of both were now wide open. They promptly saw themselves as naked. Cobra, watching from a distance, was ebullient. Another drama was about to begin.

Moments later, as if *deux ex machina*, Chief Lord arrived at the square. He called, "Where are you? Trying to hide, Adamo?" Adamo and Eva had separated, running in different directions. When Chief Lord caught up to him, Adamo mumbled something about hearing the Chief in the garden, being afraid because he was naked—"so I hid."

"I have information that you drank from the *Knowledgina*. What about it? You know the law, damn it," said the Chief, who must have found Cobra's tape recording, or gotten some other tip. Adamo, who knew no lawyer and couldn't resist trying to defend himself with what he thought was his best defense, reflexively said: "That *woman* that *you* introduced me to, she gave it to me and I drank from its fruit." Some defense—It's *Your* Fault and *Her* Fault.

Chief Lord, having captured Adamo with his own words, looked for Eva next. He soon found her, distraught on the far side of the gar-

den, trying to compose herself. No *Miranda* warnings for her either, simply, "What did you do, Eva?" Eva, who had watched Court TV occasionally and had a little more to work with than her love, began planning her own uncounselled defense. "Cobra beguiled me, so I drank from it." Boom. Entrapment!

Armed with these two confessions, Chief Lord next paid a visit to Cobra, still sitting on the park bench, laughing uproariously at having played the snake, seemingly impervious to his own criminal exposure for having aided and abetted the couple in the commission of a crime punishable by death. Lord, gaining confidence, didn't even bother taking a statement from Cobra.

Without describing the gory details, Adamo, Eva, and Cobra managed to elude the death penalty, but still faced extremely onerous sentences: Paradise lost.

Still, several issues are raised by this episode. While key defense claims were not available to their forebears in the Garden of Eden—to some criminal lawyers, the *real* Original Sin—they might be available to Adamo, Eva, and Cobra under American Law.

* * *

Ignorance of Law

Could Eva have raised a defense of ignorance of the law?

As any teenager probably will tell you, ignorance of the law is no excuse; one's mistaken belief as to whether or not a particular act violates the law is, as a general rule, no defense.[2] Thus, even if Eva was not specifically aware of Eden's proscription against *Knowledgina*, she could still properly be found guilty of the crime.

As with most rules, however, this one too, has its exceptions. Initially, ignorance of the law may relieve a party from criminal liability if such knowledge is, under the relevant statute, a specific element of the crime.[3] In addition, mistake of law is a valid defense if that mistake results from an official government statement's having misled an individual into believing that her conduct was permissible.[4] Because Cobra

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[2] See, e.g., People v. Marrero, 69 NY2d 382, 515 NYS2d 212 (1987).

[3] 69 NY2d at 390–391.

[4] See, e.g, NY Penal Law § 15.20 (McKinney's 1987).

had no governmental law enforcement authority, however, Eva could not rely on his reassurances regarding her culpability. As neither of the recognized exceptions to the general rule applies in this case, Eva may not rely on any subjective mistaken belief that her conduct was not criminal. Moreover, even if available, the success of this "defense" is dubious, given Eva's gratuitous outburst, which, at a minimum, strongly suggests that she did, in fact, know of the ban.

Ignorance of Fact

Could Adamo have raised a defense of ignorance of fact?

Unlike ignorance of the law, one's ignorance of certain facts making his conduct criminal may exculpate a defendant from the crime charged.[5] Thus, for example, if a defendant is caught with a package containing narcotics, his ignorance as to the contents of the package may be a defense to a charge of criminal possession of a controlled substance.[6] Similarly in this case, if Adamo did not know that he was drinking *Knowledgina* or that the particular fruit was the impermissible one, his ignorance of those facts could be asserted as a defense to the crime charged. As with Eva's "admission," however, Adamo's statement to Chief Lord essentially precludes his assertion of this defense, as he does not deny that he knew it was *Knowledgina*, but only attempts to shift the blame.

Good advice: Don't volunteer interviews by the authorities.

Entrapment

Does Eva have an entrapment defense?

Theological niceties suggesting that the serpent in Eden was a "divine instrumentality" who seduced Eve and, thus, "entrapped" her, are irrelevant here. American law would simply not recognize an "entrapment" defense for Eva or a fortiori, for Adamo. The black-letter rule is unequivocal: There is no defense of private entrapment.[7] Entrapment

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[5] See United States v. Byrd, 352 F2d 570 (2d Cir. 1965).

[6] Cf. People v. Rypinski, 157 AD2d 260, 555 NYS2d 500 (4th Dep't 1990); but cf. People v. Georgens, 107 AD2d 820, 484 NYS2d 657 (2d Dep't 1985).

[7] For an excellent discussion on the laws relating to entrapment, see generally Jon A. Sale & Benefict P. Kuehne, "The Law of Entrapment and Governmental Overreaching," in White Collar Crime: Business and Regulatory Offenses § 6 (1995).

requires participation by a government agent, including anyone who acts at the instigation or behest of enforcement authorities, such as informants who are paid or seek some other reward for procuring arrests. Inducement that comes from someone such as Rex Cobra who appears to act in a purely private capacity, and not in concert with the authorities, does not give rise to entrapment.[8] That Chief Lord later investigated the conduct does not turn privately induced crime into a basis for an entrapment defense.

If, however, Rex Cobra were a government agent or an informant operating even with modest supervision by the authorities, an entrapment defense might be raised. The defense has two elements: (1) government inducement of the crime and (2) lack of predisposition on the defendant's part.[9] Eva, thus, could present credible evidence of inducement—after all, Cobra initially persuaded Eva to drink *Knowledgina.* Once a defendant presents such "inducement" evidence, the government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime; that is, that Eva was "ready and willing, without persuasion" to commit the crime and was merely "waiting for a propitious opportunity to do so." Proof of predisposition might come from (1) an existing, similar course of criminal conduct; (2) an already formed design by Eva to commit the crime; or (3) a "willingness" to commit the crime as evidenced by Eva's "ready response to the inducement."[10]

Here, (1) and (2) are clearly absent, and Eva's response to the inducement was hardly a "ready" one, because Eva first turned Cobra down. Thus, Eva has a very good "jury" issue, for predisposition is basically a question for the jury.[11]

Vicarious Entrapment

If Eva has an entrapment defense, does Adamo also have such a defense?

As for Adamo, if Cobra were a law enforcement mole, even though Adamo was never directly induced by Cobra, in some jurisdictions he

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[8] See United States v. Hernandez, 995 F2d 307 (1st Cir.), cert. denied sub nom., Sanchez v. United States, 114 S. Ct. 407 (1993).

[9] United States v. Salerno, 66 F3d 544 (2d Cir. 1995).

[10] Id. at 547.

[11] But see Jacobson v. United States, 503 US 540, 112 S. Ct. 1535 (1992).

may still claim "vicarious derivative entrapment." However, this particular entrapment defense is not available in all jurisdictions and even where available, it is often of only limited application.

For example, the Second Circuit allows a defense of vicarious entrapment when " 'the government's inducement was directly communicated to the person seeking [the] entrapment charge' by an unwitting middleman,"[12] but not where a middleman is encouraged to commit a crime, "and the middleman, responding to the pressure upon him, takes it upon himself to induce another person to participate in the crime. . . . "[13]

True, under this standard Adamo cannot benefit directly from any entrapment defense Eva may have (assuming Cobra were acting on the government's behalf), because Cobra never actually encouraged Eva to induce Adamo; she did that on her own, out of *love* for him. However, in a joint trial, Adamo would benefit vicariously, as a pure matter of jury appeal, from Eva's ability to air the sheer overpowering odor of entrapment.

Inconsistent Defenses

May a defendant assert entrapment and an inconsistent defense?

If Eva had not incriminated herself by telling Chief Lord that Cobra "seduced" her causing her to drink from the *Knowledgina*, an admission suggesting consciousness of her own guilt, she might fare better before a jury with a claim that she was unaware that *Knowledgina* was even against the law. Likewise, Adamo, without his admission that effectively blamed Lord and Eva for what he obviously knew was a criminal offense, might better argue that he did not know that the fruit he was given by Eva was actually the fruit containing *Knowledgina.* These arguments, however, cannot logically be reconciled with a defense of entrapment.

It is, indeed, often strategically unwise to raise inconsistent (so-called "multiple choice") defenses, for example, "I didn't do it, but if I did it, I was coerced (or entrapped)." Still, the Supreme Court has held that a defendant may legally claim that he or she failed to commit one or more elements of the crime charged and, at the same time, argue that

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[12] United States v. Pilarinos, 864 F2d 253 (2d Cir. 1988) (quoting United States v. Toner, 728 F2d 115 (2d Cir. 1984)).

[13] Id.

she was entrapped into committing it. In *Matthews v. United States*,[14] a Small Business Authority employee on trial for accepting a bribe in exchange for an official act denied the mental state necessary for a bribe prosecution, and at the same time argued that he was entrapped into accepting the money. When convicted after being denied the right to jury instructions on both defenses, his conviction was reversed.

Entrapment by Estoppel

Is the defense of entrapment by estoppel available to Cobra?

The serpent in the Garden of Eden, who was condemned to a perpetual crawl, would have been hard pressed to claim that he perceived that a "Higher Authority" authorized him to seduce, that is, "aid and abet" by soliciting Eva to commit a crime, premising his belief on a supposed "prior" relationship with Lord.

American law, however, does recognize a defense of entrapment based on perceived governmental authority. A defendant may claim a lack of criminal intent because he "honestly believed" that he was performing the otherwise illegal acts in cooperation with the authorities, for example, as an informant who was requested or directed to make cases for Chief Lord.[15] The Second Circuit, for example, recognized the defense of entrapment by estoppel in a drug conspiracy prosecution in which defendants claimed to have participated *only* because they believed they were assisting government agents investigating drug trafficking; the defendants had previously been informants for law enforcement.[16] Of course, one relying on this defense would have to offer probative evidence to support the "honest belief."

Overreaching Government Conduct

Under what circumstances is there a defense of overreaching government misconduct?

Because Cobra was not a government operative, Eva has no possibility of claiming the defense of overreaching government misconduct.

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[14] 485 US 58, 108 S. Ct. 883 (1988).

[15] See generally Joel Cohen, "Entrapment by Estoppel: A Defense of Fairness," NYLJ 1, col. 1 (Apr. 28, 1995).

[16] United States v. Abcasis, 45 F3d 39 (2d Cir. 1995).

But, if Cobra were, in fact, Chief Lord's operative, his "testing" Eva by persuading her to use an hallucinogen—with no proof that she previously used or intended to use narcotics—is disturbing. Still, American courts generally will not dismiss prosecutions involving government conduct short of that which violates that "fundamental fairness, shocking to the universal sense of justice."[17] Or, in the concurring words of Justices Powell and Blackmun in *Hampton v. United States,* "[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction."[18]

In isolated cases, however, such as the Third Circuit's decision in *United States v. Twigg*,[19] court have found that a defendant's "receptivity" to an informant's criminal proposal would not bar a due process defense. In *Twigg*, DEA agents provided an informant with all the necessary equipment to manufacture Speed, including hard-to-obtain chemical ingredients, glassware, a rented farmhouse for a laboratory, and a fictitious undercover business. The court found that the government's agents generated new crimes by the defendant merely to press criminal charges against him, when he was lawfully "minding his own affairs."[20] In light of the "outrageous" conduct by these agents, the court refused to uphold the conviction.[21]

While Eva's pre-Cobra conduct seems similar to *Twigg*'s, in fact, Chief Lord's conduct (assuming he was supervising Cobra) was far less offensive than the government agents in *Twigg*: *Knowledgina* came from a natural fruit actually growing in the garden, not from a synthetic that the government acted "egregiously" to help manufacture, as in *Twigg*. Accordingly, it is unlikely that Eva will be able to avail herself of this defense.

Miranda Warnings

Was Adamo (or Eva) entitled to *Miranda* warnings?

Miranda warnings must be given to a person being questioned by law enforcement officers after "being taken into custody or otherwise

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[17] United States v. Russell, 411 US 423, 93 S. Ct. 1637 (1973) (quoting Kinsella v. United States ex rel. Singeleton, 361 US 234, 246, 80 S. Ct. 297, 304 (1960).

[18] 425 US 484, 96 S. Ct. 1646 (1976).

[19] 588 F2d 373 (3d Cir. 1978).

[20] Id. at 381.

[21] Id. at 378–379; see also People v. Isaacson, 44 NY2d 511, 406 NYS2d 714 (1978).

deprived of his freedom of action in any significant way."[22] Statements or admissions that are elicited in noncompliance with this requirement are generally inadmissible at trial.[23] Thus, if either Adamo or Eva were wrongfully deprived of *Miranda* warnings before being questioned by Chief Lord, their statements could not be used in a court of law to prove their guilt. In this case, however, neither Adamo nor Eva were entitled to *Miranda* warnings, as neither of them were "in custody" for *Miranda* purposes at the time they were questioned.[24]

For a person to be "in custody" so as to require *Miranda* warnings, there must be either a formal arrest or a restraint on one's freedom of movement to the level associated with a formal arrest.[25] This latter standard is an objective inquiry into whether a reasonable person in the individual's position would understand that he or she is not free to leave.[26] In the hypothetical above, although Chief Lord was a law enforcement agent, there were no indications that either Adamo or Eva was, in any way, constrained from leaving at the time they were questioned and therefore, neither was entitled to *Miranda* warnings.[27]

Statements by Conspirators

Is Adamo's statement to Lord admissible against Eva?

By the time Chief Lord began conducting his interviews, the Adamo/Eva/Cobra possible conspiracy was over; Eva's and Adamo's responses to Lord's questioning were postconspiratiorial admissions, generally admissible only against the declarant.[28] Thus, without an independent basis for its admission at Eva's trial, the prosecution could probably not offer, under the hearsay exception for a coconspirator's declaration,

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[22] Miranda v. Arizona, 384 US 436, 86 S. Ct. 1602 (1966).

[23] See, e.g., Stansbury v. California, 114 S. Ct. 1526 (1994).

[24] See United States v. Kirsh, 54 F3d 1062 (2d Cir.).

[25] Stansbury v. California, 114 S. Ct. 1526 (1994) (citing California v. Beheler, 463 US 1121, 103 S. Ct. 3517 (1993).

[26] *United States v. Kirsh*, supra note 24, at 1067. See also United States v. Morales, 834 F2d 35 (2d Cir. 1987).

[27] Cf. Pennsylvania v. Bruder, 488 US 9, 109 S. Ct. 205 (1988); Campaneria v. Reid, 891 F2d 1014 (2d Cir. 1989); People v. Burton, 626 NYS2d 918 (4th Dep't 1995); People v. Reaves, 209 AD2d 647, NYS2d 132 (2d Dep't. 1994).

[28] See Anderson v. United States, 417 US 211, 94 S. Ct. 2253 (1974); Krulewitch v. United States, 336 US 440, 69 S. Ct. 716 (1949).

Adamo's statement incriminating Eva that "Eva gave it to me and I drank from the fruit."[29]

Obviously, there is no hearsay problem if Adamo testifies at Eva's trial as to her role in the crime. More difficult questions arise, however, in the context of a joint trial of Adamo and Eva in which the prosecution seeks to introduce Adamo's statement. While Adamo's statement is clearly admissible at the trial to establish his own guilt, the statement also implicates Eva. If Adamo does not testify, Eva's Sixth Amendment right to confront and cross-examine adverse witnesses may be infringed. Moreover, encroachment on this Sixth Amendment right cannot be cured by a limiting instruction to the jury that the statement may be considered only against Adamo.[30] One solution in this case would be to redact Adamo's statement to exclude Eva's involvement altogether, for example by offering in lieu of Adamo's statement, "Eva gave it to me and I drank from its fruit," simply "I drank from its fruit." It would, then, be admissible in a joint trial, but only against Adamo.

Until recently, Adamo's statement could have been admitted under an exception to the *Bruton* rule, which held that if the nontestifying codefendant's confession and the defendant's own confession were "interlocking," that is, they were substantially similar, such statement was admissible.[31] However, this exception has since been rejected by the Supreme Court.[32]

Unlike Adamo and Eva's confessions, which were made after the conspiracy had ended, Cobra's discussion with Eva was made in furtherance of the conspiracy, even though Eva had not yet agreed to participate.[33] Thus, if Cobra testifies and authenticates the tape, or if his tape is otherwise properly authenticated and admitted in a joint prosecution of Adamo and Eva, his discussions with Eva would be admissible not only against Eva, but also against Adamo even though it preceded Adamo's entrance into the conspiracy and even though he never spoke to (or even met) Adamo.[34]

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[29] Fed. R. Evid. 801(d)(2).

[30] See Bruton v. United States, 391 US 123, 88 S. Ct. 1620 (1968).

[31] Parker v. Randolph, 442 US 62, 99 S. Ct. 2132 (1979).

[32] Cruz v. New York, 481 US 186, 107 S. Ct. 1714 (1987).

[33] See United States v. Paone, 782 F2d 386 (2d Cir. 1986), cert. denied, 483 US 1019 (1987).

[34] See United States v. Gypsum, 333 US 364, 68 S. Ct. 525 (1948).

Tape Recordings

Is Cobra's recording admissible against Eva or Cobra?

Under New York law it is absolutely legal for Cobra, even acting independently and without law enforcement supervision, to secretly record his conversations with others.[35] The tape recordings thus made are admissible in New York courts and federal court.[36] (Other jurisdictions have different rules.)

If Eva or Adamo, or both, are on trial, Cobra's recording of Eva may be admitted against them either through Cobra's own testimony, or if they exist, independent means of authentication.[37] Under these circumstances, if Cobra does not testify because there was no law enforcement supervision of him, there will probably be no available means of authentication. Of course, if Eva turns state's evidence against Cobra and testifies, in a prosecution against him as an aider and abettor, that the recording accurately depicts her conversation with Cobra, it will be admissible against him.[38]

Conclusion

In the final analysis, Adamo and Eva virtually assured their successful prosecutions by volunteering what they thought, based on their limited knowledge of the law, were their best defenses. The lesson to be learned from this is that one should always seek the advise of an experienced criminal lawyer before making statements to the authorities, as a little *Knowledgina* is a dangerous thing, the Bible tells you so!

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[35] See generally Joel Cohen, "Consensual Recordings—A Primer on New York Law," NYLJ 1, col. 1 (Jan. 9, 1989).

[36] NY Penal Law 250.00 (McKinney 1989); see also People v. Lasher, 58 NY2d 962 (1983); 18 USC §2510–2511.

[37] See, e.g., People v. McGee, 49 NY2d 48 (1979), cert. denied sub nom., Waters v. New York, 446 US 942, 100 S. Ct. 2166 (1980), and cert. denied sub nom., Quamina v. New York, 446 US 942, 100 S. Ct. 2167 (1980); People v. Ely, 68 NY2d 520 (1986).

[38] See *People v. McGee*, supra note 37.

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Forensic Science:

The Constitutional Right to Surmount Exclusionary Rules Barring the Introduction of Exculpatory Scientific Evidence

Edward J. Imwinkelried*

In criminal cases it is ordinarily the prosecution that offers scientific testimony.[1] However, as the *Simpson* case demonstrates, the defense also has occasion to resort to scientific testimony. Suppose the trial judge bars defense testimony based on a scientific technique. If the judge does so, the judge will be relying either on a common-law rule such as the "general acceptance" test announced in *Frye v. United States*[2] or a statute such as Federal Rule of Evidence 702, which the Supreme Court construed in *Daubert v. Merrell Dow Phamaceuticals, Inc.*[3] It is true that such rules and statutes have the force of law. Yet in our constitutional hierarchy, common-law rules and statutes are subordinate to constitutional rights. Is there a constitutional right that the accused can rely on to override a common-law rule or statute that would otherwise bar the admission of exculpatory scientific evidence?

The Existence of a Constitutional Right

The United States Supreme Court has declared that in some cases, an accused has a constitutional right to surmount common-law or statutory exclusionary rules. The Court initially recognized the existence of the right in *Washington v. Texas*, an opinion written by Chief Justice Warren.[4] In that case, the Court struck down a Texas statutory rule that rendered certain persons altogether incompetent as defense witnesses. The question left unanswered by *Washington* was whether the right spent its force by putting the witness on the stand. At the point, was the state free to apply any exclusionary rule it wanted to restrict the content of the witness's testimony?

The Court addressed that question and expanded the constitutional right in *Chambers v. Mississippi*,[5]

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[1] H. Kalven & H. Zeisel, The American Jury 137 (1966).

[2] 293 F. 1013 (DC Cir. 1923).

[3] 113 S. Ct. 2786 (1993).

[4] 388 US 14 (1967).

[5] 410 US 284 (1973).

which invoked the right to invalidate a state common-law hearsay doctrine. The emerging standard is that the accused has a constitutional right to present critical, demonstrably reliable evidence.[6] However, neither *Washington* nor *Chambers* involved scientific evidence. May the accused invoke that constitutional right to override the judge's ruling barring the introduction of exculpatory scientific evidence? To answer that question, we must turn to the Supreme Court's 1987 decision in *Rock v. Arkansas.*[7]

Vickie Rock was charged with manslaughter in the shooting death of her husband. Before trial, she had difficulty recalling all the precise details of the shooting. She twice underwent hypnosis by a neuropsychologist to revive her memory. Only after hypnosis did she purport to remember that her gun was defective and had accidentally misfired. After the prosecutor learned that the accused had undergone hypnosis, he filed a pretrial motion to bar her trial testimony about the events recalled only after hypnosis. The trial judge granted the motion, and the state supreme court affirmed. The state court adopted the view that hypnotically enhanced testimony is so unreliable that it is per se inadmissible.[8] At the time the state court passed on the issue, there was a sharp split of authority over the admissibility of hypnotically enhanced testimony, but at least according to some commentators, per se inadmissibility was the majority view in the United States.[9]

On appeal, Ms. Rock challenged the exclusion of her testimony on the theory that the exclusion violated her constitutional right to present a defense. Five justices sustained the challenge. Justice Blackmun wrote the majority opinion. Justice Blackmun began his analysis by citing the result in *Ferguson v. Georgia*[10] as an indication that an accused has a "constitutional right to testify in her own defense."[11] He then pointed to *Washington* and noted that *Washington* announced the accused's right to call defense witnesses.[12] He asserted that the accused's general right to call witnesses "[I]llogically include[s] . . . a right to testify himself. . . . "[13]

After concluding that there is a constitutional right to present defense evidence, including the accused's own testimony, the justice emphasized that conclusion did not end the analysis.[14] He quoted *Chambers* for the proposition that the right

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[6] See generally E. Imwinkelried, Exculpatory Evidence: The Accused's Constitutional Right to Introduce Favorable Evidence (1990).

[7] 483 US 44 (1987).

[8] Rock v. State, 288 Ark. 566, 573, 708 SW2d 78, 81 (1986).

[9] Casenote, "The Admissibility of Hypnotically Refreshed Testimony: *Rock v. Arkansas*," 30 BC L. Rev. 573, 594 (1989). See also Note, "Hypnosis and the Right to Testify: An Evidentiary and Constitutional Dilemma for Connecticut," 9 Bridgeport L. Rev. 359, 399 (1989). See also Note, "*Rock v. Arkansas:* Hypnotically 'Refreshed' Testimony or Hypnotically 'Manufactured' Testimony?" 74 Cornell L. Rev. 136, 142 (1988) ("[m]ost courts").

[10] 365 US 570 (1961).

[11] Rock v. Arkansas, 483 US 44, 50 n.7 (1987).

[12] Id. at 52.

[13] Id.

[14] Id. at 53.

"may, in appropriate cases, bow to accommodate other state interests in the criminal trial process."[15] The question thus resolved itself into whether the state courts had properly balanced the competing interests by enforcing the per se inadmissibility rule.

Justice Blackmun readily admitted that the state has a legitimate interest in protecting the integrity of the fact-finding process by excluding unreliable evidence, but he nevertheless held that the state courts had not struck the proper balance in *Rock*. The justice conceded that "[t]he use of hypnosis in criminal investigations . . . is controversial, and the current medical and legal view of its appropriate role is unsettled."[16] However, he was impressed by the evidence that "The inaccuracies the process introduces can be reduced, although perhaps not eliminated, by the use of procedural safeguards"[17] such as Dr. Martin Orne's proposal for videotaping all hypnotic sessions.[18] The justice acknowledged that "[s]uch guidelines do not guarantee the accuracy of the testimony, because they cannot control the subject's own motivations or any tendency to confabulate, but they do provide a means of controlling overt suggestions."[19] The hypnotically refreshed testimony in *Rock* did not bear the substantial assurances of trustworthiness present in *Chambers*,[20] but Justice Blackmun concluded that such testimony can be reliable in an individual case.[21]

As previously stated, in *Washington v. Texas*,[22] the Court invalidated the application of the state incompetency rules. In part, the Court did so because the prosecution could use conventional means, cross-examination and cautionary instruction, to expose the potential weaknesses in accomplices' testimony.[23] Justice Blackmun took up the same theme in *Rock*. He observed that "[t]he more traditional means of assessing accuracy of testimony . . . remain applicable in the case of a previously hypnotized defendant."[24] The prosecutor may cross-examine the accused, present expert testimony about the dangers of hypnotically enhanced memory, and request cautionary instructions.[25]

Given the state of the scientific record on the reliability of hypnosis and the methods of attacking the credibility of hypnotically enhanced testimony open to a prosecutor, Justice Blackmun repudiated the rule of per se inadmissibility. The "[w]holesale" exclusion of all hypnotically enhanced testimony is "an arbitrary

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[15] Id. at 55, quoting Chambers v. Mississippi, 410 US 284, 295 (1973).

[16] Rock v. Arkansas, 483 US 44, 59 (1987); Note, *"Rock v. Arkansas:* Hypnotically 'Refreshed' Testimony or Hypnotically 'Manufactured' Testimony?" 74 Cornell L. Rev. 136, 155 (1988).

[17] 483 US 44, 60 (1987).

[18] Id.

[19] Id. at 60–61.

[20] Note, *"Rock v. Arkansas:* Hypnotically 'Refreshed' Testimony or Hypnotically 'Manufactured' Testimony?" 74 Cornell L. Rev. 136, 164 (1988).

[21] Id. at 136.

[22] 388 US 14 (1967).

[23] Westen, "The Compulsory Process Clause," 73 Mich. L. Rev. 71, 115–116 (1974).

[24] Rock v. Arkansas, 483 US 44, 61 (1987).

[25] Id. at 61.

restriction on the right to testify in the absence of clear evidence . . . repudiating the validity of all posthypnosis recollections."[26] Arkansas had failed to show that a hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events. . . . "[27]

In stating the Court's holding, Justice Blackmun held open the possibility that in a given case, a trial judge may still constitutionally exclude hypnotically enhanced testimony. As applied to the specific facts of the case, the exclusion might serve to bar demonstrably untrustworthy testimony.[28] Before closing, the justice stated that "[t]he State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified."[29]

Application of the Constitutional Right to Witnesses Other Than the Accused

Even with the benefit of these cases, several questions are at least technically unsettled. In *Rock*, the trial judge barred the accused herself from testifying about facts that she remembered only after hypnotic induction. One unsettled question is the issue of whether the *Rock* rule applies to defense witnesses other than the accused himself. In a footnote, Justice Blackmun disclaimed deciding that issue: "This case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants and we express no opinion on that issue."[30]

Although the *Rock* opinion does not explicitly resolve the issue, most commentators have concluded that *Rock* will ultimately be extended to defense witnesses other than the accused.[31] That extension would be reasonable. Both Justice Blackmun's reasoning and his citations in *Rock* support the extension. As previously stated, Justice Blackmun derived an accused's constitutional right to testify personally from a broader "right to call witnesses."[32] In addition, he staunchly reaffirmed the Court's earlier decisions in *Washington*[33] and *Chambers*[34] cases that involved the exclusion of testimony by defense witnesses other than the accused.

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[26] Id.

[27] Id.

[28] Id. at 62.

[29] Id. at 61.

[30] Id. at 58 n.15.

[31] Casenote, "The Admissibility of Hypnotically Refreshed Testimony: *Rock v. Arkansas*," 30 BC L. Rev. 573, 593 (1989); Note, "Hypnosis and the Right to Testify: An Evidentiary and Constitutional Dilemma for Connecticut," 9 Bridgeport L. Rev. 359, 401 (1989) (the spirit of *Rock*); Case Comment, "*Rock v. Arkansas:* Hypnotically Refreshed Testimony of a Criminal Defendant Cannot Be Per Se Excluded from Evidence," 18 Mem. St. U. L. Rev. 297, 299, 309 (1988). Note "Hypnosis and the Defendant's Right to Testify in a Criminal Case," 1989 Utah L. Rev. 545, 569.

[32] Rock v. Arkansas, 483 US 44, 52 (1987).

[33] Id. at 53–54.

[34] Id. at 55.

Given the nature of the balancing test used to determine the scope of the accused's constitutional right to present evidence,[35] it would be arbitrary to limit *Rock* to testimony by the accused herself. Under the test, the court must weigh the accused's bona fide need to resort to the excluded evidence. It is easy to conceive of cases in which the testimony of a defense witness other than the accused will be far more critical to the defense than the accused's own testimony. The materiality of the excluded evidence determines whether the facts trigger the accused's constitutional right,[36] and the materiality of evidence turns more on its content than on the identity of the witness. Even if the content of the evidence were identical, a defense witness's testimony might be more material because the jury would tend to discount the accused's personal testimony as dripping with self-serving motivation.

Application of the Constitutional Right to Other Scientific Techniques

The other unsettled question is whether to assume *Rock* applies to scientific techniques other than hypnotic memory enhancement.[37] It certainly would be possible to limit *Rock* to its facts. In *Rock* the accused did not offer explicitly expert testimony. The accused did not attempt to introduce expert testimony vouching for the reliability of hypnotically enhanced testimony. The accused merely attempted to testify about the details of the shooting, which she could not recall before the hypnosis sessions; she could have done so without ever using the word "hypnosis."

Yet limiting *Rock* in this fashion would be illiberal. The primary focus of Justice Blackmun's opinion was the state of the scientific record on the reliability of testimony generated by the scientific technique of hypnotic enhancement. His primary concern was the reliability of the testimony produced in court, and its reliability, in turn, depended on the validity of the scientific methodology used to produce the testimony. Further, the *Rock* opinion contemplates that the jury can be exposed to expert testimony on the subject. The justice suggests that prosecutors use expert testimony to educate jurors about the risks of hypnotic enhancement of memory.[38] Thus, although it is possible that the courts will confine *Rock* to lay testimony produced in part by scientific techniques, it seems unlikely that they will do so. With poetic justice, one of the first lower court cases presenting the question of the scope of the *Rock* doctrine arose in Arkansas, *Patrick v. State.*[39] The Arkansas Su-

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[35] See Exculpatory Evidence, supra note 6, §§ 2-3 to 2-6.

[36] Id. at §2-4b.

[37] See generally Casenote, "The Admissibility of Hypnotically Refreshed Testimony: *Rock v. Arkansas*," 30 BC L. Rev. 573 (1989); Note, "*Rock v. Arkansas:* Hypnotically 'Refreshed' Testimony or Hypnotically 'Manufactured' Testimony?" 74 Cornell L. Rev. 136 (1988); Case Comment, "*Rock v. Arkansas:* Hypnotically Refreshed Testimony of a Criminal Defendant Cannot Be Per Se Excluded from Evidence," 18 Mem. St. U. L. Rev. 297 (1988).

[38] Rock v. Arkansas, 483 US 44, 61 (1987).

[39] 295 Ark. 473, 750 SW2d 391 (1988).

preme Court held that *Rock* applies to explicitly scientific testimony, in that case, evidence about a new intoxication testing technique.

Application of the Constitutional Right to Specific Types of Scientific Evidence

For the balance of this column we shall assume that the courts will ultimately extend *Rock* to testimony by witnesses other than the accused and that they will read *Rock* as applying broadly to defense scientific testimony. On this assumption, we can conjecture further about the manner in which the court will apply *Rock* to some particular types of defense scientific evidence.

Well-Accepted Scientific Techniques

Shortly after the rendering of the *Chambers* decision, Professor Westen predicted that the courts would eventually extend the accused's constitutional right to present evidence to scientific testimony. He argued that:

> [I]t is scarcely conceivable that defendants could be constitutionally denied the opportunity to call experts to give opinion evidence about such matters as fingerprints, blood-stains, sanity, and other matters that routinely arise in criminal litigation.[40]

His argument is especially sound if, for the moment, we confine ourselves to well-accepted scientific techniques for making such determinations as identifications of fingerprints or of red blood cell stains. These techniques are generally conceded to be highly reliable.[41] Moreover, when prosecutors offer testimony based on these techniques, the courts routinely admit the testimony.[42] When the Founding Fathers approved the Confrontation Clause, they hoped to establish the principle of equality between the parties in criminal litigation.[43] In his concurrence in *Washington*, Justice Harlan indicated that he found the incompetency of accomplices as defense witnesses particularly offensive, because under Texas law the same persons were competent as prosecution witnesses.[44]

Of course *Rock* strengthened Professor Westen's position. The reliability of well-accepted scientific techniques such as fingerprint identification compares very favorably with the suspect reliability of hypnotically enhanced testimony. If anything, the dubious reliability of hypnotically enhanced testimony suffers by comparison to that of such well-accepted scientific techniques as red blood cell analysis. If *Rock* can compel the admission of hypnotically refreshed testimony, a for-

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[40] Westen, "Compulsory Process II," 74 Mich. L. Rev. 191, 203 (1976).

[41] For general discussions of the trustworthiness of these techniques, see A. Moenssens, J. Starrs, C. Henderson, & F. Inbau, Scientific Evidence in Criminal Cases, chs. 8, 13 (4th ed. 1995); P. Giannelli & E. Imwinkelried, Scientific Evidence chs. 16–17 (2d ed. 1993).

[42] Id. at §§ 16-9, 17-8(A).

[43] Westen, "The Compulsory Process Clause," 73 Mich. L. Rev. 71, 95 (1974); Pettijohn v. Hall, 599 F2d 476, 481 (1st Cir. 1979) (a core purpose of the Sixth Amendment is that the defendant has the same rights to introduce evidence as the prosecution).

[44] Washington v. Texas, 388 US 14, 24 (1967).

tiori the accused could invoke *Rock* to attack a trial judge ruling excluding testimony about a fingerprint identification or a red blood cell analysis.

Controversial Scientific Techniques

As just noted, an accused should have little trouble asserting a constitutional right to overturn a trial court ruling excluding testimony based on a well-accepted technique such as fingerprint identification. In contrast, the accused's prospects for success are more problematic when the defense witness proposes to base his or her testimony on a controversial technique. We turn now to the application of the accused's constitutional right to present evidence to a number of debatable techniques, including hypnotic enhancement, polygraphs, psychological testimony about the unreliability of eyewitness identifications, psychiatric testimony about the accused's state of mind, and the new portable breath tests for determining intoxication.

Polygraphy. In most jurisdictions, it is difficult for a defense attorney to introduce testimony about a debatable scientific technique. The difficulty arises because many jurisdictions still subscribe to the *Frye* test for admitting scientific evidence.[45] Under *Frye v. United States*,[46] the proponent of testimony based on a novel scientific technique must show that the technique has gained general acceptance within the relevant scientific circles. Until the technique gains the requisite degree of acceptance, testimony about the technique is inadmissible as a matter of law; it is immaterial that the defense expert is personally convinced of the validity of the technique. Many jurisdictions had relied on *Frye* as the basis for excluding polygraph evidence,[47] and several courts had cited *Frye* as the rationale of excluding hypnotically refreshed testimony.[48] However, in light of the *Rock* decision, trial judges can no longer mechanically enforce the *Frye* rub.[49] Even when the technique is too new to have gained widespread acceptance, the defense expert's proof of the technique's validity could be so impressive that the accused's constitutional right to present evidence comes into play. *Rock* may open the door to expert defense testimony based on novel techniques, testimony that would previously have been automatically inadmissible under *Frye*.

Rock controls the application of the accused's constitutional right to

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[45] P. Giannelli & E. Imwinkelried, Scientific Evidence § 1-5 (2d ed. 1993).

[46] 293 F. 1013 (DC Cir. 1923).

[47] P. Giannelli & E. Imwinkelried, Scientific Evidence § 8-3 (2d ed 1993); Note, "Hypnosis and the Right to Testify: An Evidentiary and Constitutional Dilemma for Connecticut," 9 Bridgeport L. Rev. 359, 385 (1989).

[48] State v. Tuttle, 780 P2d 1203, 1210 (Utah 1989); Note, "*Rock v. Arkansas:* Hypnotically 'Refreshed' Testimony or Hypnotically 'Manufactured' Testimony?" 74 Cornell L. Rev. 136, 141–142 (1988).

[49] Id. at 137, 152, 161, 166. Note, "Hypnosis and the Defendant's Right to Testify in a Criminal Case," 1989 Utah L. Rev. 545, 567.

this type of evidence. Until the state of the scientific record on the reliability of this technique changes, it will be hornbook law that a jurisdiction may not enforce a rule of per se inadmissibility.[50] The judge must determine the admissibility of the proffered evidence by a balancing test and assess the reliability of the evidence in as-applied fashion.

In all probability, many jurisdictions will accept Justice Blackmun's invitation to "establish guidelines to aid trial courts in the evaluation of posthypnosis testimony. . . . "[51] These jurisdictions will undoubtedly direct trial judges to consider, inter alia, the factors that Justice Blackmun mentioned in his opinion. He seemed to commend "the use of procedural safeguards,"[52] including hypnosis only by a trained psychiatrist or psychologist,[53] conducting the hypnosis session "in a neutral setting with no one present but the hypnotist and the subject,"[54] and videotaping "all sessions, before, during, and after hypnosis."[55] The accused's case for admission of the evidence will be strongest when the accused can demonstrate strict compliance with guidelines.

It is still the majority view in the United States that polygraph testimony is inadmissible even when the parties enter into a pretrial stipulation to the contrary.[56] Notwithstanding the majority view, even before the rendering of the *Rock* decision there was substantial scholarly support for the position that in the right case—a definite polygraph diagnosis by an eminently qualified, objective examiner—the accused has a constitutional right to present favorable polygraph testimony.[57]

More importantly, some courts have found the scholarly commentary persuasive and have invoked the accused's constitutional right to override an exclusionary rule barring polygraph evidence. In a few cases, the courts have squarely held that the accused had a constitutional right to present exculpatory polygraph evidence.[58] In *State v. Dor-*

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[50] Rock v. Arkansas, 483 US 44, 61 (1987).

[51] Id.

[52] Id. at 60.

[53] Id.

[54] Id.

[55] Id.

[56] See P. Giannelli & E. Imwinkelried, Scientific Evidence § 8-3 (1986).

[57] Clinton, "The Right to Present a Defense: An Emerging Constitutional Guarantee in Criminal Trials," 9 Ind. L. Rev. 711, 811–815 (1976); Note, "Compulsory Process and Polygraph Evidence: Does Exclusion Violate a Criminal Defendant's Due Process Rights?" 12 Conn. L. Rev. 324 (1980); Comment, "Admission of Polygraph Results: A Due Process Perspective," 55 Ind. LJ 157 (1979 81); Note, "*State v. Dean:* A Compulsory Process Analysis of the Inadmissibility of Polygraph Evidence," 1984 Wis. L. Rev. 237.

[58] See also P. Giannelli & E. Imwinkelried, Scientific Evidence § 8-3(D) (2d ed. 1993) ("In addition to the cases involving a defendant's right to present defense evidence, several cases have ruled polygraph evidence admissible on other constitutional grounds. In United States v. Hart, 344 F. Supp. 522 (EDNY 1971), the court ruled that the results of a polygraph examination of a government witness, which indicated deception, were admissible under Brady v. Maryland, 373 US 83 (1963). The court interpreted *Brady* as requiring the

sey,[59] an intermediate appellate court did so on the theory that the accused has a due process right to present critical, reliable defense evidence. The record below indicated that "[t]he person who administered the polygraph examination is a person skilled in this art and science and is qualified to interpret the results . . . " and that the test was "well conducted" "under controlled circumstances."[60] The court relied on *Chambers* as authority.[61] In *State v. Sims*,[62] an Ohio decision, the court mandated the admission of polygraph test results. Citing *Washington*,[63] the court reasoned that there is an implied right to present crucial defense evidence in the compulsory process guarantee. In *Jackson v. Garrison*,[64] a federal district court held that the exclusion of polygraph evidence denied the accused a fair trial.

Several other courts have used constitutional rationales to make more limited inroads on the general rule excluding polygraph evidence. In one case,[65] the accused attempted to force a government witness to concede that: He had a plea agreement with the prosecution, a term of the agreement obliged him to pass a polygraph test, and he had failed the test. The defense articulated a bias theory of logical relevance; the theory was that because he had failed the test and was in peril of losing the benefit of his agreement, the government witness was desperate to please the prosecution—desperate enough to lie about the accused. The court relied on Supreme Court cases, such as *Delaware v. Van Arsdall*,[66] holding that the right to cross-examine is constitutionally protected.[67] The court held that the trial judge erred in completely foreclosing cross-examination about the failed polygraph test. The court explained that "polygraph results are admissible for reasons other than proving the substance contained."[68]

Another case, *McMorris v. Israel*,[69] arose in Wisconsin. At the time, Wisconsin admitted polygraph tests pursuant to stipulation.[70] In *McMorris*, without giving any reason, the state prosecutor flatly refused to enter into a stipulation. The

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disclosure of any evidence which may tend to exculpate a defendant. 344 F. Supp. at 523. Since the prosecution initially thought the polygraph sufficiently reliable to conduct an examination, it had the burden, according to the court, of explaining why the test results should be excluded at trial.).

[59] 87 NM 323, 532 P2d 912 (NM App.), aff'd on other grounds 88 NM 184, 539 P2d 204 (1975).

[60] Id. at 324, 532 P2d at 913.

[61] Id. at 325, 532 P2d at 914.

[62] 52 Ohio Misc. 31, 32, 369 NE2d 24, 46 (1977).

[63] Id. at 369 NE2d at 33.

[64] 495 F. Supp. 9 (WDNC 1979), rev'd, 677 F2d 371 (4th Cir. 1981).

[65] United States v. Lynn, 856 F2d 430 (1st Cir. 1980).

[66] 475 US 673 (1986).

[67] United States v. Lynn, 856 F2d 430, 433 (1st Cir. 1988).

[68] Id. See also United States v. Whitt, 718 F2d 1494, 1501 (10th Cir. 1983) (the prosecution "opened the door").

[69] 643 F2d 458 (7th Cir. 1981).

[70] After the Seventh Circuit decision in *McMorris*, the Wisconsin Supreme Court overruled its prior decision and held polygraph evidence per se inadmissible. State v. Dean, 103 Wis. 2d 228, 279, 307 NW2d 628, 653 (1981).

Court of Appeals for the Seventh Circuit granted the accused habeas corpus relief. The court stated: "Where credibility is as critical as in the instant case, the circumstances are such as to make the polygraph evidence materially exculpatory within the meaning of the Constitution."[71] The court rested its holding on narrow grounds, namely, that the prosecutor's refusal to stipulate without offering a valid ground for refusal denied the accused due process: "From all that appears, [the prosecutor] was acting solely for tactical reasons in the belief that a test would not be helpful to his case. If a prosecutor refuses and states reasons, it then becomes the duty of the court to determine whether the reasons offered rise above the purely tactical considerations in a given case."[72]

In light of the current state of the polygraph art,[73] it would be difficult to argue for the admission of exculpatory polygraph evidence in every case. There is an ongoing debate in scientific circles over the trustworthiness of the tests.[74] However, it seems fairly clear that the trustworthiness of polygraphs compares favorably with the reliability of many of the types of nonscientific evidence the courts routinely admit. As one court noted, as a matter of course trial judges allow attorneys to treat a witness's "shiftiness of eyes or clarity of gaze" as credibility evidence during closing argument.[75] According to that court, the polygraph is "more reliable than [these] . . . ways of trying to prove whether somebody is lying. . . ."[76] The Office of Technology Assessment of the United States Congress has asserted that "the conclusion about scientific validity can be made only in the context of specific applications . . . ,"[77] a conclusion that dovetails with the as-applied adjudication of claims based on the accused's constitutional right to present evidence.

In addition to entertaining doubts about the trustworthiness of polygraphs, many courts are reluctant to admit polygraph evidence due to a fear that the evidence will overwhelm the lay jurors. However, studies of the judicial experience with polygraphs in Massachusetts,[78]

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[71] McMorris v. Israel, 643 F2d 458, 462 (7th Cir. 1981), cert. denied, 455 US 967 (1982).

[72] 643 F2d at 466.

[73] See generally A. Moenssens, J. Starrs, C. Henderson & F. Inbau, Scientific Evidence in Criminal Cases, ch. 20 (4th ed. 1995).

[74] Id. at § 14.09.

[75] Jackson v. Garrison, 495 F. Supp. 9, 11 (WDNC 1979), rev'd, 677 F2d 371 (4th Cir. 1981).

[76] Id.

[77] A. Moenssens, F. Inbau & J. Starrs,, Scientific Evidence in Criminal Cases § 14.09, at 714, ns.8–9 (3d ed. 1986).

[78] Tarlow, "Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System," 26 Hastings LJ 917, 968 (1975). See also Barnett, "How Does a Jury View Polygraph Results," 2 Polygraph 275 (1972).

[79] Tarlow, "Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System," 26 Hastings LJ 917, 968 n.258 (1975).

[80] Id. (citing State v. Jenkins, 523 P2d 1232 (Utah 1974) (the jury convicted the accused although the trial judge admitted polygraph evidence supporting the accused's innocence)).

Michigan,[79] Utah,[80] Wisconsin,[81] and Canada[82] indicate that that fear is largely unfounded. According to these studies, jurors frequently reject polygraph evidence and return verdicts inconsistent with the polygraphist's testimony.[83] Controlled experiments simulating courtroom polygraph testimony have reached the same finding.[84] In a study of the use of polygraph evidence in Wisconsin, Robert Peters, of the Crime Laboratory Bureau, Wisconsin Department of Justice, stated that "[t]he actual trial results clearly support the belief that juries are capable of weighing and evaluating all evidence and rendering verdicts that may be inconsistent with the polygraph evidence."[85] Mr. Peters flatly asserts that "polygraph evidence does not assume undue influence in the evidentiary scheme."[86]

[81] Peters, "A Survey of Polygraphic Evidence in Criminal Trials," 68 ABA J. 162 (1981).

[82] Cavoukian & Heslegrave, "The Admissibility of Polygraph Evidence in Court," 4 Law & Hum. Beh. 117 (1980).

[83] Tarlow "Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System," 26 Hastings LJ 917, 968 n.258 (1975).

[84] Carlson, Pasano & Jannuzzo, "The Effect of Lie-Detector Evidence on Jury Deliberations: An Empirical Study," 5 J. Pol. Sci. & Adm. 148 (1988); Markwart & Lynch, "The Effect of Polygraph Evidence on Mock Jury Decision-Making," 7 J. Pol. Sci. & Adm. 324 (1979).

[85] Peters, "A Survey of Polygraphic Evidence in Criminal Trials," 68 ABA J. 162, 165 (1981).

[86] Id. See also Imwinkelried, "The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology," 28 Vill. L. Rev. 554, 567–568 (1983).

Even with the benefit of the *Rock* decision, a defense counsel arguing for a constitutional right to present polygraph evidence faces an uphill battle. It is true that there are now a handful of cases accepting the argument. However, most courts have rejected it.[87] Further, "the precedent value of the cases [accepting the argument] is not strong. *Jackson* was overruled on appeal, *Dorsey* was affirmed but not on constitutional grounds, and *Sims* is inconsistent with later Ohio cases."[88] Chief Justice Rehnquist has characterized *McMorris* as a "dubious constitutional holding."[89] The defense counsel will have to make an especially good record to overcome the courts' traditional resistance to polygraph testimony. Counsel should be prepared to make a detailed showing of the polygraphist's qualifications and impartiality, the use of proper test procedures, and the definiteness of the polygraphist's diagnosis.

Mental Health Testimony. There is another type of restriction on the admissibility of psychiatric evidence.[90] These restrictions are inspired by the belief that, albeit relevant, psychiatric testimony is untrustworthy.

In 1975, Professor Westen wrote that "it is scarcely conceivable that

[87] P. Giannelli & E. Imwinkelried, Scientific Evidence § 8-3(D) (2d ed. 1993) (collecting the cases).

[88] Id. See also Exculpatory Evidence, supra note 6, ch. 6.

[89] Israel v. McMorris, 455 US 967, 970 (1982) (Rehnquist, J., dissenting from denial of certiorari).

[90] See Exculpatory Evidence, supra note 6, ch. 6, § 5-3.

defendants could be constitutionally denied the opportunity to call experts to give opinion evidence about such matters as . . . sanity. . . . "[91] When Professor Westen penned those words, psychiatric testimony was routinely admitted and the legal system had great faith in the power of psychiatry to make such findings as retrospective determinations of an accused's mens rea. However, such restrictions are not only conceivable today, they are a reality. For example, as part of the Comprehensive Crime Control Act of 1984, Congress added Rule 704(b) to the Federal Rules of Evidence:

> No expert testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.[92]

To some extent, the new restrictions on psychiatric testimony represent a political backlash against the acquittal of John Hinkley, who was prosecuted after being charged with the attempted assassination of former President Reagan.[93] However, more fundamentally, these restrictions are a product of a long-term reassessment of the trustworthiness of psychiatric evidence.[94] Many scholars bemoaned the "softness" of symptomatology in psychiatry.[95] Leading jurists joined in the criticism.[96] Judge Bazelon wrote:

> [I]t may be that psychiatry and the other social and behavioral sciences cannot provide sufficient data relevant to a determination of criminal responsibility no matter what the rules of evidence are. If so, we may be forced to eliminate the insanity defense altogether or re-fashion it. . . .[97]

Although the Federal Rules of Evidence generally abolish the former prohibition of expert opinions on ultimate facts in issue in the case,[98] there is now substantial judicial sentiment that even trained psychiatrists should not be permitted to opine directly as to the existence of mental elements of charged offenses and defenses. Many courts have sustained prohibitions of such opinions.[99] In upholding the prohibitions, the courts have reasoned that the ultimate inference of the existence of the mental elements exceeds the

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[91] Westen, "Compulsory Process II," 74 Mich. L. Rev. 191, 203 (1975).

[92] Fed. R. Evid. 704(b), 28 USCA.

[93] P. Giannelli & E. Imwinkelried, Scientific Evidence § 9-3 (1986).

[94] R. Carlson, E. Imwinkelried & E. Kionka, Materials for the Study of Evidence 540–541 (3d ed. 1991).

[95] Gerard, "The Usefulness of the Medical Model to the Legal System," 39 Rutgers L. Rev. 377 (1987); Ennis & Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Calif. L. Rev. 693 (1974).

[96] Smith v. Schlesinger, 513 F2d 462, 475 (DC Cir. 1975).

[97] Washington v. United States, 390 F2d 444, 457 n.33 (DC Cir. 1967).

[98] Fed. R. Evid. 704(a)-(b), 28 USCA.

[99] Phillips v. Wainwright, 624 F2d 585, 588 (5th Cir. 1980) (The trial court acknowledged, in rejecting defense counsel's proffer, "that [t]here are a lot of things a psychiatrist may testify about . . . , but the question of self-de-

psychiatrist's expertise.[100] One court excluded testimony that the accused suffered from a depravity of mind.[101] In doing so, the court asserted that "[t]here is no evidence . . . that a psychiatrist . . . has any scientific knowledge on which to base an opinion whether the petitioner evinced a depraved mind."[102] In explaining a similar ruling, another court asserted that the ultimate inference the psychiatrist proposed to testify to was "more a matter of speculation than of science."[103]

Although the bulk of the cases uphold these restrictions on psychiatric testimony, there are some favorable defense precedents. Several of the defense precedents are decisions of the Court of Appeals for the Seventh Circuit. The leading Seventh Circuit decision is *Hughes v. Matthews*.[104] In that case, the court dealt with the Wisconsin rule that the accused could not introduce psychiatric testimony negating specific intent; the Wisconsin courts had construed the statute as permitting the accused ot offer psychiatric testimony only if pleading insanity. The court noted that the Wisconsin rule burdened the accused's constitutional right to present evidence, recognized in *Washington* and *Chambers*.[105] The prosecution urged the court to sustain the statutes on the ground that the state legislature had a justifiable distrust of psychiatric testimony.[106] The court rejected the argument. The prosecution argued alternatively that underlying the statutory restriction was a legitimate "fear that admitting psychiatric testimony to disprove specific intent may cause judges and juries to find legally sane defendants not guilty, and consequently guilty persons will be absolved of criminal responsibility for mental abnormalities not amounting to insanity."[107] The court also brushed this argument aside:

> Whatever validity the argument might have when a finding of no intent would result in no criminal responsibility, it is unpersuasive in the present case where the testimony was offered only to show that a second-degree murder conviction was proper.[108]

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fense is one peculiarity [sic] within the jury"); Haas v. Abrahamson, 705 F. Supp. 1370 (ED Wis. 1989) (in excluding psychiatric testimony that the accused suffered from depravity of mind, the court commented that a psychiatrist may not function as a "superjuror" and that "[t]here is no evidence that . . . a psychiatrist . . . has any scientific knowledge on which to base an opinion on whether the petitioner evinced a depraved mind"); People v. Molina, 249 Cal. Rptr. 273, 275 (Cal. App. 1988); People v. McCowan, Cal. App. 2d 1, 227 Cal. Rptr. 23 (1986); State v. Dalton, 98 Wis. 2d 725, 298 NW2d 398 (1980); Annot., "Admissibility of Expert Testimony as to Whether Accused Had Specific Intent Necessary for Conviction," 16 ALR 4th 666 (1982).

[100] State v. Holcombe, 643 SW2d 336, 341 (Tenn. Crim. App. 1982).

[101] Haas v. Abrahamson, 705 F. Supp. 1370 (ED Wis. 1989).

[102] Id. at 1375.

[103] State v. Holcomb, 643 SW2d 336, 341 (Tenn. Crim. App. 1982).

[104] 576 F2d 1250 (7th Cir. 1978).

[105] Id. at 1255.

[106] Id. at 1257.

[107] Id. at 1258.

[108] Id.

The Seventh Circuit revisited the issue in *Parisie v. Greer*.[109] Parisie was prosecuted in Illinois state court on a murder charge. At trial, the accused's theory was that the decedent was a homosexual and made homosexual advances toward the accused. The accused attempted to introduce expert testimony that he was suffering from "homosexual panic" at the time he shot the decedent. The trial judge permitted the accused himself to testify to the decedent's homosexual advance. However, the judge excluded both lay testimony corroborating the decedent's homosexuality and the expert testimony about "homosexual panic." The court held that the exclusion of the evidence denied the accused a fair trial.

At the beginning of its constitutional analysis, the *Parisie* court reaffirmed *Hughes*.[110] As in *Hughes*, the court cited *Washington* and *Chambers* as authority for the accused's constitutional right to present exculpatory evidence.[111] The court then applied the right to the facts of the case. The court evidently found the psychiatric testimony trustworthy in part because the expert was court appointed.[112] The court characterized the excluded testimony as "vital corroborative evidence."[113] The court stated that "the defendant is entitled under the Sixth Amendment to have the entire defense picture before the jury. . . ."[114] The Colorado Supreme Court has likewise recognized an accused's constitutional right to override restrictions on the admissibility of psychiatric testimony. In *Hendershott v. People*,[115] the accused was charged with third-degree assault, a general mens rea crime. The prosecution made a pretrial motion to bar psychiatric testimony. The trial judge interpreted the state statutes as permitting the introduction of psychiatric testimony only in prosecutions for crimes requiring a specific intent and, accordingly, granted the motion.

The Colorado Supreme Court held that the trial judge's ruling was "constitutional" error.[116] The court found that the excluded testimony was both "reliable and relevant." The prosecution contended that the court should sustain the trial judge's ruling on the basis of the unreliability of psychiatric testimony. However, the court forcefully rejected that contention:

> The People . . . point to the problems of proof which arise when psychiatric testimony is admissible. In the People's view, these problems are due primarily to the inexact and tentative nature of psychiatry and would be exacerbated by the admission of mental impairment evidence to negate such culpable mental states as "knowingly" and "recklessly." This argument, however, overlooks the essentially subjective character of the issues relating to criminal culpability. These issues involve moral, legal and medical components and rarely, if ever,

[109] 671 F2d 1011 (7th Cir. 1982).

[110] Id. at 1015.

[111] Id.

[112] Id. at 1016.

[113] Id.

[114] Id.

[115] 653 P2d 385 (Colo. 1982), cert. denied, 459 US 1225 (1983).

[116] Id. at 397.

> will they be resolved on the basis of objective scientific evidence. To be sure, the subjective character of these issues undoubtedly will generate disagreement among psychiatric experts, especially since psychiatry is far from an exact science. Nonetheless, there is no reason to believe that psychiatric testimony is any less helpful to the fact finder in resolving whether a defendant acted "knowingly" or "recklessly" than in determining whether he had the capacity to form the "specific intent."[117]

The Supreme Court's 1983 decision in *Barefoot v. Estelle*[118] indirectly adds to the precedential value of the Seventh Circuit and Colorado decisions. In *Barefoot*, the accused was convicted of capital murder. During the sentencing phase, the trial judge allowed the prosecution to introduce expert testimony about the accused's future dangerousness. On certiorari to the Court, the accused argued that the testimony was so unreliable that its admission was unconstitutional. It is undeniable that there are substantial doubts about the reliability of psychiatric predictions of future dangerousness.[119] Nevertheless, the Court held that the testimony was not so unreliable that its admission was constitutionally infirm.[120] In *Chambers,* as examples of satisfactory showings of trustworthiness—showings sufficient to trigger the accused's constitutional right to present evidence—the Supreme Court cited some of its earlier decisions governing the reliability of prosecution evidence.[121] Professor Westen argues that "[a]t the very least . . . *Chambers* stands for the proposition that evidence that is sufficiently reliable by constitutional standards to be introduced 'against' the accused is sufficiently reliable to be introduced 'in his favor.' "[122] In light of *Chambers*, the *Barefoot* Court's rejection of the attack on psychiatric predictions of future dangerousness strengthens the accused's attack on the exclusion of defense psychiatric evidence.

Although *Barefoot* lends indirect support to the defense position, *Rock* is still the most direct favorable precedent. The *Rock* decision will make it more difficult for prosecutors to defend the exclusion of psychiatric testimony on the ground that the testimony is intoleraby unreliable. There are grave doubts about the reliability of hypnotically enhanced testimony,[123] but the *Rock* Court nevertheless refused to sanction a rule of per se inadmissibility. If a trial judge contemplates excluding hypnotically enhanced testimony, the judge must assess the reliability of the specific testimony proffered in as-applied fashion.

Realistically, as in the case of defense polygraph evidence, a defense counsel attempting to override a restriction on psychiatric evidence

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[117] Id. at 395.

[118] 463 US 880 (1983).

[119] Id. at 921 n.2 (Blackmun, J., dissenting).

[120] Id. at 899.

[121] Chambers v. Mississippi, 410 US 284, 301 (1973).

[122] Westen, "The Compulsory Process Clause," 73 Mich. L. Rev. 71, 155 (1974).

[123] Casenote, "The Admissibility of Hypnotically Refreshed Testimony: *Rock v. Arkansas*," 30 BC L. Rev. 573, 577, 594–597 (1989).

may have a difficult time persuading the court. The most favorable defense precedents digested previously are a bit dated; those decisions were rendered in 1978[124] and 1982[125]. Many of the favorable precedents antedate the most recent reappraisal of the trustworthiness of psychiatric evidence. The vast majority of the more recent decisions reject defense attacks on restrictions on psychiatric testimony.[126] It is true that *Rock* may force the court to be more receptive to these attacks, but a defense counsel mounting an attack must make the best possible record in the trial court. More specifically, the defense counsel's offer of proof should include evidence that: the psychiatrist in question is qualified; the psychiatrist is impartial; the psychiatrist relied on generally accepted symptomology (such as those set out in the American Psychiatric Association's Diagnostic Manual of Mental Disorders, Fourth Edition); the psychiatrist gathered a comprehensive case history of the subject; and the psychiatrist independently verified the salient events and facts in the case history. With a record this complete, the defense counsel has a potent argument for surmounting restrictions to the admission of exculpatory psychiatric testimony.

The last subsection of this column addressed the question of whether the accused has a constitutional right to present psychiatric testimony about his or her state of mind to disprove the alleged mens rea. Sometimes, however, the defense offers mental health testimony about the prosecution witnesses. For example, if the accused is an African-American man charged with assaulting a Caucasian, the defense may attempt to introduce a psychologist's testimony about the untrustworthiness of cross-racial identifications.[127] There is some hard evidence that expert testimony on such topics as cross-racial identification can help the lay jurors appreciate the latent weaknesses in eyewitness identification.[128]

The overwhelming majority of trial judges have excluded this type of psychological testimony, and most appellate courts have sustained the trial judge rulings.[129] The appellate courts often rely on the argument that the psychological research on the reliability of eyewitness identification is too fragmentary and ten-

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[124] Hughes v. Matthews, 576 F2d 1250 (7th Cir. 1978).

[125] Parisie v. Greer, 671 F2d 1011 (7th Cir. 1982); Hendershott v. People, 653 Colo. 385 (Colo. 1982), cert. denied, 459 US 1225 (1983).

[126] See also Burrus v. Young, 808 F2d 578, 581 (7th Cir. 1986); Campbell v. Wainwright, 738 F2d 1573, 1581 (11th Cir. 1984) ("*Hughes* represents the high water mark in this area, however, and the tide has ebbed").

[127] E. Loftus, Eyewitness Testimony 139 (1979); Johnson, "Cross-Racial Identification Errors in Criminal Cases," 69 Cornell L. Rev. 934, 938 (1984).

[128] E.g., Brigham, "Disputed Eyewitness Identifications: Can Experts Help?" 13 Champion 10 (June 1989) (a publication of the National Association of Criminal Defense Lawyers); Cutler, Penrod & Dexter, "The Eyewitness, the Expert Psychologist, and the Jury," 13 Law & Hum. Beh. 311 (1989).

[129] P. Giannelli & E. Imwinkelried, Scientific Evidence § 9-2(C) (2d ed. 1993) (collecting the state and federal cases). See Moore v. Tate, 882 F2d 1107 (6th Cir. 1989).

tative to yield reliable testimony.[130] Fewer than a handful of courts have held that the trial judge erred in excluding defense psychological testimony on this topic.[131]

Faced with this state of the law, a few defense counsel have argued that the exclusion of psychological testimony on this topic violates the accused's constitutional right to present exculpatory evidence.[132] However, to date, those arguments have been unsuccessful.[133] There is some scholarly support for the argument, though.[134] One commentator called on the courts to recognize "a due process right to present eyewitness expert testimony. . . ."[135] The commentator points out that in cases such as *United States v. Wade*,[136] the Supreme Court itself has acknowledged the acute risk of mistaken identification by eyewitnesses.[137] In passing in a footnote, the commentator cites *Rock* as support for his argument.[138]

At the very least, *Rock* will make it more difficult for the courts to uphold a per se rule of the inadmissibility of psychological testimony on this topic. However, any defense counsel contemplating mounting a constitutional attack on the exclusion of psychological testimony about the unreliability of eyewitness identification must face the fact that as yet there is no case authority finding a constitutional right to introduce such testimony. As in the case of polygraphs and psychiatry, the counsel must make the most persuasive record possible in the trial court. Counsel must ensure that the record reflects that: the psychologist is properly trained; the psychologist is impartial; and there has been ample experimental verification of the psychologist's hypothesis about the particular weakness of eyewitness

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[130] United States v. Watson, 587 F2d 365, 369 (7th Cir. 1978), cert. denied, 439 US 1132 (1979). See also Pass, "Questioning the Research on Eyewitness Reliability," (1987) The Practical Prosecutor 15; Egeth & McCloskey, "Eyewitness Identification—What Can a Psychologist Tell a Jury?" 38 Am. Psychologist 550 (1983).

[131] United States v. Downing, 753 F2d 1224 (3d Cir. 1985); State v. Chapple, 135 Ariz. 281, 660 P2d 1208 (1983); People v. McDonald, 37 Cal. 3d 351, 690 P2d 721, 208 Cal. Rptr. 236 (1984). But see United States v. Downing, 609 F. Supp. 748 (ED Pa. 1985) (on remand, the trial court in *Downing* held that the exclusion of the expert testimony was proper under the facts of that case); State v. Poland, 698 P2d 183, 193–194 (Ariz. 1985) (*Chapple* was an exceptional case, and in the normal case the trial judge may exclude psychological testimony about the general reliability of eyewitness testimony).

[132] State v. Kemp, 507 A2d 1387 (Conn. 1986).

[133] Id.; Moore v. Tate, 882 F2d 1107 (6th Cir. 1989) (rejecting the district court's contrary decision).

[134] Klingsberg, "The Admissibility of Eyewitness Expert Testimony," 25 Crim. L. Bull. 219 (1989).

[135] Id. at 221.

[136] 388 US 218 (1967).

[137] Klingsberg, "The Admissibility of Eyewitness Expert Testimony," 24 Crim. L. Bull. 219, 224 (1989).

[138] Id. at 221 n.13. See also Fassett, "The Third Circuit's Unique Response to Expert Testimony on Eyewitness Perception: Is What You See What You Get?" 19 Seton Hall L. Rev. 697, 721–722 (1989); Cogent, "Expert Testimony on Eyewitness Identification: The Constitution Says, 'Let the Expert Speak,'" 56 Tenn. L. Rev. 735, 759, 776 (1989).

identification that the defense counsel wants to establish.

PBT Intoxication Tests. Police departments throughout the United States are now using a new generation of intoxication tests. Depending on the jurisdiction the test is referred to as a passive alcohol sensor[139] or a portable breathalyzer (PBT). The traditional breathalyzer is an active device; the analyst somehow invades the suspect's body to obtain the sample, such as by requiring that the suspect breathe into the instrument. For that reason, the courts often require a Fourth Amendment justification before the analyst may subject the suspect to the test. However, the new generation of tests is passive. The officer holds the sensor near the suspect's face. The sensor samples the exhaled air, a pump draws air from in front of the person being tested. The sensor registers a digital display of breath alcohol concentration.

In most of the reported PBT cases, prosecutors have attempted to introduce PBT results as inculpatory evidence. The courts have held that the prosecutor either may not use the PBT result as substantive evidence of guilt[140] or may use the result only for the limited purpose of establishing probable cause for the use of an active intoxication testing device.[141]

Suppose, however, that the test result is exculpatory and that at trial the defense attempts to introduce the test result as substantive evidence of innocence. Can the judge exclude the exculpatory test result on the basis of the case law barring prosecution use of PBT evidence? May the judge exclude the testimony without violating the accused's constitutional right to present defense evidence?

That issue was presented in *Patrick v. State*,[142] a case that fittingly arose in Arkansas—the same jurisdiction that gave birth to the *Rock* decision. In *Patrick* the defense did a fine job of advocacy. To begin with, defense counsel did a superb job of making a factual record in the trial court. The record contained testimony by Dr. Roger Hawk, an assistant professor at the University of Arkansas at Little Rock.[143] Dr. Hawk testified in detail about the reliability of the PBT device. He relied on "a professional independent study" of the validity of the PBT technique.[144] After reviewing the scientific testimony in the record, the court concluded that "the evidence is not so inherently unreliable that a jury cannot rationally evaluate it."[145]

In addition, the defense counsel marshalled the leading cases and

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[139] P. Giannelli & E. Imwinkelried, Scientific Evidence § 22-3(B), at 218 (2d ed. 1993).

[140] Trousdale v. State, 500 So. 2d 1329 (Ala. Crim. App. 1986); Boyd v. Montgomery, 472 So. 2d 694 (Ala. Crim. App. 1985); State v. Deshaw, 404 NW2d 156 (Iowa 1987); People v. Thomas, 121 AD2d 73, 509 NYS2d 668 (1986); State v. Schimmel, 409 NW2d 335 (ND 1987); P. Giannelli & E. Imwinkelried, Scientific Evidence § 22-6(B) (2d ed. 1993).

[141] People v. Thomas, 70 NY2d 823, 523 NYS2d 437, 517 NE2d 1323 (1987); P. Giannelli & E. Imwinkelried, Scientific Evidence § 22-6(B), at 234–235 N.230 (2d ed. 1993).

[142] 295 Ark. 473, 750 SW2d 391 (1988).

[143] Id. at 476, 750 SW2d at 394.

[144] Id. at 479, 750 SW2d at 394.

[145] Id. at 480, 750 SW2d at 394.

secondary authorities on the accused's constitutional right to present evidence. The opinion contains citations not only to *Washington*, *Chambers*, and, of course, *Rock*,[146] but the opinion also mentions the *Dorsey* opinion applying the accused's constitutional right to polygraph evidence.[147] The opinion further relies on the preeminent secondary authorities, notably the articles by Professors Clinton[148] and Westen.[149] Applying the legal authorities to the facts in the record, the court easily concluded that the exclusion of the exculpatory PBT result abridged the accused's constitutional right to present evidence.[150]

In a more recent decision the accused attempted to offer expert testimony to attack the reliability of breath testing devices used by the police.[151] The testimony would have shown that breath testing devices rely on a dubious assumption to convert breath alcohol measurements into blood alcohol measurements. The trial judge excluded the evidence. The appellate court held that the exclusion denied the accused a fair trial by preventing him "from introducing basic evidence in support of a key defense."[152]

Conclusion

When a defense counsel is planning his or her trial presentation, the attorney should obviously attempt to comply with the normal common-law and statutory exclusionary rules applicable to the items of evidence that he contemplates introducing. However, if he concludes that a critical item of evidence is technically inadmissible, there are alternatives available. If the item is both critical and demonstrably reliable, counsel can make the alternative argument that the client has a constitutional right to present the evidence—notwithstanding the common-law or statutory exclusionary rule. As a matter of tactics, counsel should probably raise the argument by a pretrial in limine motion. If the judge hears this constitutional argument for the first time at sidebar during trial, he will likely be inclined to apply the traditional exclusionary rules. By submitting the issue pretrial, the defense counsel in effect says to the judge that he or she has so much faith in the argument that the judge should be given ample time to critically evaluate it. There are a surprisingly large number of lower court precedents upholding this constitutional right;[153] and when an item of exculpatory evidence is vital as well as trustworthy, the defense counsel should not take a common-law or statutory "No" as the final answer.

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[146] Id. at 477–478, 750 SW2d at 393–394.

[147] Id. at 478, 750 SW2d at 393.

[148] Id.

[149] Id. at 480, 750 SW2d at 394.

[150] For a discussion of Patrick, see Tarantino, "*Patrick v. State:* Exculpatory Evidence," 13 Champion 24 (Sept./Oct. 1988).

[151] People v. Thompson, 265 Cal. Rptr. 105 (Cal. Super. 1989).

[152] Id. at 109.

[153] See generally Exculpatory Evidence, supra note 6.

State Constitutional Developments

Barry Latzer*

This continues a series of columns collecting and analyzing criminal cases decided by state courts on the basis of state constitutional law. The topics covered, in order of presentation, are: search and seizure; self-incrimination/*Miranda*; right to counsel; confrontation; double jeopardy; and speedy and public trial. When, in a given column, there are no cases for one of the preceding topics, that topic heading will simply be omitted.

Due process issues that have also been considered by the U.S. Supreme Court (on federal constitutional grounds) and other issues not readily fitting under one of the above topics are placed in a "Miscellaneous" category. State constitutional cases meriting only summary treatment are collected in an "In Brief" section, organized alphabetically, by state, and located at the end of the column. This column does not cover the following: cases resting on statutory or exclusively federal constitutional grounds; cases that are ambiguous as to whether the state constitution was the basis for decision; and interpretations of state provisions without federal parallel, unless the issue also received U.S. Supreme Court consideration.

Search & Seizure

Idaho Approves the Hodari D. *"Seizure" Definition.* Our last column reported that the New Jersey Supreme Court had repudiated the federal definition of "seizure" set forth in *California v. Hodari D.*[1] The instant Idaho case reminds us once again that independent state constitutional law does not only mean rejection of the Supreme Court. *State v. Agundis*,[2] a ruling of the Idaho Court of Appeals, adopted *Hodari D.* as a matter of state law, but only after separate state constitutional analysis.

The salient facts of *Agundis* are that a narcotics agent, out of uniform, passed two men standing beside the open hatchback of a car parked adjacent to the agent's unmarked vehicle. As the officer walked by, one of the men stuffed a white plastic grocery bag under his sweater and turned away. Both men

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[1] 499 US 621 (1991), contra State v. Tucker, 642A2d 401 (NJ 1994). See Latzer, "State Constitutional Developments," 32 Crim. L. Bull. 62, 65 (1996).

[2] 903 P2d 752 (Idaho App. 1995).

seemed surprised and nervous. The agent drove off, but stopped a short distance away and continued to observe the men from his rearview mirror. They were handling a number of objects, including the plastic grocery bag, a brown paper grocery bag, and a black rectangular object that the agent believed to have been a portable stereo. One man picked up the black object and took it into the passenger area of the car, emerging without it. One of the men closed the hatchback and again concealed the white bag under his coat. The other man took the brown bag out of the rear of the automobile and picked up a shovel.

Deciding to investigate, the officer drove up to the men, identified himself, and asked if they would wait there. One man said "No," and both walked off. The officer then said, "I'm a police officer. Stop right where you are," whereupon the men began to run. The agent followed in his car and radioed the local police for assistance. The men split up and ran in different directions, and the officer, giving chase on foot, tackled one of them. A pat-down uncovered nothing, but police found the two bags and the shovel back at the scene, abandoned when the chase ensued. Local police later arrested Agundis, based on a description provided by the narcotics agent. The two grocery bags contained marijuana. The next day, a private citizen reported a black bag buried in the snow near where the chase occurred. That bag contained cocaine. Agundis was charged with marijuana and cocaine trafficking and failing to possess a drug tax stamp.

The issue was whether Agundis had been seized under the federal and state constitutions when the officer said "Stop right where you are." Defendant maintained that the illegal drugs were the fruit of an improper seizure. Was there a seizure? The federal Fourth Amendment rule, enunciated in *Hodari D.*, is clear: There must be either physical force exerted by the officer or submission to authority by the suspect.[3] As the Supreme Court said:

> The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. ("She seized the purse-snatcher, but he broke out of her grasp.") It does not remotely apply, however, to the prospect of a policeman yelling "Stop in the name of the law!" at a fleeing form that continues to flee.[4]

Under the Fourth Amendment therefore, Agundis was not seized, and the Idaho court so held.[5] Under the New Jersey "free to leave" test, discussed in our last column, the result is less certain. A suspect is seized under the New Jersey Constitution if "police actions would cause a reasonable person to believe that the police wanted to capture him and not just to speak with him."[6] At the moment the officer told Agundis "Stop right where you are," it is not

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[3] *Hodari D.*, 499 US at 626.

[4] Id.

[5] *Agundis*, 903 P2d at 756.

[6] *Tucker*, 642 A2d at 405.

clear that a reasonable person in his position would have concluded that the police "wanted to capture him." Agundis of course argued that under the *Mendenhall* formula—the forerunner to *Hodari D.* and the model for the New Jersey standard—there was a seizure because a reasonable person would not feel free to leave when an officer says "stop."[7]

The Fourth Amendment issue having been resolved, the requirements of Article I, Section 17 of the Idaho Constitution remained to be determined.[8] Idaho could adopt the federal rule, or the more protective New Jersey formula, or some entirely different definition of "seizure" as it is used in Section 17. The *Agundis* court provided an independent analysis of the state provision, but nevertheless found the *Hodari D.* formula persuasive. The issue, as the Idaho court saw it, was deterrence. "It may be argued that police will not be dissuaded from unjustified efforts to detain citizens if we allow into evidence contraband that was abandoned by a suspect who flees following an unlawful command to stop."[9] The court concluded, however, that under the circumstances, "no added deterrence value would be obtained by excluding evidence."[10] In support, it quoted *Hodari D.*: "Unlawful orders will not be deterred . . . by sanctioning through the exclusionary rule those of them that are *not* obeyed. Since policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures."[11]

Thus, "in the absence of application of physical force, a person who does not submit to law enforcement authority is not seized within the meaning of Art. I, § 17 of the Idaho Constitution."[12] Agundis was not seized when the officer yelled "Stop."

New Hampshire Defines Abandonment. An allied issue to the seizure question discussed previously is the matter of abandoned property. Fleeing suspects, like *Hodari D.*, frequently toss the contraband aside hoping to dissociate themselves from the incriminating evidence. If

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[7] In United States v. Mendenhall, 446 US 544 (1980), Supreme Court Justice Stewart, speaking for himself and then-Justice Rehnquist, said that "[a] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Id. at 554.

[8] Idaho Const. art. I, § 17 says: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized."

[9] *Agundis*, 903 P2d at 758.

[10] Id.

[11] Id. quoting *Hodari D.*, 499 US at 627. It is rather odd that the definition of "seizure" should depend on the deterrent effect of excluding the product of the police-citizen confrontation. The *Hodari D.* reasoning seems to be that police conduct will be deemed lawful where exclusion is likely to be ineffective. This is a good example of the exclusionary rule tail wagging the Fourth Amendment dog.

[12] *Agundis*, 903 P2d at 758.

the suspect is deemed "seized," and the seizure is unlawful, it could taint the recovery of the discarded property.[13] But what if the suspect is not seized, or the seizure is legitimate? That leaves the question of abandonment: Does the suspect retain his Fourth Amendment or state constitutional privacy interest in the discarded property?

State v. Westover[14] provides one answer, and law enforcement officials won't like it. Under the New Hampshire Constitution, temporary abandonment is not a relinquishment of the right to be secure from unreasonable search. "[T]here must be a significant dissociation of the property from the defendant for a finding of abandonment."[15]

Daniel Westover was a passenger in a car that had pulled into the lot of a convenience store/gas station, followed by two police vehicles. The police had noticed that the car had no sticker, and they had received a report that defendant and two others had been in the car rolling a marijuana cigarette. After police began talking to the driver, and asked if they could search the car, defendant sought permission to exit the vehicle. Having been allowed to do so, he got out of the car then reached back in to retrieve some crumpled gray clothing. As he walked toward the store he gently tossed the clothing aside in a remote area 15 to 25 feet from a garbage dumpster and approximately 40 feet from the store. An officer then went over and examined the discarded material—a sweatshirt and a T-shirt—and found a concealed marijuana pipe and a bag of marijuana.

The state supreme court held that the evidence should have been suppressed. It did not utilize, as so many courts do, an expectation of privacy analysis, because New Hampshire has not adopted this standard for the state search-and-seizure provision. Citing an Oregon ruling, it held simply that personal property, such as defendant's clothing, is protected by the state provision.[16] Nevertheless, abandoned property is not protected. Abandonment under New Hampshire law is determined by the intent of the possessor, as indicated by objective facts at hand. Relevant considerations include the place at which the property was relinquished, the length of time it was left, and its condition. The state argued that abandonment may be inferred, in part, from the fact that the property contained contraband, and that defendant was trying to dissociate himself therefrom. But the court thought this suggestion an insidious one, akin to justifying a search by what it uncovers.[17]

The trial court had ruled that there was a temporary abandonment, and that Westover did not intend to abandon his property permanently. While denying that "a generalized intent to

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[13] E.g., State v. Tucker, 642 A2d 401 (NJ 1994).

[14] 666 A2d 1344 (NH 1995).

[15] Id. at 1349.

[16] Id. at 1348, citing State v. Rounds, 698 P2d 71 (Or. App. 1985) (physical trespass to a personal effect expressly entitled to protection under the state constitution so expectation of privacy analysis unnecessary). NH Const. pt. I, art. 19 establishes the "right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions."

[17] *Westover*, 666 A2d at 1348.

return to the property at some time" precludes a finding of abandonment, the state supreme court held that a mere temporary abandonment was not sufficient to permit a police search.[18] There must be a "significant dissociation" from the property, and here, where defendant "gently tossed" his sweatshirt aside as he entered the store, and where police searched it moments later with defendant having said or done nothing more, there was no significant dissociation.[19]

Two dissenters made a cogent case for abandonment.[20] They pointed out that defendant's conduct was a response to police declarations that they were going to search the car, and that the discarding of the property suggested defendant's intent to dissociate himself from the contraband. Secondly, discarding the property some 40 feet from the store did not indicate an intent to reclaim the property when returning from the store; why not set the item down nearer to his destination? Finally, tossing the items into a remote area near a dumpster is consistent with abandonment, as such an area is perceived as containing discarded property.

Notwithstanding the majority's protests that an intent to return to the property does not preclude abandonment, *Westover* would seem to bar an entire category of police searches of discarded possessions. By refusing to acknowledge a suspect's intent to disassociate himself from contraband, while stressing the brief passage of time between the discarding of the property and its search, the court virtually rules out the search of property in the commonplace hot-pursuit situation. Fleeing suspects frequently try to conceal their contraband from police by tossing it away in order to avoid possessory offense charges. No doubt they fully intend to recover the booty if they manage to escape. If police beat them to it and immediately seize the discarded property however, the *Westover* analysis will probably lead to suppression. Defendant's intent to temporarily dissociate himself from the contraband is not sufficient for an abandonment claim, while the brief lapse of time suggests that there was no permanent relinquishment.

Washington State Signals the End of "Automatic Standing." Although *United States v. Salvuc-ci*[21] long ago abolished "automatic standing" for the Fourth Amendment, the state of Washington recognized the doctrine as a state constitutional matter.[22] *State v. Carter*,[23] the latest Washington case on the subject, suggests that the rule is hanging on by only a thread.

In a nutshell, "automatic standing" permits defendants charged with possessory offenses to assert illegal search and seizure claims without having to admit at the suppression hearing that they were in possession of the contraband at is-

[18] Id. at 1348–1349.

[19] Id. at 1349.

[20] Id. at 1350–1352 (Thayer, J., joined by Horton, J., dissenting).

[21] 448 US 83 (1980).

[22] State v. Simpson, 622 P2d 1199 (Wash. 1980), modified State v. Zakel, 834 P2d 1046 (Wash. 1992).

[23] 904 P2d 290 (Wash. 1995).

sue. The problem of having to choose between one's Fourth and Fifth Amendment rights was the main impetus for the federal automatic standing rule.[24] Some years after the federal rule was established, however, the Supreme Court resolved the self-incrimination problem a different way by barring trial use of defendant's suppression hearing testimony in order to prove guilt.[25] This paved the way for the abandonment of the federal automatic standing doctrine in *Salvucci.*

After *Salvucci*, prosecutors remained free to use defendant's suppression hearing testimony to impeach him at trial. Some felt that the threat of impeachment was itself sufficient to force a trade-off of Fourth for Fifth Amendment rights (or their state equivalents). Indeed, this was the position of the Washington Supreme Court in the 1980 *Simpson* case, which repudiated *Salvucci* and maintained the automatic standing rule as a matter of state law.[26] As the *Simpson* court put it: "[W]ithout automatic standing, a defendant will ordinarily be deterred from asserting a possessory interest in illegally seized evidence because of the risk that statements made at the suppression hearing will later be used to incriminate him[,] albeit under the guise of impeachment."[27] The other argument in *Simpson* was that without automatic standing, the overly technical standing doctrine would too often result in the admission of the fruits of unlawful police invasions of privacy.[28] As will be seen, the *Carter* case rejected both of these arguments, thus demolishing the doctrinal foundation for the automatic standing rule in Washington.

Carter arose with a "buy-bust" operation. Defendant and a second woman led an undercover officer to a Seattle motel for a cocaine sale. After the sale (one cocaine rock for a marked $20 bill), the undercover officer described the women and their location to the arrest team. Carter was arrested in the motel room, and sought to suppress the cocaine evidence recovered by the police. She was tried and found guilty, and the Washington Court of Appeals affirmed, concluding that there was no longer an automatic standing rule in Washington and that therefore Carter did not have standing to challenge the search.[29]

The state supreme court affirmed, but was unprepared to abandon automatic standing "until the issue is more adequately brought before

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[24] Jones v. United States, 362 US 257 (1960) (establishing automatic standing as a matter of federal constitutional law), reversed *Salvucci*, 448 US 83.

[25] Simmons v. United States, 390 US 377 (1968).

[26] *Simpson*, 622 P2d 1199.

[27] Id. at 1206.

[28] Failure to adopt an automatic standing rule, the *Simpson* court reasoned, "allows the invasion of a constitutionally protected interest to be insulated from judicial scrutiny by a technical rule of 'standing.' The inability to assert such an interest threatens all of Washington's citizens, since no other means of deterring illegal searches and seizures is readily available." Id.

[29] State v. Carter, 875 P2d 1 (Wash. App. 1994). The Court of Appeals relied heavily on the *Zakel* case, 834 P2d 1046 (1992), which qualified the *Simpson* rule by requiring that defendant must be in possession of the contraband at the time of the contested search or seizure in order to have automatic standing.

us."[30] Nevertheless, the court rejected both of the arguments offered in *Simpson* in support of the rule. It disagreed that defendants might not assert their privacy interests out of fear of self-incrimination through impeachment. There is no self-incrimination privilege to present perjured testimony, observed the court, therefore automatic standing was not designed to protect against impeachment of such testimony. "The automatic standing rule was never intended to confer upon defendants a license to make false representations on the witness stand."[31]

Secondly, the *Carter* court contended that the automatic standing rule was not easier to apply than the alternative expectation of privacy test currently used by the United States Supreme Court.[32] "Adopting a blanket rule that a defendant charged with a possessory offense will always have a privacy interest promotes 'blind adherence' to the assumption that possession of a seized good is an adequate measure of Fourth Amendment rights."[33] In other words, the case-by-case/reasonable expectation of privacy approach is sounder than permitting every defendant accused of a possessory offense to assert a search and seizure claim.

The court concluded that since Carter was charged with possession of cocaine she had automatic standing, but it upheld the warrantless entry into her motel room on the basis of exigent circumstances. Four of the Washington Supreme Court's nine justices dissented. Did they offer a defense of automatic standing? Hardly. They instead questioned the majority's rather summary determination that there were exigent circumstances. With no judge to speak in behalf of the automatic-standing doctrine, the inexcapable conclusion is that it is doomed in Washington. Meanwhile, across the continent, some of the northeastern states remain committed to the rule.[34]

Self-Incrimination/Miranda

Pennsylvania Abandons Transactional Immunity. In *D'Elia v. Pennsylvania Crime Commission*,[35] the Pennsylvania Supreme Court had held that the state self-incrimination clause required transactional immunity—complete amnesty for a witness for any transactions revealed in the course of the compelled testimony. *Commonwealth v. Swinehart*[36] has now strictly confined *D'Elia* to its facts: only Pennsylvania Crime Commission witnesses are henceforth entitled to transactional immunity.[37] With respect to

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[30] *Carter*, 904 P2d at 297.

[31] Id. at 295.

[32] Rakas v. Illinois, 439 US 128 (1978) (permitting Fourth Amendment claims only when the search and seizure invades defendant's reasonable expectation of privacy).

[33] *Carter*, 904 P2d at 295.

[34] Commonwealth v. Amendola, 550 NE2d 121 (Mass. 1990); State v. Sidebotham, 474 A2d 1377 (NH 1984); State v. Alston, 440 A2d 1311 (NJ 1981); Commonwealth v. Sell, 470 A2d 457 (Pa. 1983); State v. Wright, 596 A2d 925 (Vt. 1991).

[35] 555 A2d 864 (Pa. 1989).

[36] 664 A2d 957 (Pa. 1995).

[37] *D'Elia* received rather an indecent burial. A footnote concluded that "[c]learly a majority of the court failed

immunity generally, *Swinehart* held that Article I, Section 9 of the state constitution affords no more protection than the Fifth Amendment. That is, both provisions require only use and derivative use immunity, meaning that the compelled testimony cannot be used as evidence nor as a lead for derivative evidence.

Swinehart was charged with murdering her husband. Her nephew, Thomas DeBlase, the real party in this case, was suspected of being a co-conspirator in the crime and was subpoenaed to testify at her trial. DeBlase was offered use and derivative use immunity pursuant to statute, but he refused to testify and was incarcerated for contempt. He argued that the statute offered insufficient protection to satisfy Article I, Section 9, which, he contended, requires transactional immunity.

In rejecting his argument, the court used the guidelines for state constitutional analysis developed in an unrelated case, *Commonwealth v. Edmunds.*[38] *Edmunds* provided a four-factor benchmark for state constitutional analysis: "1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence."[39] In *Swinehart*, as in *Edmunds* before it, the fourth factor—policy considerations—was the most significant determinant of the meaning of the Pennsylvania Constitution.

The first factor, the text of the provisions, was said to be "not persuasive of either interpretation on the issue at bar" as there are no "major differences" between Section 9 and the Fifth Amendment.[40]

Factor two is more interesting. The United States Supreme Court had, for 80 years, favored transactional immunity.[41] Not until 1972 did *Kastigar v. United States*[42] establish the use and derivative use standard for the Fifth Amendment. As the *Swinehart* court observed, "Pennsylvania, for the most part, followed the lead of the United States Supreme Court."[43] That is, Pennsylvania pro-

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to endorse the reasoning set forth in *D'Elia.*" Id. at 965 n.12. This is a bit misleading. Three of the seven *D'Elia* justices signed the lengthy lead opinion advocating transactional immunity. Three other justices approved Justice Papadakos's one-sentence concurrence stating: "I join the majority opinion because I perceive its holding to apply only to situations arising before the Pennsylvania Crime Commission." Id. at 872. Thus, it is more accurate to say that the entire court endorsed a transactional immunity theory, but four of the seven members would have applied it only to Crime Commission witnesses.

[38] 586 A2d 887 (Pa. 1991) (rejecting on state constitutional grounds the good-faith exception to the exclusionary rule).

[39] Id. at 895. Although not one of the four factors, the court added that "an examination of related federal precedent may be useful." Id.

[40] *Swinehart*, 664 A2d at 962. U.S. Const. amend. V reads in pertinent part: "nor shall any person be . . . compelled in any Criminal Case to be a witness against himself." The equivalent clause of Pa. Const. art. I, § 9 states: "he cannot be compelled to give evidence against himself."

[41] Brown v. Walker, 161 US 591 (1896); Counselman v. Hitchcock, 142 US 547 (1892).

[42] 406 US 441 (1972).

[43] *Swinehart*, 664 A2d at 963.

vided transactional immunity as a matter of state law from 1892 to 1978.[44] Although this would seem to suggest that *Edmunds* factor two favors transactional immunity, the *Swinehart* court drew a different conclusion. It reasoned that the Pennsylvania bench had no choice but to follow the Supreme Court as it "set a minimum floor to which all states were bound."[45] This is not correct. Federal law did not set a floor until 1964, at the earliest, when the Fifth Amendment Self-Incrimination Clause was incorporated into Fourteenth Amendment due process.[46] Contrary to the language of *Swinehart*, Pennsylvania was under no federal constitutional obligation to provide transactional immunity prior to 1964, nor after 1972.

The third *Edmunds* factor, related case law from other states, also proved inconclusive. As *Swinehart* correctly observed, the states are divided on the issue, with six rejecting and six adopting *Kastigar* on state constitutional grounds.[47]

Consequently, the fourth factor—policy considerations—proved crucial. The court candidly acknowledged that there were compelling arguments to be made in behalf of transactional immunity. Foremost was what it called the "web effect," which "weaves itself into the circumstances surrounding a later prosecution of a witness who had been compelled to testify."[48] DeBlase, for instance, argued that if forced to testify, he would forever be caught in the web of untraceable effects of his testimony upon his trial—from jury selection, to the presentation of a defense, to the ability to use character witnesses, to the decision to take the stand in his own defense.

On the other hand, the *Swinehart* court acknowledged strong countervailing considerations:

> The very nature of criminal conspiracies is what forces the Commonwealth into the Hobson's choice of having to grant one of the parties implicated in the criminal scheme immunity in order to uncover the entire criminal enterprise. Thus, in order to serve justice an accommodation must be made, however, that arrangement should not place the "witness" in a better position as to possible criminal prosecution than he had previously enjoyed. A grant of immunity should protect the witness from prosecution through his own words, yet it should not be so broad that the witness is forever free from suffering the just consequences of his actions, if his actions can be proven by means other than his own words.[49]

This was the clinching argument: by providing complete amnesty, transactional immunity overprotects the witness and elevates his rights

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[44] Id.

[45] Id. at 969.

[46] Malloy v. Hogan, 378 US 1 (1964). Arguably, the "federal floor" with respect to immunity standards was not established until 1972, when the Court applied the use and derivative use test to the states. Zicarelli v. Commissioner of Investigation, 406 US 472 (1972) (decided the same day as *Kastigar*).

[47] *Swinehart*, 664 A2d at 965–966. See also B. Latzer, State Constitutional Criminal Law § 4:18 (1995).

[48] *Swinehart*, 664 A2d at 968.

[49] Id.

above the right of the public to every person's evidence. Use/derivative use immunity, the court concluded, strikes a better balance and satisfies the state constitution.

To minimize the possibility that the immunized witness's testimony might nevertheless be used against him, *Swinehart* provided that "the Commonwealth must prove, on the record, by the heightened standard of clear and convincing evidence, that the evidence upon which a subsequent prosecution is brought arose *wholly* from independent sources."[50]

Right to Counsel

New Jersey Extends Right to Counsel to Civil Child Abuse Investigations. In *State v. P.Z.*,[51] a New Jersey appeals court excluded from defendant's child abuse trial statements he had made to a case worker in a purely civil investigation during which he had not been advised of *Miranda* rights. Although the legal basis for the decision was not clear, the federal right to counsel does not attach prior to the initiation of a criminal prosecution.[52] The *P.Z.* court implied that it relied on the state constitutional right to counsel. It pointed out that New Jersey's right to counsel is more protective than the Sixth Amendment.[53]

P.Z.'s seven-week-old daughter was hospitalized due to "shaken baby syndrome." Civil proceedings were initiated against defendant and his wife, who were represented by a public defender. The family court lodged legal custody of the victim and a sibling in the state family services agency. After learning that P.Z. admitted to his wife that he had shaken the baby, case workers decided to investigate further prior to the release of the victim from the hospital. The prosecutor's office was informed of these developments, as required by state law where criminal child abuse is suspected. Two social workers went unannounced to defendant's home, and told him that they were there to look into his wife's statement. P.Z. at first declined to speak, indicating that he had consulted with his lawyer. But after urging by the case workers, he tearfully admitted that he had shaken the baby. Subsequently, the state sought to admit this statement into P.Z.'s criminal trial for assault and endangering the welfare of a child.

The appeals court held that *Miranda* warnings must be read and that the right to counsel attaches during civil child abuse investigations. It defended its decision on two grounds: First, that such investigations are sufficiently adversarial, and second, that they will be facilitated by excluding any statements from criminal proceedings. On the first point, the court said:

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[50] Id. at 969.

[51] 666 A2d 1000 (NJ Super. App. Div. 1995).

[52] Brewer v. Williams, 430 US 387 (1977) (Sixth Amendment applies to deliberate elicitation of statements of one who is formally charged with a crime).

[53] *P.Z.*, 666 A2d at 1003. The *P.Z.* court was referring here to State v. Sanchez, 609 A2d 400 (NJ 1991), which held, contrary to Patterson v. Illinois, 487 US 285 (1988), that prosecutors may not initiate conversations with criminal defendants after indictment.

> The Title Nine [civil child abuse] case, although a civil matter, had very serious personal consequences to all parties involved, including the defendant. In addition, there was at least some coercive element in the environment of the situation confronting the defendant. At the time of interrogation, the Title Nine action had already been instituted and counsel had been appointed for and represented defendant in that action. The State was defendant's adversary in that action, as well as during the time when the statement in question was taken.[54]

Moreover, "parallel civil and criminal proceedings are both operating against a defendant at the inception of proceedings in either court" because state law requires that family court, the family services agency, and prosecutors inform one another of abuse cases.[55] Finally, the state legislature indicated its concern with this issue by exempting from use in criminal cases any statements made by potential respondents during preliminary conferences with complainants prior to filings in family court.[56]

The court's second point was that family service workers will be better able to pursue their investigations and protect children if the statements they receive are inadmissible in criminal court. "If the statements they receive are not admissible in a criminal prosecution, they need not jeopardize their own investigation out of concern for the suspect's rights by giving *Miranda* warnings or honoring a prospective defendant's right to counsel."[57]

Conceding a "paucity" of supportive case law, the *P.Z.* court analogized to a case holding that statements to welfare agents in a bastardy proceeding by the mother of two out-of-wedlock children could not be used against her in a criminal prosecution for fornication.[58] Just as the bastardy case was believed to enhance the likelihood of mothers' cooperating with social workers to the benefit of impoverished children, the instant case, by eliminating the threat that statements will be used in criminal prosecution, is intended to encourage the cooperation of parents with family workers, and thereby to reduce the suffering of children in abusive environments. Whether or not it has this effect, *P.Z.* clearly broadens the right to counsel by extending it to civil investigations.

Miscellaneous

Maryland Sets Forfeiture Standard. The United States Supreme Court has given the owners of forfeited property mixed signals. It recently closed the federal constitutional door to innocent owner claims, while permitting attacks

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[54] *P.Z.*, 666 A2d at 1004.

[55] Id.

[56] This did not apply to defendant, whose interview took place after the family court had heard his case.

[57] Id. at 1004–1005. This is a revelatory comment. Apparently, the court believes that *Miranda* warnings impede investigations and, while requiring them, the court virtually invites social workers to *not* administer them.

[58] Id. at 1005, citing State v. Clark, 275 A2d 137 (NJ 1971).

based on the Eighth Amendment Excessive Fines provision.[59] But there may be hope for claimants under state constitutional law. Picking up where the Supreme Court left off, the Maryland Court of Appeals, the state's highest tribunal, developed a standard for determining whether forfeited property offended the excessive fines provision of the state Declaration of Rights.[60] As will become evident, the innocent owner line of attack, rejected by the Supreme Court, reappears as part of Maryland's test for excessive fines.

Aravanis v. Somerset County[61] relied on Article 25 of the Maryland Constitution, which is, the court found, "textually and historically, substantially identical to the Eighth Amendment."[62] Nevertheless, apparently because of the uncertainty as to whether the Eighth Amendment Excessive Fines Clause is applicable to the states, the Maryland court relied on independent state grounds.[63] It also stated that Article 25 "should be interpreted co-extensively" with the Eighth Amendment.[64]

Regarding the Eighth Amendment, the Supreme Court, in *Austin v. United States*,[65] held that in rem forfeitures, though civil, were subject to the Excessive Fines Clause if they were punitive, that is, if they required payment to the sovereign as punishment for some offense. *Austin* did not, however, develop a formula for measuring "excessive," leaving the lower courts to work that out first.

Appellant Aravanis challenged the civil forfeiture of his home after he pleaded guilty to drug violations stemming from the seizure of two pounds of marijuana and drug paraphernalia from his residence. The Court of Appeals held that the state forfeiture statute, like the federal statute at issue in *Austin*, was punitive, and therefore subject to the Excessive Fines Clause of Article 25. Unlike *Austin*, however, the Maryland court developed a test for excessiveness. It did so after weighing the alternatives offered by Justice Scalia, concurring in *Austin*, and various state and federal courts.

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[59] Compare Bennis v. Michigan, 64 USLW 4124 (US Mar. 4, 1996) (failure of the state to provide an innocent owner defense did not violate due process or the Fifth Amendment Takings Clause) and Austin v. United States, 113 S. Ct. 2801 (1993) (the Eighth Amendment Excessive Fines Clause applies to in rem civil forfeitures).

[60] Aravanis v. Somerset County, 664 A2d 888 (Md. 1995).

[61] Id.

[62] Id. at 893–894. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Md. Decl. of Rts. art. 25 says: "Excessive bail, fines and punishment. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law."

[63] *Aravanis*, 664 A2d at 893 & n.10. The *Aravanis* court noted that Supreme Court Justice O'Connor, concurring in Browning-Ferris Indus. v. Kelco Disposal Inc., 492 US 257, 284 (1989), thought that the Excessive Fines Clause applied to the states along with the rest of the Eighth Amendment, and that a number of state courts assumed that it was applicable. *Aravanis*, 664 A2d at 893 n.10.

[64] Id. at 894.

[65] *Austin*, 113 S. Ct. 2801.

Justice Scalia contended that, unlike monetary fines and in personam forfeitures, where the touchstone is the value of the fine in relation to the offense, in the case of in rem forfeitures the issue is the "guilt" of the property—the relationship of the confiscated property to the offense.[66] The Maryland court called this an "instrumentality test," and noted that most lower courts combined it with a "proportionality test," that is, some measure of the property owner's loss due to forfeiture in comparison to his criminal culpability.

Aravanis concluded that both tests were required, because if forfeiture is punishment, it must have as its object a person and not just property. "It is appropriate, therefore, that the owner's culpability with respect to the underlying criminal activity be considered."[67] What the court did not point out is that this imports into excessive-fines analysis an innocent-owner criterion. Obviously, if the owner was not involved in the criminal activity, that will support his case for keeping the property.

Thus, Maryland provides a two-part test for determining whether forfeitures are excessive: an instrumentality test and a proportionality test. The instrumentality part of *Aravanis* looks at " '(1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder' "[68] The proportionality part of the test requires

> a comparison of the extent of the loss to the relevant factors involved, including the gravity and extent of the illegal activity, the nexus between that conduct and the subject property, and the extent of involvement of the owner—all to determine if the "fine" is out of all reasonable proportion to the relevant factors.[69]

The court did not apply this test to *Aravanis*; instead it remanded the case to the trial court for further proceedings.

Although the Court of Appeals signaled its desire to conform Article 25 with the Eighth Amendment, it is, of course, under no federal constitutional obligation to do so. It must be doubted that the Supreme Court, having just rejected such claims, would approve of a test that would acknowledge innocent owners.[70] Were the Supreme Court ultimately to adopt Justice Scalia's analysis, Maryland could continue to maintain its more protective formulation.

Michigan Rules on Victims' Right to Restitution. State constitutional victims' rights amendments are starting to generate some interesting litigation. In *People v. Peters*,[71] the Michigan Supreme Court had to consider the right of crime victims to restitution after the death of the

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[66] Id. at 2814–2815.

[67] *Aravanis*, 664 A2d at 898.

[68] Id. at 896, quoting United States v. Chandler, 36 F3d 358, 365 (4th Cir. 1994).

[69] *Aravanis*, 664 A2d at 898.

[70] *Bennis*, 64 USLW 4124.

[71] 537 NW2d 160 (Mich. 1995).

offender during the pendency of his appeal. It held that the appeal should be dismissed, but that the conviction and compensatory sanctions should stand. Purely penal sanctions, however, must be abated ab initio.

Peters had pleaded no contest to multiple counts of arson. While he was in the real estate business, 90 of defendant's homes burned. Twenty-five of these fires were deemed suspicious. The Detroit Fire Department claimed roughly $180,000 in expenses fighting the fires, and the Michigan Basic Property Insurance Company said it paid defendant approximately $800,000, $277,000 of which was for the 25 suspect blazes. At sentencing, it was revealed that Peters was 67 years old and dying of lung cancer. The trial judge indicated that he would agree to a nonincarcerative sentence provided there were sufficient "financial pain."[72] He then imposed a fine of $10,000 and restitution of $400,000—$140,000 to the fire department and $260,000 to the insurer. Peters appealed the restitution order, but died before the appeal could be heard.

The Michigan Constitution (unlike the federal) provides "an appeal as a matter of right," except where the accused pleaded guilty or nolo contendere.[73] It also provides, in the state Crime Victims' Amendment, "[t]he right to restitution."[74] In a sense, the question in *Peters* is: Which state constitutional right will prevail, a defendant's right to appeal, or a victim's right to restitution?

Defendant's survivors argued that when death deprives one of an appeal, the interests of justice require that the conviction not stand given the absence of a final adjudication. After all, they reasoned, appeals are part of the adjudication process. They further contended that if the conviction is abated, then the sanctions must be voided as well, because sanctions are contingent upon a conviction.

The Michigan Supreme Court, 5–2, rejected this reasoning. The court noted that the conviction destroyed the presumption of innocence, and that "it is better policy to allow the litigation to end and the presumptively valid conviction to stand than it is to allow the convicted defendant's survivors to pursue litigation ad infinitum, in an effort to clear the deceased defendant's name.[75] Moreover, allowing the appeal to proceed serves no state interest because the deceased defendant would be unavailable for a retrial should one be necessary.

Nevertheless, the court agreed with other jurisdictions that sanctions, the "primary purpose" of which is penal, should not stand because after the offender's demise they no longer serve a purpose.[76] By contrast, where the intent is to compensate the victim, the sanction should survive the offender's death. Notwithstanding this analysis, the court conceded that the distinction between penal and compensatory sanctions is "not always clear," and that "with almost any sanction, it is

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[72] Id. at 165 n.34.

[73] Mich. Const. art. I, § 20. The 1994 amendment to this provision, not applicable to defendant's case, eliminated appeal of right for guilty or no contest pleas.

[74] Mich. Const. art. I, § 24.

[75] *Peters*, 537 NW2d at 163–164.

[76] Id. at 161, 164.

possible to identify both penal and compensatory purposes."[77]

Defense counsel stressed the trial judge's "financial pain" comments, and contended that these remarks showed that Peters' restitution was primarily penal. But the top court replied that this analysis failed to account for the full array of trial court considerations, especially the state constitutional victims' rights provision and related legislation. It is clear, concluded the court, that the trial judge intended that the restitution defray the financial loss suffered by the victims. Thus, because the purpose was compensatory and not primarily penal, the restitution survived defendant.

The two dissenters placed more weight on the state constitutional right of defendants to appeal than on the state constitutional right of victims to restitution. They argued that where a defendant has the *right* to appeal, his death abates the conviction and all collateral consequences, but that where defendant dies pending a *discretionary* appeal, the appeal should be dismissed as moot, and the collateral consequences of the conviction should stand.[78]

In Brief

Idaho Adopts Apparent Authority to Consent Rule. In *Illinois v. Rodriguez*,[79] the United States Supreme Court held that objectively reasonable reliance upon a third party's apparent authority to consent to a search is sufficient for validity, even if actual authority is wanting. *State v. McCaughey*[80] has now turned aside a claim that the Idaho Constitution affords broader protection. *McCaughey* held that where police, arriving on a domestic violence call, relied on the permission of defendant's wife to search a padlocked basement and a detached locked shed of what appeared to be the marital domicile, the search did not violate the state or federal constitutions. This was so, even though it was later revealed that the couple were planning to separate, that Mrs. McCaughey was in the process of packing to leave, that she had never been to the locked basement, and that she had never been given the keys to the shed or the basement. Defendant testified, contrary to his wife and her daughter, that he had told them both to stay out of the basement, and that he told Mrs. McCaughey not to go into the shed. Because the police reasonably believed that Mrs. McCaughey could consent to the search, the marijuana recovered from the shed and basement were admissible.

New Mexico Approves DWI Roadblocks. Warrantless and suspicionless drunk driver roadblocks do not offend the Fourth Amendment.[81] Nor do they violate the New Mexico Constitution.[82] The test is reasonableness, which is determined by several factors. The *Bates* court

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[77] Id. at 164.

[78] Id. at 166–167 (Cavanagh, J., joined by Levin, J., dissenting).

[79] 497 US 177 (1990).

[80] 904 P2d 939 (Idaho 1995).

[81] Michigan Dep't of State Police v. Sitz, 496 US 444 (1990).

[82] State v. Bates, 902 P2d 1060 (NM App. 1995).

stressed the following: approval by supervisory personnel; set up for the Friday night of a holiday weekend in a location that had a number of alcohol-related accidents; every vehicle was to be stopped for a one-minute initial contact; five minutes without any stops were permitted in case of congestion; advance warning signs were placed, and the roadblock was visible from four-tenths of a mile away; a separate lighted area was set aside for secondary investigations; there was advance publicity. This was sufficient for reasonableness under both constitutions.

Taking a Pulse Is a Search in Oregon. This would probably be a case of first impression in every jurisdiction. In *State v. Stowers*,[83] the defendant/motorist was arrested for driving under the influence when the officer, having noticed other signs of drug use, reached over and placed his fingers on defendant's neck to take his carotid pulse. The high pulse rate suggested drug use and was offered to justify Stowers' arrest. Relying exclusively on the state Fourth Amendment analog, the Oregon Court of Appeals did not approve. Taking a pulse entailed examination of an individual's physical and psychological condition that was not otherwise observable. A person's pulse is, therefore, private, and may not be taken absent a warrant or a recognized exception to the warrant requirement. Because these were lacking, the pulse rate could not be used to justify the arrest.

In Texas Incompetents Have No Right to Be Tried on the Merits. Rufus Smith, indicted for murder in 1988, had initially been found incompetent to stand trial and was committed for treatment. In the years since, in a reversal of the usual roles, the prosecution has insisted that Rufus Smith remained incompetent, while Smith has steadfastly sought his day in court. Four times since, doctors declared him competent, and each time the state demanded a hearing, whereupon four different juries reiterated the incompetence determination. Before the Texas Court of Appeals in 1995,[84] Smith argued that he had a right guaranteed by the state and federal constitutions to be tried on the merits. State law placing the burden of proving competence upon the prosecution, Smith alleged, denies this right, because the prosecution can simply fail to meet its burden.[85] The court disagreed that the allocation of the burden of proof offended due process or state constitutional due course of law. It further found that there was no affirmative obligation on the state to attempt to sustain its burden.

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[83] 902 P2d 117 (Or. App. 1995).

[84] Smith v. State, 912 SW2d 268 (Tex. App. 1995).

[85] Under Texas law, defendant has the initial burden of proof of incompetency by a preponderance of the evidence. Once there is a finding of incompetence, the burden shifts to the state to prove competence beyond a reasonable doubt. Id. at 270.

Recent Decisions*

United States Supreme Court Decision

Forfeiture provision in plea agreement did not require inquiry into factual basis. Libretti v. United States, 116 S. Ct. 356 (1995) [CLD § 42.60].

After the defendant entered a guilty plea in which he agreed to forfeit certain assets, he was convicted in the district court of continuing criminal enterprise. The defendant then appealed the order of forfeiture of all his property, and the district court amended the forfeiture order to delete certain property owned by third parties. The Tenth Circuit Court of Appeals affirmed, and denied defendant's motion for a remand as moot.

The Supreme Court affirmed, holding that the criminal rule requiring inquiry into the factual basis of a guilty plea does not apply to the forfeiture provision of a plea agreement based on violations of the drug laws. The court explained that forfeiture is an element of the sentence, not the offense, so the relevant inquiry is whether the sentencing stipulation was informed and uncoerced on the part of the defendant, not whether it was factually sound.

Significant Federal Court Cases

Attorney did not render ineffective assistance of counsel by eliciting unfavorable facts about defendant. United States v. Brown 71 F3d 1352 (7th Cir. 1995) [CLD § 45.110].

After defendant was convicted in the district court of conspiracy and related charges, he appealed on the ground that his attorney's representation of him was ineffective.

The Seventh Circuit Court of Appeals affirmed, holding that the attorney's representation was not ineffective even though he elected facts unfavorable to the defendant (such as security measure taken at his home), on cross-examination of a prosecution witness. The court noted that the defense attorney needed to find some way to undermine the witness's credibility, and he opted to pursue a line of questioning that strongly implied that the witness was willing to say or do anything that would impress the FBI.

Trial court did not abuse its discretion in refusing to remove challenged juror. United States v. Ramos, 71 F3d 1150 (5th Cir. 1995) [CLD § 36.00].

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* Bracketed references after each case are to pertinent sections of the *Criminal Law Digest* (3d ed. 1983), leading the reader to other cases in point. The *Digest*, published by Warren, Gorham & Lamont, is a classified collection of cases reported in CLB.

After defendants were convicted in the district court of conspiracy and related charges, they appealed on the grounds, among others, that a juror who had allegedly been subject to outside influences should have been removed.

The Fifth Circuit Court of Appeals affirmed, holding that the trial court did not abuse its discretion in holding a limited hearing and refusing to remove a juror based on allegations of outside influence. The court noted that the trial judge extensively questioned the juror, excluded the offending witness from the courtroom and expressly rejected the notion that the defendants were behind the stalker's conduct.

Wife's conversation with husband following arrest was not privileged. United States v. 281 Syosset Woodbury Rd. 71 F3d 1067 (2d Cir. 1995) [CLD § 34.135].

After the U.S. magistrate in a civil forfeiture proceeding held that claimant's conversation with her husband following his arrest for drug trafficking was privileged, the government appealed and the district court reversed.

The Second Circuit Court of Appeals affirmed, holding that the privilege against adverse spousal testimony did not protect a civil forfeiture claimant from testifying about a conversation with her husband following his arrest. The court noted that a witness can waive the privilege against self-incrimination and that applying to confidential marital communications.

Failure of prosecution to disclose recorded conversation of defendant required reversal. United States v. Lanowe, 71 F3d 966 (1st Cir. 1995) [CLD § 32.05].

After defendant was convicted of interstate transportation of a stolen motor vehicle and related charges, he appealed on the grounds, among others, that the prosecution failed to disclose the recorded conversation of the defendant and a defense witness that was used to impeach that witness.

The First Circuit Court of Appeals vacated in part and remanded, holding that the prosecution's failure to disclose the recorded conversation warranted reversal. The court noted that the prosecution received the statement while it was under a continuing obligation to disclose it, the statements were relevant to the charged crime, and failure to disclose the statements deprived the defense of the opportunity to refresh the witness's recollection of the conversation and to investigate the circumstances surrounding it.

Requiring defendant with brain tumor to complete trial while taking medication was not abuse of discretion. United States v. Lopez, 71 F3d 954 (1st Cir. 1995) [CLD § 48.00].

After defendant was convicted in the district court of making false statements to federally insured financial institutions and wire fraud, he appealed on the grounds, among others, that he should not have been required to complete his trial after it was discovered during trial that he had a brain tumor.

The First Circuit Court of Appeals affirmed in part and vacated in part, holding that it was not an

abuse of discretion to require defendant to complete the trial while suffering from a brain tumor, because medical experts had testified that, while the medication could interfere with defendant's ability to present his case, the added stress could be handled with careful monitoring. The court further noted that much of the medication was directed to medical symptoms that could have continued even after the tumor was removed.

Statute making it illegal for a felon to carry a firearm interstate did not violate commerce clause. United States v. Bell, 70 F3d 495 (7th Cir. 1995) [CLD § 24.100].

After defendant was convicted following a guilty plea of possession of a firearm in interstate commerce, he appealed on the grounds that the statute was unconstitutional.

The Seventh Circuit Court of Appeals affirmed, holding that the criminalization of the transport of a firearm interstate by a felon did not violate the commerce clause. The court noted that the statute specifically required that there be a nexus between the transport of the firearm and interstate commerce, and that jurisdictional elements would ensure that the firearm possession in question would affect interstate commerce.

Right to counsel did not apply to civil forfeiture proceedings. United States v. $100,375.00 in U.S. Currency, 70 F3d 438 (6th Cir. 1995) [CLD § 45.45].

After the United States brought an action for forfeiture of money used in drug-related activities and a judgment of forfeiture was entered, the claimant appealed on the grounds that he had not been represented by competent counsel.

The Sixth Circuit Court of Appeals affirmed, holding that the Sixth Amendment right to counsel does not apply to a civil forfeiture proceeding. The court further found that the ineffective assistance of counsel claim may not be raised on appeal for the first time when there is no proof of ineffective assistance of counsel in the record.

Defendant's conviction for conspiracy to commit arson and for use of firearm in the commission of a federal felony did not violate bar against double jeopardy. United States v. Riggio, 70 F3d 336 (5th Cir. 1995) [CLD § 47.45].

After defendant was convicted of conspiracy to commit arson and use of a firearm in the commission of a federal felony, he appealed on the grounds that the convictions constituted double jeopardy.

The Fifth Circuit Court of Appeals affirmed, holding that the two convictions did not violate the bar against double jeopardy even though both charges arose out of the same criminal episode. The court reasoned that the "use of firearm" charge required proof of additional facts that the conspiracy charge did not, namely that defendant actually used the firearm.

Failure of court to inform jury that paid informant's actions were attributable to the government just as if he were an FBI agent was harmless error. United States v. Alzate, 70 F3d 199 (1st Cir. 1995) [CLD § 27.15].

After defendant was convicted in the district court on narcotics charges, he appealed on the grounds that the trial judge had failed to properly instruct the jury on his entrapment defense.

The First Circuit Court of Appeals affirmed, holding that defendant was not prejudiced when the trial court failed to instruct the jury that the actions of the FBI's paid informant were attributable to the government for the purposes of the entrapment defense. The court found that the entrapment instruction given to the jury adequately conveyed the notion that the government could not prove predisposition if defendant's willingness to commit the crime was itself manufactured by the government in the course of dealing with defendant before he committed the crime charged.

Admission of hearsay modus operandi testimony was harmless error. Levasseur v. Pepe, 70 F3d 187 (1st Cir. 1995) [CLD § 34.220].

Following his state court convictions for rape, assault, and related charges, petitioner sought a writ of habeas corpus, which was denied in the district court.

The First Circuit Court of Appeals affirmed, holding, among other things, that the trial court's erroneous admission of hearsay modus operandi testimony was a harmless error. The court noted that the admission of the hearsay testimony did not permeate the proceedings and that the young female witness who stated that petitioner asked her if she wanted a ride, in much the same way that petitioner was accused of offering the victim a ride, was offered only once during the rebutted case and was repeated once in the closing argument.

Testimony of party's agent was held to be harmless hearsay. United States v. Wiedyk 71 F3d 602 (6th Cir. 1995) [CLD § 34.235].

After defendant was convicted in the district court of receiving kickbacks in his capacity as an officer of an employee benefit plan, he appealed on the grounds, among others, that the testimony of the employee of an organization hired by the employee benefits plan regarding statements of his partner were inadmissible hearsay.

The Sixth Circuit Court of Appeals affirmed, holding that any error in the admission of the hearsay testimony was harmless. The court noted that defendant's counsel effectively showed on cross-examination that the witness had scant knowledge of the facts he alleged.

Denial of defendant's right to confrontation regarding lab results was harmless error. United States v. Grandlund, 71 F3d 507 (5th Cir. 1995) [CLD § 44.30].

After defendant's supervised release was revoked in the district court, he appealed on the grounds that his right to confrontation had been denied.

The Fifth Circuit Court of Appeals affirmed, holding that although the trial court failed to make findings on the record, the error was harmless where the record adequately supported the finding of good cause for denying defendant's right of confrontation as to lab results. The court noted that defendant

offered no exculpatory explanation for seven positive drug tests.

Evidence that defendant had threatened to kill a witness was properly admissible. United States v. Bartelho, 71 F3d 436 (1st Cir. 1995) [CLD § 34.45].

After defendant was convicted in the district court of possession of a firearm by a convicted felon, he appealed on the grounds, among others, that certain highly prejudicial evidence had be improperly admitted.

The First Circuit Court of Appeals affirmed, holding that the probative value of the evidence that defendant had threatened to kill the witness outweighed its prejudicial effect. The court reasoned that the evidence that defendant had threatened the witness's life was relevant to the jury's decision whether to credit her taped version of the facts, in which she stated that defendant had threatened her, or her conflicting trial testimony.

Former congressman's due process argument was not subject to interlocutory review. Untied States v. Kolter, 71 F3d 425 (DC Cir. 1995) [CLD § 39.00].

After the former Congressman was indicted for offenses involving alleged misappropriation of congressional funds, he brought an interlocutory appeal from the order of the district court, which denied his motion to dismiss the indictment.

The Court of Appeals for the District of Columbia affirmed, holding that defendant was not entitled to an interlocutory appeal of his claim that the house rules forming the basis of the criminal prosecution against him were so vague that the prosecution violated his right to due process. The court reasoned that there was no final decision of the district court and no need for interlocutory review because a postconviction review would be adequate to protect his right to due process.

Failure of government to disclose tax returns in tax fraud case required reversal. United States v. Lloyd, 71 F3d 408 (DDC 1995) [CLD § 32.00].

After defendant was convicted in the district court of three counts of aiding and abetting the preparation of false federal income tax returns, he appealed on the grounds that trial court had improperly failed to grant his motion for a new trial.

The Court of Appeals for the District of Columbia reversed and remanded, holding that the court should have granted the motion for a new trial because the undisclosed tax returns raised the reasonable probability if a different result had been disclosed at trial. The court thus found that the nondisclosed items were material exculpatory evidence.

Selected State Court Cases

Prosecutor engaged in misconduct by eliciting testimony that the Bible says false prophets shall be put to death, but misconduct was harmless when other evidence of guilt was overwhelming. State v. Lundgren, 653 NE2d 304 (Ohio 1995) [CLD § 14.155].

Defendant, the leader of a religious cult, was convicted of murdering a family of five and sentenced to death. In an unsworn statement, defendant admitted killing the family, explaining that he abhorred the sin he saw in the family and that God had commanded him to kill them. Defendant contended that the prosecutor violated his right to a fair trial by eliciting the following testimony from a witness. Q: "And what does the scriptures command shall be done with a false prophet, Richard Brand." A: "It says, you put them to death."

The Ohio Supreme Court affirmed. The court found that the prosecutor's quotation of this passage during the guilt phase closing argument was improper. Defendant, however, failed to object to this portion of the prosecutor's argument. Given the overwhelming evidence of defendant's guilt, the witnesses's answer, which amounted only to a statement concerning the content of the passage, did not affect defendant's substantial rights. Furthermore, any effect the passage had on defendant's sentence could be cured by the court's independent reassessment of the sentence.

New Jersey's Wiretap and Electronic Surveillance Control Act applies to interception of out-of-state communications when interception involves criminal activity in New Jersey. State v. Worthy, 661 A2d 1244 (NJ 1995) [CLD § 13.320].

An informant who lived in Oklahoma told a New Jersey prosecutor's investigator that defendant, a New Jersey resident, wanted the informant to sell defendant marijuana in bulk. As a result, the investigator set up a sting operation in which the informant was to call defendant from Oklahoma and set up a drug transaction. He directed the informant to record the phone calls, and the tapes were used in the prosecution of defendant for drug offenses. The trial court granted defendant's motion to suppress the tape-recorded conversations, and the Appellate Division affirmed. The state appealed.

Held, affirmed. Under New Jersey's Wiretap and Electronic Surveillance Control Act, a law enforcement officer must obtain approval from the New Jersey Attorney General or a county prosecutor before intercepting a conversation. Unlike federal law, the New Jersey Act applies to the interception of out-of-state telephone calls when a person located in New Jersey is a party, when the interception is undertaken for the purpose of investigating criminal activity in New Jersey, and when New Jersey law enforcement officers direct the interception.

Confession induced by offer of leniency for cooperation in future prosecutions of others did not violate defendant's right to freedom from self-incrimination. Commonwealth v. Laatsch, 661 A2d 1365 (Pa. 1995) [CLD § 43.10].

Defendant was arrested for selling marijuana. After administering the *Miranda* warnings, the arresting officer asked if defendant knew why he had been arrested. In response, defendant admitted to selling drugs. The officer also testified that he told defendant that if he were willing to cooperate in future investigations, his cooperation would be made

known to the district attorney. Citing *Commonwealth v. Gibbs*, 553 A2d 409 (Pa. 1989), defendant appealed, arguing that he had been impermissibly induced to incriminate himself without consulting an attorney.

The Pennsylvania Supreme Court affirmed. *Gibbs* dealt with an offer of lenient treatment in return for the defendant's cooperation in the investigation. By contrast, the offer in this case dealt with defendant's cooperation in the investigation of "future" crimes, that is, crimes completely unrelated to the offenses with which he had been charged. There is a clear distinction between an offer conditioned on a confession and an offer seeking cooperation in the investigation of others without the prerequisite of self-incrimination. The former is an impermissible inducement to waive one's right against self-incrimination. The latter is not.

Death sentences could not be made consecutive to sentences of life imprisonment and term of years. Commonwealth v. Graham, 661 A2d 1367 (Pa. 1995) [CLD § 17.165].

Defendant was convicted of seven counts of first-degree murder and seven counts of abusing a corpse. In its sentencing order, the trial judge imposed consecutive sentences of one to two years for each of the seven abuse-of-corpse convictions, ordered that a life imprisonment term for one of the murders be consecutive to those sentences, and directed that the death sentences for the remaining six murders be consecutive to the other sentences. On automatic appeal, the Commonwealth argued that the court had no authority to make the death penalty consecutive to the other sentences.

The Supreme Court of Pennsylvania vacated the judgment that the death sentences were to be consecutive to the other sentences. When formally imposing a sentence of death under the Pennsylvania statute, the court has no discretion to order that such sentences be consecutive to any other sentences then being imposed or previously imposed. A sentence of death is sui juris and stands entirely apart from other punishments prescribed by the sentencing code.

Jury instruction permitting defendant's conviction for escape from community residence based on evidence that he failed to report to his parole officer was misleading. State v. Woods, 662 A2d 732 (Conn. 1995) [CLD § 3.105].

Defendant was a convicted felon who had been transferred to a "community residence" to complete his sentence. He was charged with escape after repeatedly failing to report to his supervising parole officer. Defendant challenged his conviction for escape on the grounds that the court's instructions to the jury allowed them to convict on the basis of this failing to report alone, that is, without proof that he had absconded from the community residence.

The Connecticut Supreme Court reversed. The court's instruction equated the failure to report with an escape. While failure to report may be evidence that the defendant has left his designated place of confinement, it is not enough, standing alone, to prove an unauthorized physical departure from the desig-

nated confinement. Such a departure is necessary for an "escape" under the state statute. The court's instruction may have misled the jury into believing that defendant could be found guilty of escape solely for failure to report to his parole officer.

Bifurcated trial is ordinarily required for capital-murder charge that depends on proof that defendant previously committed another intentional or felony murder. State v. Jones, 662 A2d 1199 (Conn. 1995) [CLD § 13.50].

Defendant was convicted of capital murder under CGSA § 53a-54b(3), which makes it a capital offense for a person to commit murder if he has previously been convicted of intentional murder or felony murder. Defendant moved to have a bifurcated proceeding, arguing that the jury hearing the evidence concerning the current charge must not be made aware of any prior conviction until after it has decided the issue of guilt on the current charge. The trial court denied the bifurcated trial and defendant was convicted, resulting in this appeal.

The Connecticut Supreme Court reversed. A bifurcated trial was necessary because of the prejudice resulting from the jury's awareness that defendant had previously been convicted of and served time for murder. The risk of such prejudice was not outweighed by the state's interest in judicial economy. Little time would be saved in a case such as this, where the evidence of the prior conviction was pro forma and the conviction served such a limited purpose. However, bifurcation is not required in every case under the state statute. This procedure might not be necessary, for example, if the state sought to introduce the earlier conviction as evidence of a signature crime to prove identity.

Defendant in drug case could not obtain discovery of police officer's file based on bare rumors that the officer had participated in a drug rehabilitation program. State v. Puzzanghera, 663 A2d 94 (NH 1995) [CLD § 11.25].

Defendant was convicted of sale of a controlled drug. His conviction arose out of an undercover drug investigation, during which an undercover police officer purchased cocaine from the defendant and his co-defendants. Charging that he had been coerced into committing the offenses with which he was charged to provide cocaine for the undercover police officer's use, he sought an in camera review of the police officer's file. He also cited rumors that the officer had been a participant in a drug rehabilitation program. The trial court denied defendant's request and defendant appealed.

The New Hampshire Supreme Court affirmed. In order to trigger an in camera review of a police officer's personnel file, the defendant must establish probable cause to believe that the file contains evidence relevant to his defense. He must present some specific concern, based on more than bare conjecture, that will probably be explained by material in the file. Defendant could not meet his burden of proof. The rumors about the officer's participation in the drug rehabilitation program were mere assertions of suspicion that did not amount to probable cause.

Sex offender profile was not admissible because there are as yet no scientifically reliable indicators of child sexual abuse. State v. Cavaliere, 663 A2d 96 (NH 1995) [CLD § 13.427].

Defendant, accused of felonious sexual assault, sought to introduce a psychologist's testimony that he did not fit into a "sexual offender profile." This evidence was to be based on interviews of defendant and on several standard psychological tests, including the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), the Milton Clinical Multiaxial Inventory-II (MCMI-2), and the Multiphasic Sec Inventory. The prosecution presented evidence that the tests may be effective when diagnosing individuals who admit to their crime, but suffer from a high failure rate when given to individuals who deny any crime. It also argued that 40 percent of sex offenders exhibit no other psychopathology than sexual deviancy. The trial court allowed the profile evidence, subject to cross-examination.

The New Hampshire Supreme Court reversed. Citing *State v. Cressey*, 628 A2d 696 (1993), the court ruled that there is as yet no scientifically reliable indicator of child sexual abuse. As a result, an expert's testimony would effectively be beyond reproach. Any diagnosis would be likely to emerge unscathed even after cross-examination, because it would be based not any one indicator or symptom but on the expert's interpretation of a variety of factors, making it difficult to critique.

The knowing use of perjured testimony to obtain a criminal conviction violates due process and entitles defendant to a new trial. People v. Jimerson 652 NE2d 278 (Ill. 1995) [CLD § 16.10].

Defendant was convicted of rape and murder based almost entirely on the testimony of a co-defendant. At the trial, co-defendant testified that she could not remember being promised anything in return for her testimony. However, discovery in the trials of other participants in the rape and murder disclosed that co-defendant had been promised leniency in return for her testimony, and all the charges against her were dropped. Defendant filed a petition for postconviction relief seeking a new trial on the ground that co-defendant was permitted to testify falsely at his trial.

The Illinois Supreme Court granted the petition. If a prosecutor knowingly permits perjured testimony in a criminal prosecution, it is clear that the trial lacked the fundamental fairness implicit in constitutional guarantees of due process of law, thus entitling him to a new trial. Moreover, there was ample evidence that co-defendant was promised leniency. Thus, defendant was entitled to a new trial.

Dismissal of indictment was proper discovery sanction for prosecution's destruction of evidence following discovery request. People v. Newberry, 652 NE2d 288 (Ill. 1995) [CLD § 11.35].

After police arrested defendant, they seized a substance that they believed was cocaine. A field test was negative, and defendant was indicted for unlawfully possessing a "look-alike" substance with intent

to distribute. However, a subsequent laboratory test indicated the presence of cocaine. The grand jury then returned an indictment for possession of cocaine, and the earlier indictment was withdrawn. Defendant's counsel filed a motion to examine all tangible objects seized from defendant, but the state could not comply because a lab technician erroneously destroyed the cocaine. The trial court then dismissed the indictment, the state appealed, and the case eventually reached the Illinois Supreme Court.

The Illinois Supreme Court affirmed. When evidence is requested by the defense in a discovery motion, the state is on notice that the evidence must be preserved, and the defense is not required to make an independent showing that the evidence has exculpatory value in order to establish a due process violation. Moreover, dismissal of the indictment was a proper discovery sanction under Illinois Supreme Court Rule 415(g)(i).

Inclusion of conduct with depraved indifference to human life as element of second-degree murder did not render the statute void for vagueness. People v. Cole, 652 NE2d 912 (NY 1995) [CLD § 1.00].

Defendant was convicted of second-degree murder in that she killed a child. On appeal, she argued that Penal Law § 125.25(4), the statute under which she was convicted, is unconstitutionally vague to the extent it encompasses "conduct with a depraved indifference to human life."

The Court of Appeals affirmed. Conduct with a depraved indifference to human life is a type of conduct that was well understood at common law, and brutality toward a child fits within the accepted understanding of the kind of recklessness involving a depraved indifference to human life. The depraved indifference element of § 125.25(4) is an objective aggravating circumstance, rather than part of the mens rea. The fact that the statute encompasses conduct that "creates a grave risk of serious physical injury *or* death" (emphasis supplied) does not render the statute unconstitutionally vague because the type and level of risks to be avoided by the actor are specified.

Requiring disclosure of FBI's notes on DNA testing of defendant's and victim's blood was consistent with New York's philosophy of broad pretrial disclosure. People v. DaGata, 652 NE2d 932 (NY 1995) [CLD § 11.25].

Prior to his trial for rape, defendant requested discovery, including "copies of any and all reports of scientific tests or experiments and memoranda prepared in connection with this case." This request was reiterated both during and after his trial, which resulted in a conviction. Nonetheless, the prosecution refused to obtain for defendant the FBI's notes concerning DNA tests on defendant's blood and that of the victim, although a one-page report was provided. Following the trial, the court obtained the FBI notes and determined that defendant was not entitled to them because they were not exculpatory. In a motion to set aside the verdict, defendant argued that he was denied a fair trial by the

court's refusal to give him access to the laboratory notes.

The Court of Appeals of New York reversed. Under CPL § 240.20, defendant was entitled to the FBI's notes whether exculpatory or not. Defendant could have used the notes to determine whether further inquiry would possibly lead to favorable information. Defendant could have challenged (1) the FBI's methodology; (2) the type of DNA testing used; (3) storage methods; or (4) whether other tests or analyses could have resulted in a more proficient reading of the materials analyzed.

Conviction for possession of a specific amount of drugs ordinarily requires proof that defendant was aware of the weight of the drugs he possessed. People v. Sanchez, 652 NE2d 925 (NY 1995) [CLD § 3.85].

Two police officers on routine motor patrol saw a car with its trunk popped out, so they directed the driver to pull over. As they approached the car, a single passenger in the rear appeared to be fumbling with something. He opened the rear door and attempted to flee, but was apprehended with cocaine of an aggregate weight of 8 7/8 ounces. Concluding that the evidence of defendant's knowledge of weight was legally insufficient to sustain the charge of criminal possession of a controlled substance in the first degree, the charge was reduced to criminal possession in the seventh degree. The Appellate Division affirmed.

The Court of Appeals of New York reversed. The felony-weight offenses of possession of drugs must contain an element of mental culpability as to the weight of the drugs possessed. Possession alone does not generally support the conclusion that defendant was also aware that the drugs possessed were of a certain weight. Additional evidence, such as the substantial quantity of drugs possessed or the manner of packaging, is also required. In this case, however, there was more than mere possession. Defendant was holding more than twice the threshold amount for possession in the first degree. Thus, there was no basis to reduce the charge.

From the Legal Literature

Criminal Procedure—Habeas Corpus

Turocy, James J., "Constitutional Law—Criminal Procedure—Habeas Corpus—Reaching the Merits of Successive and/or Abusive Petitions," 34 Duquesne L. Rev. 373 (Winter 1996).

This article analyzes *Schlup v. Delo*, 115 S. Ct. 851 (1995) and the issue of successive and/or abusive habeas corpus petitions. He first explains the *Schlup* case, which held that when an inmate files a successive and/or abusive habeas corpus petition alleging constitutional error (Schlup claimed ineffective assistance of counsel) together with an actual claim of innocence, the proper standard of proof is the probability of innocence as determined by *Kuhlman v. Wilson*, 477 US 436 (1986) and *Murray v. Carrier*, 477 US 478 (1986). The Supreme Court in *Schlup* ruled that the lower court had abused its discretion when it relied on the standard set forth in *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992), which required clear and convincing evidence of innocence.

The article deftly leads the reader through the myriad and sometimes murky problems that arise in habeas corpus law, and aptly delineates and clarifies the issues that arise in this body of case law. He points out that principles of res judicata apply to habeas petitions, and that when courts determine whether to readjudicate a claim, the interest of the petitioner are balanced against judicial concerns of comity and finality. He concludes that although the latter of these concerns may suffer somewhat from the *Schlup* decision, successive habeas petitions with at least a colorable claim of innocence will not be barred from review.

Proportionality and Punishment

Grossman, Steven, "Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment," 84 Ky. LJ 107 (1995–1996).

This is a fine example of an attempt to find some semblance of order in a line of cases decided by the Supreme Court on proportionality in noncapital sentencing, under Eighth Amendment principles. The author does not fail in his attempt, but rather, maintains that order is simply absent here. He begins his inquiry with *Weems v. United States*, 217

US 349 (1910), where the petitioner's sentence of fifteen years of punishment called "cadena temporal" was deemed unconstitutional, and *Rummel v. Estelle*, 445 US 263 (1980), where the Supreme Court upheld Rummel's sentence of a life term of imprisonment under Texas's recidivist statute for a conviction for theft of $120.75.

In some cases, the Court has advocated using objective criteria for proportionality review: Consideration of the nature of the crime and its seriousness; a comparison of the punishment for this crime as compared to other crimes in the same jurisdiction; and a comparison of punishments for the same crime in other jurisdictions. However, the author points out that the reasoning throughout all of the cases in this line has not been uniform, nor sound. He recommends that the Court adopt a philosophy of punishment that incorporates the precepts of both retribution and utilitarianism. This philosophy, which he calls "limiting retributivism," would embody the principle of "just desserts," a punishment to fit the crime, but the punishment is never excessive. Although perhaps unpopular in a "tough on crime" climate, it may be an idea that warrants consideration when most prisons and jails are at the saturation point.

Right to Carry

Mason Thomas J., "Guns, Deadly Force and the Duty to Retreat in Oregon," 56 Or. St. B. Bull. 9 (Dec. 1995).

More and more people in the United States are carrying a weapon, perhaps because, as the author tells us, there are now twenty-eight states with "right to carry" laws on their books. The "right" described is the right to carry a concealed weapon. Since 1989, some 193,000 permits have been issued in Oregon alone and approximately 115 million Americans are eligible for permits. In Oregon, the criteria for issuing a permit to carry a concealed weapon are that the person: be over 21, never have been convicted of a felony, not have been convicted of a misdemeanor within four years, not be mentally ill, and have passed a firearm safety course.

The article then raises some interesting issues, which some of us probably have not thought about since law school, i.e., when a person is entitled to use deadly force. It describes deadly force as a special category of physical force, and states that its use is guided by three tests: what a reasonable person would have done under the circumstances; whether the force used to repel the attack was proportional to

the force used on him; and the limitations on deadly force, which proscribe it unless the person believes the other is committing a felony involving use of force, or the other person is committing a burglary in a dwelling, or the other is about to use unlawful deadly force against him. The author states that Oregon is a "duty to retreat" state, which means that unless the attack is taking place in the home or workplace, the person must avoid the danger unless doing so would sacrifice his own safety. He then outlines important questions that the person obtaining a permit should consider, such as where it is unlawful to carry the weapon, and what kind of training is not only legally required but possibly necessary for his own protection. He concludes with a list of do's and don'ts for self-protection in the home and on the street that a person carrying a concealed weapon should not only learn, but remember.

Sexual Predators Laws

Comment, "The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts," 32 Hous. L. Rev. 775 (1995).

Andrew Hammel's review of sexual predator laws is thorough and well-written. It is not difficult to see why it was the winner of the Joan Garfinkel award for the best paper in the area of civil liberties and the 1995 winner of the Randal A. Hendricks award for the most outstanding interdisciplinary comment.

He begins with a review of the Minnesota Psychopathic Personality Law, which was enacted in 1939 and amended in 1994 in order to withstand constitutional challenge after a decision that year by the Minnesota Supreme Court. *In re Linehan*, 518 NW2d 609 (Minn. 1994) determined that when committing an inmate to a mental health facility upon completion of a criminal sentence for a sex crime, the state must prove by clear and convincing evidence a habitual course of misconduct in sexual matters, an utter lack of power to control sexual impulses, and the likelihood that he would attack or otherwise injure another. This led one Minnesota Supreme Justice to ask how Linehan could be convicted of a crime requiring mens rea, but at the same time suffer from lack of control.

Hammel discusses the Washington sexual predator law, struck down by *Young v. Weston*, 898 F. Supp. 744 (D. Wash. 1995), in August of 1995. The law was found unconstitutional because it was determined to be criminal in nature, in that it subjects persons to an affirmative re-

straint, applies to conduct that is already criminal, and promotes the aims of punishment—retribution and deterrence. He then discusses the factors that should be required in civil commitment statutes: a mental illness requirement, a treatment component, a definition of the purpose of commitment, and a statement of the reason for commitment. Lastly, he addresses the issue of whether sexual offenders are indeed mentally ill and asserts that the psychiatric community has had a difficult time answering that question in the affirmative. One point that is particularly striking in his concluding remarks is that the state legislatures, in enacting sexual predator laws, are forcing psychiatrists into the role of "de facto jailer." Very nice work.

Three Strikes and Juveniles

Comment, "Striking Out Juveniles: A Reexamination of the Right to a Jury Trial in Light of California's 'Three Strikes' Legislation," 29 UC Davis L. Rev. 437 (Winter 1996).

Often, when laws are enacted, it seems as though the legislature has failed to envision the full logical extension of the law. This is the case with California's Proposition 184, which allows for prior criminal convictions to enhance a sentence for a felony conviction. These prior convictions can include prior juvenile adjudications. In this Comment, David C. Owen demonstrates that this is problematic. Because the historic origins of the juvenile court are as a rehabilitative arena, juveniles are not given the full panolpy of due process considerations to which adults are entitled. One right still denied to juveniles is that of the right to jury trial. This, says Owen, is a major concern, for if prior juvenile adjudications may subject a person to a sentence enhancement, possibly even life imprisonment, the juvenile court is no longer rehabilitative, but is downright punitive.

As further evidence of the punitive nature of the juvenile court, Owen quotes from the California Welfare and Institutional Code governing juvenile matters, which states that the purpose of the juvenile justice system is "to protect the public and impose a sense of responsibility on minors for their acts." So much for parens partriae. He proposes that California initiate a two-part system that would recognize a right for to jury trial for serious juvenile offenders and a right to treatment for nonserious offenders. This, he concludes, would grant juveniles subject to Proposition 184 enhancements the same rights that their adult counterparts enjoy and return the rehabilitative aspect for nonserious juvenile offenders.