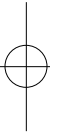
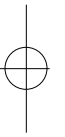


Law and Mental Disorder





Law and Mental Disorder

George J. Alexander
Elizabeth H. and John A. Sutro Professor of Law
Santa Clara University

and

Alan W. Schefflin
Professor of Law
Santa Clara University

Carolina Academic Press
Durham, North Carolina

Copyright © 1998
George J. Alexander and Alan W. Schefflin
All Rights Reserved

Alexander, George J.

Law and mental disorder / George J. Alexander and Alan W.
Schefflin.

p. cm.

Includes bibliographical references and index.

ISBN 0-89089-917-7

1. Mental health laws—United States. I. Schefflin, Alan W.

II. Title.

KF3828.A935 1998

344.73'044—dc21

98-30548
CIP

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
Website: www.cap-press.com

Printed in the United States of America

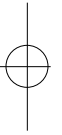
Dedication

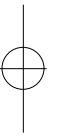
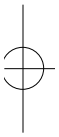
To Elizabeth H. and the late John A. Sutro. As a member of my Board of Visitors when I was dean of the law school, Jack kept me from many mistakes with his always sharply focused advice. The endowed chair that Elizabeth steered to the law school, together with her warm personal support, have provided me time and inspiration to complete my part of this book.

George J. Alexander

To my wife, Jamie, and my daughter, Hallie, whose constant love and support sustained me throughout the preparation of this book. Without them, I was more apt to be its subject rather than its author.

Alan W. Schefflin





Contents

Table of Cases	xxi
Acknowledgments	xxiii
Preface	xxvii

Part One — The Concept of Disease and Law

Chapter 1: Who's Crazy? Who Decides? Who Cares?	5
Introduction	5
A. What is Mental Illness?	8
<i>Traynor v. Turnage</i> (1988)	8
Notes	15
Thomas Prentice, "Prince Prescribes Spiritual Cure for Mentally Ill"	16
Notes	17
Thomas S. Szasz, "What Counts As Disease?"	17
Notes	20
<i>Kunin v. Benefit Trust Life Insurance Company</i> (1990)	21
<i>Patterson v. Hughes Aircraft Co.</i> (1993)	25
Notes	27
B. The Adaptable Nature of Psychiatry	30
Thomas S. Szasz, "The Sane Slave: Social Control and Legal Psychiatry"	30
Notes	32
Psychiatry and Anxiety	32
Contemporary Views Concerning Sexuality as an Indication of Mental Disorder	36
Notes	37
C. A Case Study: Mental Health and Law Practice—Edward Ronwin's Bar Admission Efforts	40
<i>Application of Edward Ronwin</i> (1976)	40
Notes	43
<i>In the Matter of Edward Ronwin</i> (1983)	43
<i>Iowa Supreme Court Board of Professional Ethics v. Ronwin</i> (1996)	50
Notes	52
<i>Petition of Schaengold</i> (1967)	52
<i>In re Hoover</i> (1987)	54
Notes	59
<i>Campbell v. Greisberger</i> (1994)	59

Notes	65
D. A Brief History of Madness	67
1. Possession Theories	67
2. Developmental Theories	71
3. Biological Theories	78
4. The Future of Mental Health and the Mind	81
Notes	81
Chapter 2: Who May Practice Therapy?	83
A. Licensing Limits on Talking Cures	83
<i>Morwald v. Workmen's Compensation Appeal Board</i> (1991)	84
Notes	86
1. Licensure in the United States	87
2. Licensure of Psychology	88
a. Comparison of California and Florida Licensing Laws	89
b. Telehealth	94
Notes	95
3. Free Expression Limits to Licensure	96
<i>Abramson v. Gonzales</i> (1992)	96
4. Religious Limitations to Licensure	101
<i>People v. Jordan</i> (1916)	101
<i>Crane v. Johnson</i> (1917)	104
Notes	106
5. Prophecy	108
<i>Rushman v. City of Milwaukee</i> (1997)	109
Notes	111
B. The Standard of Care	114
1. Pastoral Counseling	114
<i>Nally v. Grace Community Church of the Valley</i> (1988)	114
Notes	126
<i>Baumgartner v. First Church of Christ, Scientist</i> (1986)	127
Notes	131
2. Hypnosis	132
<i>Johnson v. Gerrish</i> (1986)	132
Notes	134
C. Self Help: Fending Off Mental Health Competition	142
<i>Blue Shield of Virginia v. McCready</i> (1982)	143
Notes	147
<i>United States v. Hartz</i> (1995)	148
Notes	150
<i>Abramson v. Gonzales</i> (1992)	152
<i>Hayhurst, N.M.D. v. Beyrle, N.M.D.</i> (1995)	153
Notes	154
Chapter 3: How May Therapy Be Practiced?: Professional Standards	155
A. Contact with Patients	156
1. Sexual Contact	156

<i>Simmons v. United States</i> (1986)	156
Notes	159
a. Civil Proceedings	161
<i>Roy v. Hartogs</i> (1976)	161
Notes	164
<i>American Home Assurance Company v. Smith</i> (1995)	167
Notes	169
b. Criminal Proceedings	170
<i>State v. Leiding</i> (1991)	170
Notes	174
c. Disciplinary Proceedings	177
d. Lawyers	179
e. Clergy	181
2. Dual Relationships	187
Notes	189
<i>Harris v. Leader</i> (1998)	191
B. Legal Limitations — Standard of Care	194
1. Unorthodox Therapies	194
<i>Chumbler v. McClure</i> (1974)	194
<i>Jones v. Chidester</i> (1992)	195
Notes	198
2. Innovative Therapies	201
<i>Rains v. Superior Court (Center Foundation)</i> (1984)	201
Notes	205
<i>Abraham v. Zaslów</i> (1975)	208
Notes	210
Jay Haley, <i>Ordeal Therapy</i> (1984)	211
Notes	216
C. Informed Consent	218
Jeffrey K. Zeig, “Ethical Issues in Hypnosis: Informed Consent and Training Standards” (1985)	219
Notes	224
D. Repressed Memory	226
1. The Criminal Cases	227
David Spiegel & Alan W. Schefflin, “Dissociated or Fabricated? Psychiatric Aspects of Repressed Memory in Criminal and Civil Cases” (1994)	227
Notes	236
2. Civil Cases	239
David Spiegel & Alan W. Schefflin, “Dissociated or Fabricated? Psychiatric Aspects of Repressed Memory in Criminal and Civil Cases, (1994)	239
Notes	242
Daniel Brown, Alan W. Schefflin, and D. Corydon Hammond, <i>Memory, Trauma Treatment, and the Law</i> (1998)	243

Notes	251
Chapter 4: The Therapist as Witness	255
A. Therapists As Experts	255
1. Admissibility of Scientific Expert Testimony	257
<i>Frye v. United States</i> (1923)	258
Notes	259
<i>People v. Coleman</i> (1985)	263
Notes	266
2. Hypnosis and the <i>Frye</i> Rule	268
3. The <i>Daubert</i> Rule	271
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> (1993)	271
Notes	278
<i>United States v. Shay</i> (1995)	283
4. <i>Daubert</i> and Social Science Testimony	288
<i>United States v. Hall</i> (1997)	288
Notes	296
5. <i>Daubert</i> and Repressed Memories	303
<i>Shahzade v. Gregory</i> (1996)	303
Notes	307
6. <i>Daubert</i> and Hypnosis	313
7. <i>Daubert</i> and the Two Schools of Thought Doctrine	318
B. The “Syndrome” Syndrome	319
1. The “Battered Child” Syndrome	321
2. Battered Wife/Woman/Spouse/Person Syndrome	321
3. Child Sexual Abuse Accommodation Syndrome	323
<i>Commonwealth v. Dunkle</i> (1992)	323
Notes	333
<i>People v. Beckley</i> (1990)	337
Notes	342
4. “False Memory” Syndrome	342
5. Repressed or Recovered Memory Syndrome	343
6. Parental Alienation Syndrome	344
Notes	344
C. Psychiatric Predictions and Postdictions	346
1. Predictions	348
Notes	349
<i>In Re: Tommie Lee Melton</i> (1991)	351
Notes	359
Joseph T. McCann, “Risk Assessment and the Prediction of Violent Behavior” (1997)	360
Notes	363
<i>People v. Burnick</i> (1975)	364
Notes	369
2. Postdictions	370
<i>United States v. Westcott</i> (1996)	371

Notes	373
3. Current Capacity	374
<i>United States v. Schappel</i> (1970)	377
Notes	380
<i>Blanca v. Superior Court</i> (1996)	380
Notes	384
D. Testifying as to Truth	387
Marianne Wesson, “Historical Truth, Narrative Truth, and Expert Testimony” (1985)	388
Notes	392
 Part 2 — Confidentiality, Privilege and Compelled Disclosure	
Chapter 5: Compelling Psychiatrists to Disclose	397
A. Protecting Secrets	397
<i>State v. Beatty</i> (1989)	397
Notes	401
<i>Jaffee v. Redmond</i> (1996)	401
Notes	412
<i>In re Lifschutz</i> (1970)	413
Notes	421
<i>Sullivan v. Cheshier</i> (1995)	424
Notes	425
B. Mandatory Reporting	426
1. Compulsory Reporting Statutes	426
a. Child Abuse	426
<i>People v. Stritzinger</i> (1983)	431
Notes	436
<i>James W. v. Superior Court (Goodfriend)</i> (1993)	443
Notes	451
<i>Caryl S. v. Child & Adolescent Treatment Services, Inc.</i> (1994)	454
Notes	459
b. Elder Abuse	461
California Welfare and Institutions Code § 15630	461
Notes	462
Chapter 6: Protecting Potential Victims	465
A. The <i>Tarasoff</i> Duty	465
1. The Tragic Tale of Tatiana (Tanya) Tarasoff	465
a. The Criminal Case	466
b. The Civil Case	467
c. The California Supreme Court — <i>Tarasoff 1</i>	468
d. The California Supreme Court — <i>Tarasoff 2</i>	470
2. The Mental Health Response to the <i>Tarasoff</i> Duty	473
B. The Scope of the <i>Tarasoff</i> Duty	474
<i>Hamman v. County of Maricopa</i> (1989)	474

Notes	481
<i>Barry v. Turek</i> (1990)	482
Notes	486
<i>Cole v. Taylor</i> (1981)	486
Notes	488
C. Who is Bound by the <i>Tarasoff</i> Duty?	490
1. Family	490
<i>Hansra v. Superior Court (Magana)</i> (1992)	490
Notes	495
2. Attorneys	499
San Diego County Bar Association, Ethics Opinion 1990–1	499
Notes	504
3. Clergy	504
D. Does Exercise of the <i>Tarasoff</i> Duty Extinguish the Privilege?	508
<i>Menendez v. Superior Court (People)</i> (1992)	508
Alan W. Schefflin, “The <i>Menendez</i> Case: Legal Commentary on the Diary” (1995)	520
Notes	524
Chapter 7: Compelling Patients to Disclose	529
A. Criminal Trial Cases	529
1. Sex Crimes	529
<i>People v. Hagerman</i> (1985)	529
Notes	532
2. Non-Sex Crimes	533
<i>Troiani v. Poole</i> (1994)	533
Notes	536
3. Competency Hearings	536
4. Insanity Defense	537
<i>State v. Martin</i> (1997)	537
B. Post-Criminal Trial Proceedings	544
1. Future Dangerousness: Imposition of Capital Punishment	544
<i>Estelle v. Smith</i> (1981)	544
Notes	552
<i>Delguidice v. Singletary</i> (1996)	555
2. Future Dangerousness: Probation	559
<i>State v. Gleason</i> (1990)	559
Notes	562
3. Future Dangerousness: Release	565
<i>United States v. Phelps</i> (1992)	565
Notes	573
C. Civil Cases	573
<i>Vinson v. Superior Court (Peralta Community College Dist.)</i> (1987)	573
Notes	580
D. Professional Licensing Cases	580

<i>Humenansky v. Minnesota Board of Medical Examiners</i> (1994)	580
Notes	585
Chapter 8: Access to Patient Records	587
A. Patient Seeks Records	587
<i>Cleghorn v. Hess</i> (1993)	587
Notes	591
B. Relatives Seek Records	593
1. Relatives of the Patient	593
2. Relatives of the Therapist	594
<i>Smith v. Superior Court (County of San Mateo)</i> (1981)	594
C. Third Parties Seek Records	597
1. Commitment and Conservatorship Hearings	597
<i>In re Kathleen M.; In re Kathleen D.; In re Charles W.</i> (1985)	597
2. Judicial Proceedings	601
a. To Bring a Lawsuit	601
<i>County of Alameda v. Superior Court (Darlene W.)</i> (1987)	601
<i>Grosslight v. Superior Court of Los Angeles County</i> (<i>Hoover</i>) (1977)	605
<i>Rodriguez v. Superior Court (People)</i> (1993)	608
b. To Defend Against a Lawsuit — The Litigant Exception	613
<i>Davis v. Superior Court (Williams)</i> (1992)	613
<i>People v. Reber</i> (1986)	618
<i>Jorgensen v. State</i> (1991)	623
c. Privacy and Crime Victims	625
<i>Susan S. v. Israels</i> (1997)	625
3. For Research Purposes	632
The Orne-Sexton Controversy	632
4. For Educational Purposes	636
<i>State v. Junker</i> (1971)	636
5. For News	643
<i>In re Worrell Enterprises, Inc.</i> (1992)	643
<i>In re New York News, Inc.</i> (1986)	649
Notes	651
D. State Interests	651
1. National Security	651
The Ellsberg Affair	651
2. The Investigation of Crime or Fraud	653
<i>Scull v. Superior Court (People)</i> (1988)	653
Notes	657
<i>United States v. Moore</i> (1992)	658
Notes	659
E. Using Confidential Information	662
1. Books by the Therapist	662

<i>Doe v. Roe</i> (1977)	662
2. Books by the Patient	667
3. Books by Third Parties	670
4. Insider Trading	671

Part Three — Responsibility and Treatment

Chapter 9: Mental Excuses to Criminal Prosecution	675
A. Incompetence to Stand Trial	675
<i>Dusky v. United States</i> (1960)	675
Notes	676
1. Hearing on Competency	676
<i>Pate v. Robinson</i> (1966)	676
<i>Drope v. Missouri</i> (1975)	682
<i>Martin v. Estelle</i> (1977)	689
<i>People v. Stankewitz</i> (1982)	692
2. Amnesia	702
Notes	703
3. Synthetic Competence	704
<i>Riggins v. Nevada</i> (1992)	704
Notes	716
B. Self-Representation	716
<i>Godinez v. Moran</i> (1993)	717
Notes	723
C. The Insanity Defense	726
1. Is Insanity a Medical, Legal, or Political Concept?	727
<i>State v. Eusinazuri</i> (1991)	727
Notes	729
2. Current Significance	736
<i>United States v. Lyons</i> (1984)	736
Notes	740
3. Tests for Insanity	743
a. The “Wild Beast” Test	743
b. The <i>M’Naghten</i> Case	744
i. The “Irresistible Impulse” Test	746
c. The Durham Rule	747
d. Judge Bazelon’s “Is it Just?” Test	749
e. The ALI Test	752
4. The Insanity Defense and Mens Rea	752
<i>United States v. Westcott</i> (1996)	753
Notes	753
5. The <i>Hinckley</i> Case	754
6. The <i>Hinckley</i> Consequences	759
a. <i>Hinckley</i> and the Burden of Proof	759
b. The American Psychiatric Association Report	760
c. The American Bar Association Report	766
d. The American Medical Association Report	768

e. Revision of the Federal Insanity Test	769
<i>United States v. Gold</i> (1987)	770
Notes	773
7. The “Guilty But Mentally Ill” Verdict	780
<i>State v. Neely</i> (1991)	780
Notes	789
8. Multiple Personality Disorder and Criminal Responsibility	791
<i>Kirby v. State</i> (1991)	791
Notes	792
Chapter 10: Extended Commitment Because of Mental State	801
A. Awaiting Competence to Stand Trial	801
<i>Jackson v. Indiana</i> (1971)	801
Notes	803
B. Convicted But Later Declared Mentally Disordered	804
<i>Baxtrom v. Herold</i> (1966)	804
Notes	807
C. Found Not Guilty by Reason of Insanity	807
<i>Jones v. United States</i> (1983)	807
Notes	814
D. Others Deemed Dangerous	815
<i>United States v. Salerno</i> (1987)	815
<i>Foucha v. Louisiana</i> (1992)	816
Notes	824
<i>Kansas v. Hendricks</i> (1997)	825
Notes	833
Chapter 11: Entering the Mental Health System	837
A. Voluntary Commitment	837
1. The Ideal of Voluntary Commitment	837
2. The Reality of Voluntary Commitment	838
a. Getting In	838
<i>Plumadore v. State</i> (1980)	838
Notes	839
<i>Zinerman v. Burch</i> (1990)	840
Notes	846
b. Getting Out	846
<i>Marcus v. Liebman</i> (1978)	847
Notes	849
<i>Appeal of Philadelphia County Office of Mental Health and Mental Retardation</i> (1991)	850
Notes	853
<i>Parham v. J.R.</i> (1979)	853
Notes	859
B. Involuntary Commitment	860
1. The Changing Goals of Involuntary Commitment	860
2. Federal Constitutional Requirements	861

<i>Addington v. Texas</i> (1979)	861
Notes	867
<i>Heller v. Doe</i> (1993)	867
Notes	879
<i>Project Release, Greene v. Provost</i> (1982)	879
Notes	883
3. State Requirements for Involuntary Commitment	883
a. In General	883
<i>In re Beverly</i> (1977)	883
Notes	886
b. Dangerousness	887
<i>People v. Stevens</i> (1988)	887
Notes	889
c. Reversion of Standards	890
<i>In the Matter of the Treatment of Albright</i> (1992)	890
Notes	892
d. Evidence of Mental Condition	892
<i>In re Mental Illness of Boggs</i> (1990)	892
Notes	894
e. In Need of Treatment and Grave Disability	894
<i>In the Matter of Detention of LaBelle</i> (1988)	894
Notes	905
i. Third Party Assistance	905
<i>Conservatorship of Early</i> (1983)	905
Notes	909
ii. Lack of Treatment	910
<i>O'Connor v. Donaldson</i> (1975)	910
Notes	918
4. Interstate Compact on Mental Health	920
<i>West Virginia ex rel. White v. Todt</i> (1996)	920
Notes	926
5. Liability for Commitment and Release Decisions	926
a. Commitment	926
<i>Sherman v. Four Oaks Counseling Center</i> (1993)	926
Notes	935
b. Mental Health Practitioner's Responsibility to Commit	935
<i>Currie, Administratrix v. United States of America</i> (1987)	935
Notes	939
c. Private Accuser's Responsibility	940
<i>Doby v. Decrescenzo</i> (1996)	940
Notes	948
d. Release	948
<i>Perreira v. State</i> (1989)	948
Notes	954

Chapter 12: Somatic Treatments and Talking Cures	955
A. Somatic Treatments: Organic Interventions	955
1. Lobotomy	955
Alan W. Schefflin and Edward M. Opton, Jr., <i>The Mind Manipulators</i> (1978)	955
Notes	967
Alan W. Schefflin and Edward M. Opton, Jr., <i>The Mind Manipulators</i> (1978)	968
Notes	969
2. Psychosurgery	970
<i>Kaimowitz v. Department of Mental Health</i> (1973)	970
Notes	979
3. Electroshock Treatment	981
a. The Early History of Shock Treatment	981
Alan W. Schefflin and Edward M. Opton, Jr., <i>The Mind Manipulators</i> (1978)	981
b. The Effects of Electroshock Therapy	985
Alan W. Schefflin and Edward M. Opton, Jr., <i>The Mind Manipulators</i> (1978)	985
c. Political Control of Electroshock Therapy	997
San Francisco Board of Supervisors Resolution (1991)	998
Notes	1000
4. Chemotherapy/Psychopharmacology: Drugs	1001
a. Analytic Psychiatry v. Biological Psychiatry	1002
<i>Osheroff v. Chestnut Lodge</i> (1985)	1002
Notes	1002
b. Are Drugs Dehumanizing?	1004
Notes	1006
B. “Talking” Cures	1008
1. Psychotherapy	1008
2. Placebo	1009
Notes	1010
3. Prayer	1011
a. The Prayer Exemption	1011
<i>People v. Pierson</i> (1903)	1011
Notes	1012
b. Does Prayer Heal?	1021
C. Conclusion	1022
Chapter 13: Rights of Persons with Mental Disorders	1023
A. The Rise of Rights	1023
B. The Right to Treatment	1025
1. Is Doing Nothing “Treatment”?	1026
<i>O’Connor v. Donaldson</i> (1975)	1026
Notes	1026
<i>Youngberg v. Romeo</i> (1982)	1026

Notes	1033
C. The Right Against Treatment	1035
1. History of the Right to Refuse Treatment	1035
<i>Vitek v. Jones</i> (1980)	1035
Notes	1042
2. Punishments As Treatments	1043
<i>Knecht v. Gillman</i> (1973)	1043
<i>Mackey v. Procunier</i> (1973)	1046
Notes	1048
3. Refusing Somatic Therapies	1052
Notes	1052
4. Refusing Medication	1056
a. In General	1056
<i>Washington v. Harper</i> (1990)	1056
b. At Trial	1073
<i>Riggins v. Nevada</i> (1992)	1073
Notes	1073
c. To Avoid Execution	1073
<i>State v. Perry</i> (1992)	1073
Notes	1089
Chapter 14: Civil Law and Mental Problems	1093
A. Specific Civil Competencies	1093
B. Mental Competency and Torts, Contracts and Control of Property	1093
1. Committing Torts	1094
<i>Polmatier v. Russ</i> (1988)	1094
Notes	1098
<i>Goff v. Taylor</i> (1986)	1098
Notes	1099
George J. Alexander and Thomas S. Szasz, “Mental Illness as an Excuse for Civil Wrongs” (1967)	1101
Notes	1108
2. Entering Contracts	1110
<i>Smalley v. Baker</i> (1968)	1110
Notes	1112
George J. Alexander and Thomas S. Szasz, “From Contract to Status Via Psychiatry” (1973)	1113
Notes	1118
3. Control of Property	1118
George J. Alexander, <i>The Aged Person’s Right to Property</i> (1969)	1118
C. Guardianship and Conservatorship	1119
1. Basis for Appointment	1120
a. Acumen in Financial Matters	1120
<i>In re Conservatorship of Rose A. Browne, Incompetent</i> (1976)	1120

Notes	1121
b. Old Age and Being Unable to Resist Artful and Designing Persons as Bases	1122
<i>In the Matter of the Conservatorship of Edgar Ray Goodman</i> (1988)	1122
Notes	1125
2. Effect of Appointment of a Conservator or Guardian	1128
a. On Voting	1128
<i>Manhattan State Citizen's Group, Inc. v. Bass</i> (1981)	1128
Notes	1129
b. On Contractual Obligations	1130
<i>Browne v. Smith</i> (1949)	1130
Notes	1131
c. On Being Sued	1131
<i>Galante v. Bucciarelli</i> (1986)	1131
Notes	1132
3. Powers of the Conservator or Guardian	1132
a. Marriage and Divorce	1133
<i>In re: The Guardianship of June Mikulanec</i> (1948)	1133
Notes	1137
b. Sterilization	1138
<i>M.O. v. P.A.R.C. Home</i> (1981)	1138
Notes	1139
c. Deprogramming	1140
<i>Katz v. Superior Court</i> (1977)	1140
Notes	1156
4. Is Conservatorship the Real Issue?	1157
<i>Guardianship of the Person and Estate of Thomas Nelson Brown</i> (1976)	1157
Notes	1163
George J. Alexander, <i>Writing a Living Will: Using a Durable Power of Attorney</i> (1988)	1163
Notes	1165
George J. Alexander, "Premature Probate: A Different Perspective on Guardianship for the Elderly" (1979)	1165
Notes	1166
C. Durable Power of Attorney	1167
<i>Rice v. Floyd</i> (1989)	1167
Notes	1171
<i>Anderson v. St. Francis-St. George Hospital, Inc.</i> (1996)	1172
Notes	1177
Concluding Observations	1177
Index	1181

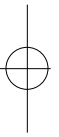


Table of Cases

- Abraham v. Zaslow (1975), 208
Abramson v. Gonzales (1992), 96, 152
Addington v. Texas (1979), 861
American Home Assurance Company v. Smith (1995), 167
Anderson v. St. Francis-St. George Hospital, Inc. (1996), 1176
Appeal of Philadelphia County Office of Mental Health and Mental Retardation (1991), 850
Application of Edward Ronwin (1976), 40
Barry v. Turek (1990), 482
Baumgartner v. First Church of Christ, Scientist (1986), 127
Baxtrom v. Herold (1966), 804
Blanca v. Superior Court (1996), 380
Blue Shield of Virginia v. McCready (1982), 143
Browne v. Smith (1949), 1130
Campbell v. Greisberger (1994), 59
Caryl S. v. Child & Adolescent Treatment Services, Inc. (1994), 454
Chumbler v. McClure (1974), 194
Cleghorn v. Hess (1993), 587
Cole v. Taylor (1981), 486
Commonwealth v. Dunkle (1992), 323
Conservatorship of Early (1983), 905
County of Alameda v. Superior Court (Darlene W.) (1987), 601
Crane v. Johnson (1917), 104
Currie, Administratrix v. United States of America (1987), 935
Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993), 271
Davis v. Superior Court (Williams) (1992), 613
Delguidice v. Singletary (1996), 555
Doby v. Decrescenzo (1996), 940
Doe v. Roe (1977), 662
Drope v. Missouri (1975), 682
Dusky v. United States (1960), 675
Estelle v. Smith (1981), 544
Foucha v. Louisiana (1992), 816
Frye v. United States (1923), 258
Galante v. Bucciarelli (1986), 1131
Godinez v. Moran (1993), 717
Goff v. Taylor (1986), 1098
Grosslight v. Superior Court of Los Angeles County (Hoover) (1977), 605
Guardianship of the Person and Estate of Thomas Nelson Brown (1976), 1157
Hamman v. County of Maricopa (1989), 474
Hansra v. Superior Court (Magana) (1992), 490
Harris v. Leader (1998), 191
Hayhurst, N.M.D. v. Beyrle, N.M.D. (1995), 153
Heller v. Doe (1993), 867
Humenansky v. Minnesota Board of Medical Examiners (1994), 580
In re: Beverly (1977), 883
In re: Conservatorship of Rose A. Browne, Incompetent (1969), 1120
In re: Hoover (1987), 54
In re: Kathleen M.; In re Kathleen D.; In re Charles W. (1985), 597
In re: Lifschutz (1970), 413
In re: Mental Illness of Boggs (1990), 892
In re: New York News, Inc. (1986), 649
In re: The Guardianship of June Mikulanec (1948), 1133
In re: Tommie Lee Melton (1991), 351
In re: Worrell Enterprises, Inc. (1992), 643
In the Matter of Detention of Labelle (1988), 894
In the Matter of Edward Ronwin (1983), 43
In the Matter of the Conservatorship of Edgar Ray Goodman (1988), 1122
In the Matter of the Treatment of Albright (1992), 890
Iowa Supreme Court Board of Professional Ethics v. Ronwin (1996), 50

- Jackson v. Indiana (1971), 801
 Jaffee v. Redmond (1996), 401
 James W. v. Superior Court
 (Goodfriend) (1993), 443
 Johnson v. Gerrish (1986), 132
 Jones v. Chidester (1992), 195
 Jones v. United States (1983), 807
 Jorgensen v. State (1991), 623

 Kaimowitz v. Department of Mental
 Health (1973), 970
 Kansas v. Hendricks (1992), 825
 Katz v. Superior Court (1977), 1140
 Kirby v. State (1991), 791
 Knecht v. Gillman (1973), 1043
 Kunin v. Benefit Trust Life
 Insurance Company (1990), 21

 M.O. v. P.A.R.C. Home (1981), 1138
 Mackey v. Proconier (1973), 1046
 Manhattan State Citizen's Group, Inc. v.
 Bass (1981), 1128
 Marcus v. Liebman (1978), 847
 Martin v. Estelle (1977), 689
 Menendez v. Superior Court (People)
 (1992), 508
 Morwald v. Workmen's Compensation
 Appeal Board (1991), 84

 Nally v. Grace Community Church of
 the Valley (1988), 114

 O'Connor v. Donaldson (1975), 910
 Osheroff v. Chestnut Lodge (1985),
 1002
 Parham v. J.R. (1979), 853
 Pate v. Robinson (1966), 676
 Patterson v. Hughes Aircraft Co.
 (1993), 25
 People v. Beckley (1990), 337
 People v. Burnick (1975), 364
 People v. Coleman (1985), 263
 People v. Hagerman (1985), 529
 People v. Jordan (1916), 101
 People v. Pierson (1903), 1011
 People v. Reber (1986), 618
 People v. Stankewitz (1982), 692
 People v. Stevens (1988), 887
 People v. Stritzinger (1983), 431
 Perreira v. State (1989), 948
 Petition of Schaengold (1967), 52
 Plumadore v. State (1980), 838
 Polmatier v. Russ (1988), 1094
 Project Release, Greene v. Provost
 (1982), 397

 Rains v. Superior Court (Center
 Foundation) (1984), 201
 Rice v. Floyd (1989), 1167
 Riggins v. Nevada (1992), 704, 1072
 Rodriguez v. Superior Court (People)
 (1993), 608
 Roy v. Hartogs (1976), 161
 Rushman v. City of Milwaukee (1997),
 109

 Scull v. Superior Court (People) (1988),
 653
 Shahzade v. Gregory (1996), 303
 Sherman v. Four Oaks Counseling
 Center (1993), 926
 Simmons v. United States (1986), 156
 Smalley v. Baker (1968), 1110
 Smith v. Superior Court (County of San
 Mateo) (1981), 594
 State v. Beatty (1989), 397
 State v. Eusinazuri (1991), 727
 State v. Gleason (1990), 559
 State v. Junker (1991), 636
 State v. Leiding (1991), 170
 State v. Martin (1997), 537
 State v. Neely (1991), 780
 State v. Perry (1992), 1073
 Sullivan v. Cheshier (1995), 424
 Susan S. v. Israels (1991), 625

 Traynor v. Turnage (1988), 8
 Troiani v. Poole (1994), 533

 United States v. Hall (1997), 288
 United States v. Hartz (1995), 148
 United States v. Lyons (1984), 736
 United States v. Moore (1992), 658
 United States v. Phelps (1992), 565
 United States v. Salerno (1987), 815
 United States v. Schappel (1970), 377
 United States v. Shay (1995), 283
 United States v. Westcott (1996), 371

 Vinson v. Superior Court (Peralta
 Community College Dist.) (1987), 573
 Vitek v. Jones (1980), 1035

 Washington v. Harper (1990), 1056
 West Virginia ex rel. White v. Todt
 (1996), 920

 Youngberg v. Romeo (1026), 1026

 Zinerman v. Burch (1990), 840

Acknowledgments

Among the most difficult aspects of putting a book into press is thanking all the people who have contributed innumerable valuable things toward its final form. It is, from the beginning, impossible. Both Alan Schefflin's wife, Jamie Caploe, and my wife, Katharine Alexander, are attorneys. They have poured energy into many chores of this book: making suggestions for inclusion, telling us about the weaknesses that needed shoring up and, when their own lives were full, proofing the drafts with dedication and skill well beyond the talents we could have hired. They also have suffered a fate worse than football widowhood when we carved increasingly more time from our family lives to work on the book.

One of our colleagues, Dr. Laurie A. Mason, who, despite the press of teaching her classes and simultaneously earning a law degree from our law school, also took a turn in immersing herself in our endless need for assistance. For her meticulous work, she earns nothing less than our unlimited gratitude.

For me, my greatest intellectual creditor has been Thomas S. Szasz. Our almost forty year acquaintance has continuously inspired me. As all but the most obdurate of his critics will readily admit, the man is brilliant. His zealotry for human autonomy has cost him dearly in professional acclaim and many still find some of his conclusions anathema. Perhaps the best indication of his impact is to be found in the extent to which his most ardent detractors have moderated their professional views because of his influence. I also owe a good deal to the late Judge David Bazelon who taught me law and psychiatry in law school, and to innumerable scholars who have added to that base.

From my early years in teaching, almost every Research Assistant has helped in ways critical to the final form of this manuscript. To cite any but the most recent is as impossible as it is to trace the source of many of my ideas. The most current—and perhaps most harried by the last minute demands of publication—stand as surrogates for forty years of service by others. I thank Karen L. Robinson, Kimberly E. Stevens and Laura L. Buhl for their own tireless work and in their representative capacity.

The support of Dean Mack Player, who had me appointed to an endowed chair and allowed me to use it to buy critical semesters of free time, was invaluable.

My coauthor, Alan Schefflin, proved that it is possible for me to work collaboratively. In my long tenure in teaching and writing an ample volume of published work, I had almost always avoided coauthorship. That must have been because I had not worked with Alan. We bring quite different substantive

experience to our work. We disagree with each other just short of being unable to support each other's work. Yet we respect each other and have a good time when we teach and write together. We are already talking about another book.

George J. Alexander
Santa Clara, California
August 1998

From the time we began co-teaching the Law & Psychiatry course almost 25 years ago, I have been delighted to have George as my mentor, colleague and friend. Our views are close enough to permit us to work together comfortably, yet different enough to demand that each of us provides that extra measure of proof and persuasion that stimulates discussions, both in and out of class. Because of George, this is a much better book than one I might have written by myself. Many times in our private discussions or co-teaching, I have been excited and envious as George pulled together concepts in ways so distinct from my own thinking. Thank you, George.

I also thank both our wives, first, for their patience during the times work on the book took us away from family activities, and second, for the many hours they spent meticulously reading drafts of the manuscript for style, content, and printing errors.

Dean Mack Player provided extra student research assistance, course scheduling that facilitated our working together, reduced course loads, and other forms of encouragement for which I am most grateful. The law school reference librarians met every challenge placed before them, obtaining unusual, obscure and esoteric material with uncommon haste.

From year to year we continue to learn much from our students, among whom have been psychiatrists, psychologists, and law students who have never taken a psychology course. Their varied insights have enabled us to create more effective ways to structure and teach this ever-growing body of material.

Over the last decade I have benefitted enormously from contact with countless mental health professionals who have invited me to participate in conferences and conventions, and who have shared with me their most compelling ethical and legal dilemmas. They have taught me much about the personal side of the practice of their professions. I have had the honor of delivering addresses and presenting workshops an average of once or twice a month. For me, there is no better way of learning the current standard of care and the most pressing immediate concerns of mental health professionals.

A special debt of gratitude and appreciation is owed to Drs. Dan Brown, Cory Hammond, Ed Frischholz, Herb Spiegel and David Spiegel for their many collaborative efforts that have kept me intellectually stimulated these many years. With their guidance I have had many opportunities to meet with and learn from mental health professionals. I treasure my friendship with each of these brilliant and generous gentlemen.

I have learned a great deal about the interaction between law and mental health from the many times I have appeared in court as an expert witness. Working on these difficult and complex cases increases my understanding about how lawyers attack and also defend mental health professionals.

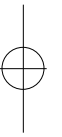
The American Society for Clinical Hypnosis has been a home away from home for many years. Never have I experienced a professional organization that feels so much like a family.

Speaking for George and myself, it has been a pleasure to work with the talented staff at Carolina Academic Press. Publisher Keith Sipe welcomed our project and provided guidance throughout the process of writing and production. In Kathy Kay's capable hands the myriad mistakes we made were quickly corrected as the manuscript passed through several proofreadings. Her practiced eye for design allowed us to include a vast array of material that still resulted in a book of reasonable length and size.

I save for last the most special acknowledgements. From my parents, my brother, and the extended family present while I was growing up, I developed a special interest in the varieties of human communication and expression. I appreciate the contribution they have made in support of my studies in mental health.

My wife, Jamie, and my daughter, Hallie, fill my life with love and laughter. Writing a book can be a lonely enterprise, but they were most understanding about the time spent away from them. Now that the book is completed, the opportunity to spend more time with them is a double reward.

Alan W. Schefflin
San Francisco, California
August 1998



Preface

Although law is quite ancient, psychiatry and clinical psychology are essentially creatures of the twentieth century. Crazy behavior has raised legal issues since the birth of legal rules, but it was not until the middle of this century that professional healers have played a major role in the framing and resolution of these issues. The impact of psychiatry and psychology on the law during the last several decades has been enormous.

The last several decades have also witnessed an astonishing growth and expansion of clinical settings in psychology and psychiatry. This growth and expansion in turn has created new genres of legal problems, not to mention a richness of cases. Consequently, today the field of law and mental disorder is far more vast than any single course could reasonably encompass.

In *Law and Mental Disorder* we decided to break tradition by examining the field as something more than an advanced constitutional reprise. Although we have retained the constitutional material where needed, our primary focus has been on (1) assessing the fundamental assumptions of psychology and psychiatry, (2) exploring the hard questions, such as whether these fields are science or art form, and (3) examining how their substance influences law, and whether other solutions are feasible. We are concerned not just with the lawyer's grasp of cases and statutes, but also with the healers' understanding of their own profession and of ours. We hope students will acquire insight into what psychologists and psychiatrists think and do in clinical and courtroom settings.

We have taken into account that law and mental disorder issues will be taught in basic classes. We therefore have attempted to raise the most controversial, the most heatedly debated, and the most scintillating ethical and legal problems in the field. In place of in-depth analysis of a particular area, we have attempted to provide materials that will trigger discussion and perhaps generate unanticipated interest in the field. We want the course to be emotionally and intellectually provocative and memorable for students, even those who otherwise had little prior interest in the subject.

These materials have been shaped over the last decade by our experiences in the classroom. We have sought cases, problems, and issues that have generated intense discussions. Areas of less appeal to students have been dropped. With some subjects, generally those where common knowledge is lacking, we have provided detailed notes. More familiar areas have been presented with less documentation.

Law and Mental Disorder is divided into three major parts. Part I explores the expanding world of the psychiatrist/psychologist. Chapter 1 has been crafted

to stimulate thinking about just how powerful and expansive psychiatry has become. As a society, is this increase in responsibility given to mental health professionals warranted? These questions become increasingly important when we return to them directly in Chapter 4, which details the role of the psychiatrist in the courtroom.

After raising many issues in Chapter 1, the material begins systematically to respond to those questions. Chapter 2 raises the question of who may practice mental health. Can any one of us give advice to others for a fee? Now that electronics will permit it, can professionals give advice on the Internet?

Chapter 2 also begins another theme that runs throughout the book—when the same problem is presented to a psychiatrist, a priest, and an attorney, are their solutions the same? Psychiatrists, priests, and attorneys have fiduciary relationships with patients, parishioners, and clients, as well as an obligation to maintain strict confidences. In what ways do their roles differ? Does the law treat each profession appropriately?

Chapter 3 moves us into the clinical world of the therapist. In general, what goes on in the therapist's office is private. If, however, the therapist violates the ethics of his or her profession or fails to perform competently at the appropriate standard of care, that privacy is breached. In this Chapter, several of the most controversial current ethical and legal issues facing psychiatry are confronted.

As previously noted, Chapter 4 moves us from the therapist's office to the courtroom. This pivotal chapter forces a direct confrontation with the essence of psychiatric functioning. What exactly do psychiatrists know about the workings of the mind? In addition to this problem of the *validity* of psychiatric opinion, we also have the problem of its *reliability*. Will psychiatrists agree with one another in the diagnosis of patients when presented with identical cases? Without validity or reliability, expert testimony is mere speculation or conjecture. In court, the psychiatrist is asked about the past (insanity defense), the present (competence to stand trial) and the future (if released, will the defendant be dangerous?). How effective are psychiatrists at each of these tasks?

In a recent study of psychologists in the United States, England, and Sweden, researchers asked for responses to the following request: "Describe, in a few words or in more detail, an incident that you or a colleague have faced in the past year or two that was ethically challenging or troubling to you." Colnerud, "Ethical Dilemmas of Psychologists: A Swedish Example in an International Perspective," 2(2) *European Psychologist* 164 (1997). See also Pope and Vetter, "Ethical Dilemmas Encountered by Members of the American Psychological Association: A National Survey," 47(3) *American Psychologist* 387 (March 1992). The most frequently reported troubling ethical issues all dealt with confidentiality. In response to this concern, Part Two deals with a single subject—how is confidential information to be treated? Chapter 5 opens with the therapist-patient privilege and the ethical duty to preserve confidences. The rest of the chapter, and the remaining three chapters in Part Two, deal with situations in which the legal privilege and the ethical duty to preserve confidentiality are insufficient shields to preserve the patient's privacy.

In the studies referred to in the preceding paragraph, one of the most frequently reported troubling confidentiality issues involved the mandated child abuse reporting laws. The second half of Chapter 5 deals with this topic.

Chapter 6 shifts from a legislatively created duty to report child abuse to the judicially created duty to warn third parties of threats made against them by patients. California's *Tarasoff* case, which created the duty, is discussed, and its nationwide ramifications are explored. Should priests and attorneys also be under a similar duty? What about friends and relatives? After the contours of the *Tarasoff* duty are examined, a final section deals with the little-discussed problem of the *Tarasoff* warning's impact on the therapist-patient privilege.

While Chapter 6 involved compelling psychiatrists to reveal patient secrets, Chapter 7 focuses on the situations in which patients can be compelled to reveal their own secrets, either expressly (compelled psychiatric examinations) or by waiver (filing a lawsuit and claiming emotional harm).

Chapter 8 completes the extended treatment of confidentiality by examining the ability of the patient, and also a variety of third parties (relatives, adversarial litigants, the government), to gain access to the patient's mental health and medical records. By the end of the chapter, it becomes clear that the walls erected to shield the disclosure of the patient's most intimate thoughts are quite porous.

Part Three brings together a range of problems involving legal rights and responsibilities. It will seem the most familiar to those weaned on prior texts. Here are the constitutional issues and basic philosophical approaches. We expect that students who have worked through the book to this point will now find this previously familiar ground a bit surrealistic, however. Concepts of responsibility and causation may now seem much harder to apply. The material asks the student to consider how one can be held responsible for an irrational mental state and whether the state can and should imprison (or, more precisely, involuntarily hospitalize) those in that condition. It asks what role public apprehension plays in how mental patients are treated. Of what importance, if mental disorder is not simply bad behavior, is the desire of the state to cure the afflicted person? Are there limits to the state's ability to "cure" something that the incarcerated person has not chosen to cure voluntarily? Can we know what a mentally disordered person would choose to do if not mentally disordered? Would that knowledge be important?

Since an individual's mental condition can be elusive and future dangerousness hard to predict accurately, may the state protect itself from feared violence by quarantining those of whom it is most frightened, irrespective of their actual potential for harm?

In Chapter 9, we examine the strain that apparent irrationality puts on a person's right to trial of criminal accusations and how the state deals with those it finds unable to assist in their own defense. Related questions include whether the state can force the defendant to be drugged to "rationality" and whether the right to self representation serves such defendants. We then examine the history and permutations of the insanity defense to the crime itself.

In Chapter 10, we examine the treatment of those found unfit for trial or not responsible of the charged crime by insanity, noting that the state does not treat

them as persons who have been found generally not guilty. We finally explore the ability of the state to treat those whose irrationality seems predictive of future danger like those found mentally unfit or not responsible for actual crimes.

By Chapter 11, we are through with considerations of criminal and quasi-criminal confinement and ready to explore commitment based solely on mental state. We explore both “voluntary” commitment and involuntary commitment and ask how the law views them. On the one hand, the standards for admission seem lower than in criminal cases; on the other the law still substantially protects the “patients” from their “treatment” if they resist. Obviously, something is different about this form of medical treatment.

Chapter 12 describes some of the major mental health treatments provided to patients. The first half of the Chapter examines a variety of somatic cures which have been a major source of litigation against psychiatrists. The second half of the Chapter addresses the issue of what exactly is curative in a therapeutic encounter. Are “talking cures” effective? What role does the placebo effect play in healing? Are prayers “treatments”? In exploring answers to these questions, the current antagonism between the psychotherapists and the biological psychiatrists is used to ask even more fundamental questions about the nature of psychiatry itself.

Patients over time have had two inconsistent legal positions in regard to treatments. Chapter 13 addresses these positions by chronicling the development of a right *to* treatment and a right *against* treatment. Here we see constitutional principles in confrontation with sound medical judgment. Which should prevail?

Finally, in Chapter 14 we summarize the many ways, other than confinement and involuntary treatment, that mental disorder affects legal outcomes. There are many adjustments of law to what are often called competencies. We enumerate a partial list and more carefully examine competency in the basic fields of torts, contracts and the right to manage property. Finally, we explore the ultimate incompetency: incompetency to manage the basic aspects of one’s life. That incompetency leads to conservatorship or guardianship, under which a court appointed officials makes basic decisions for the ward.

With the conclusion of the material in Chapter 14, the conscientious student will have acquired answers to the questions posed as the title of Chapter 1: Who is Crazy? Who Decides? Who Cares?