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# Hidden Agendas and Ripple Effects: Implications of Four Recent Supreme Court Decisions for Forensic Mental Health Professionals

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*FULL-LENGTH ARTICLE*

# Hidden Agendas and Ripple Effects: Implications of Four Recent Supreme Court Decisions for Forensic Mental Health Professionals

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**ABSTRACT.** Supreme Court decisions have implications far beyond the legal principles they articulate, and it is essential that individuals working in the forensic mental health and correctional systems understand the extent to which such decisions can affect their practice and the facilities in which they work. The seemingly-unrelated cases of *Godinez v. Moran* (1993) (establishing a unitary standard for the determinations of competency to plead guilty, competency to waive counsel, and competency to stand trial), *Kansas v. Hendricks* (1997) (upholding the constitutionality of one state's ''Sexually Violent Predator Act''), *Pennsylvania Department of Corrections v. Yeskey* (1998) (ruling that the Americans with Disabilities Act (ADA) applies to state prisons), and *Olmstead v. L.C.* (1999) (finding a qualified right to community treatment for certain persons institutionalized because of mental disability) may have profound impacts on forensic mental health and correctional practices. These potential impacts, however, have been the subject of virtually no academic, practitioner, or clinical attention, and there has been *no* consideration at all of the ''ripple effects'' of these four cases as a grouping. It is critical that forensic mental health and correctional professionals understand these cases–not simply their holdings, but how they may profoundly affect day-to-day practices.

*Godinez* makes it inevitable that more seriously mentally ill criminal defendants will be imprisoned; *Hendricks* makes it inevitable that more

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violent sexual offenders will be housed in forensic mental hospitals; *Yeskey* makes it inevitable that *all* aspects of institutionalization (whether in a facility labeled ''criminal'' or one labeled ''mental health'') will be subject to far more probing external scrutiny. *Olmstead* makes it inevitable that institutional decisionmaking as to retention and release of certain patients will be examined more critically.

This article discusses these cases, explains their holdings, demonstrates the likely ''ripple effects'' of these holdings, and discusses their implications for forensic mental health professionals. *[Article copies available for a fee from The Haworth Document Delivery Service: 1-800-342-9678. E-mail address: <getinfo@haworthpressinc.com> Website: <http://www.HaworthPress.com>]*

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## *INTRODUCTION*

Law professors, like most of the rest of us, tend to sort and categorize. We classify cases as ''civil'' or ''criminal,'' as ''institutional'' or ''community,'' as ''private '' or ''public,'' as ''common law'' or ''constitutional.'' And so on. And there are many reasons for using these heuristic devices (not the least of which is that they give us a jump start on trying to figure out doctrinal trends and patterns from what would otherwise be little more than stacks of random and isolated decisions).

This use of heuristics is, I am convinced, pernicious and corrosive,[1] and goes a long way to explain the incoherence, for instance, of our insanity defense jurisprudence.[2] But there are more subtle pitfalls in the (concededly more benign) use of heuristics that I referred to at the beginning of my talk a moment ago. For I am convinced that our desire to ''slot'' or ''typify'' cases[3] blinds us to some important–but utterly unheralded–connections between seemingly-unrelated cases. It is to one of these ''sets'' (I use this word with quotation marks because the cases in question have certainly never been seen as a ''set'') of cases to which I turn in this paper. Because I am convinced that when these four cases–*Godinez v. Moran*,[4] *Kansas v. Hendricks*,[5] *Pennsylvania Department of Corrections v. Yeskey*,[6] and *Olmstead v. L.C.*[7]–are read together, they pose serious issues (to some extent, serious *prob-*

*lems*) for all mental health professionals, whether they be clinicians or expert witnesses or administrators. For these cases have implications far beyond the legal principles they articulate, and it is essential that participants in the forensic mental health system understand the extent to which these decisions can potentially affect their practice.

At first blush, these cases appear to have little in common. *Godinez* establishes a unitary test for determining all criminal competencies;[8] *Hendricks* upholds the constitutionality of a state ''sexually violent predator act'';[9] *Yeskey* determines that the Americans with Disabilities Act[10] applies to state prisons;[11] *Olmstead* finds a qualified right to community treatment for certain persons institutionalized because of mental disability.[12] *Godinez* would appear to be of most interest to those evaluating criminal competencies; *Hendricks* to those predicting the future dangerousness of sex offenders; *Yeskey* to prison officials and those who involve themselves in federal civil rights litigation; and *Olmstead* to those in state departments of community mental health. There appears–again–to be little in common in these four universes.

Yet, I believe that there are important potential connections between these cases, and that these connections are potentially of great significance to all forensic mental health professionals. *Godinez*, for example, makes it inevitable that more seriously mentally ill criminal defendants will be imprisoned. *Hendricks* makes it inevitable that more violent sex offenders will be housed in forensic mental hospitals. *Yeskey* makes it inevitable that all aspects of institutionalization will be subject to more probing external scrutiny. And *Olmstead* makes it inevitable that institutional decision-making as to retention and release of certain patients will be examined more critically. And it is likely that the subsequent ''ripple effects'' from these cases may become even *more* important in the future, especially as the full impact of *Olmstead* becomes understood.

This paper will proceed in this manner. First, I will briefly explain the holdings (and in the cases of *Godinez*, *Hendricks* and *Olmstead*, the major dissenting and concurring opinions) of the four cases. Then, I will explain the connections I see in these cases, and what the impact of those connections may be on forensic mental health practice. Next, I will consider some ''ripple effects'' that may follow in the wake of these changes, and then will offer some modest conclusions.

## *GODINEZ V. MORAN*[13]

The issue of assessing the competence of guilty pleas entered by mentally disabled defendants presents ''one of the most difficult doctrinal and practical problems faced by the criminal justice system,'' a difficulty reflected in the ''sharply divided'' case law that has developed in this area.[14] Courts traditionally had generally recognized that the standard for competence to plead guilty is generally higher than for other sorts of consent or waiver,[15] but split on the significant question of whether the standard to plead guilty is the same as, higher than, or otherwise different from, the traditional standard for assessing competence to stand trial, e.g., whether the defendant has ''sufficient present ability to consult with his lawyer with a reasonable degree of understanding–and whether he has a rational as well as factual understanding of the proceedings against him.''[16]

The majority view had held that there is no substantial difference, and that the same test applies in assessing the validity of a guilty plea.[17] Most of these decisions were merely conclusionary and bereft of any sort of doctrinal analysis. Only in *People v. Heral* did a court offer substantive justifications for the unitary standard: that a finding of competency to stand trial necessarily involved a finding that a defendant was capable of waiving his constitutional rights, and a dual standard might create ''a class of semi-competent defendants who are not protected from prosecution because they have been found competent to stand trial, but who are denied the leniency of the plea bargaining process because they are not competent to plead guilty.''[18]

This position was challenged, however, by a series of cases involving both mentally ill and mentally retarded defendants. These cases suggested a separate test: ''A defendant is not competent to plead guilty if a mental [disability] has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the consequences of his plea.''[19] Such a test has been employed by those courts that find it necessary for judges to ''assess a defendant's competency *with specific reference to the gravity of the decisions* with which the defendant is faced.''[20] The rationale for this more stringent standard was that a simple finding of trial competency was not a sufficient basis for finding that the defendant was able to ''make [other] decisions of very serious import.''[21]

On the question of waiver of counsel, a significant amount of case

law had also developed over the question of the level of competency required for a defendant to waive representation by counsel. Since the U.S. Supreme Court's ruling in *Faretta v. California*, holding that a defendant has a federal constitutional right to represent himself if he voluntarily elects to do so,[22] courts have focused on the question of whether a defendant has ''the *mental capacity to waive the right to counsel* with a realization of the probable risks and consequences of his action.''[23]

To meet such a standard, it is not necessary that the defendant be *technically* competent to represent himself but only that he be ''free of mental disorder which would so impair his free will that his decision to waive counsel would not be voluntary.''[24] To this end, neither bizarre statements and actions, mere eccentric behavior, nor a finding that the defendant had been diagnosed as a paranoid schizophrenic have been found in specific cases to be enough to establish lack of capacity to represent oneself.[25]

The Supreme Court ended both of these controversies in *Godinez v. Moran*, holding that the standards for pleading guilty and for waiving counsel were no higher than for standing trial: did the defendant have ''sufficient present ability to consult with his lawyer with a reasonable degree of understanding'' and a ''rational as well as factual understanding of the proceedings against him.''[26]

In *Godinez*, a case that involved a triple murder, the Ninth Circuit Court of Appeals reversed a district court's decision that had denied the defendant a writ of habeas corpus that he had sought, having alleged that his waiver of counsel and subsequent guilty plea were inappropriately accepted. The Circuit concluded that the trial record should have led the trial court to ''entertain a good faith doubt about [Moran's] competency to make a voluntary, knowing, and intelligent waiver,'' and that waiver of constitutional rights required a ''higher level of mental functioning than that required to stand trial,'' a level it characterized as ''the capacity for 'reasoned choice.''[27] In coming to its decision, the court stressed the defendant's suicide attempt, his desire to prevent the presentation of mitigating evidence to the court at his sentencing hearing, his ''monosyllabic'' responses to the trial court's questions and the fact that he was on four different prescription drugs at the time he sought to change his plea and discharge counsel.[28]

The Supreme Court reversed, per Justice Thomas, rejecting the notion that competence to plead guilty or waive counsel must be

measured by a higher (or even different) standard from that used in incompetency to stand trial cases.[29] It reasoned that a defendant who was found competent to stand trial would have to make a variety of decisions requiring choices: whether to testify, whether to seek a jury trial, whether to cross-examine his accusers, and, in some cases, whether to raise an affirmative defense.[30] While the decision to plead guilty is a ''profound one, . . . it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial.''[31] Finally, the court reaffirmed that any waiver of constitutional rights must be ''knowing and voluntary.''[32]

It concluded on this point:

> Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements.[33]

Justice Blackmun dissented (for himself and Justice Stevens),[34] focusing squarely on what he saw as the likely potential that Moran's decision to plead guilty was the product of ''medication and mental illness.''[35] He reviewed the expert testimony as to the defendant's state of depression, a colloquy between the defendant and the trial judge in which the court was informed that the defendant was being given medication, the trial judge's failure to inquire further and discover the psychoactive properties of the drugs in question, the defendant's subsequent testimony as to the ''numbing'' state of the drugs, and the ''mechanical character'' and ''ambiguity'' of the defendant's answers to the court's questions at the plea stage.[36]

On the question of the multiple meanings of competency, Justice Blackmun added:

> [T]he majority cannot isolate the term ''competent'' and apply it in a vacuum, divorced from its specific context. A person who is ''competent'' to play basketball is not thereby ''competent'' to play the violin. The majority's monolithic approach to competency is true to neither life nor the law. Competency for one purpose does not necessarily translate to competency for another purpose.[37]

He concluded:

> To try, convict and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal justice system. I cannot condone the decision to accept, without further inquiry, the self-destructive ''choice'' of a person who was so deeply medicated and who might well have been severely mentally ill.[38]

In its other major holding, the *Godinez* court found that there was ''no reason'' to believe that the decision to waive counsel requires an ''appreciably higher level of mental functioning than the decision to waive other constitutional rights.''[39] It rejected the defendant's arguments that a self-representing defendant must have ''greater powers of comprehension, judgment and reason, than would be necessary to stand trial with the aid of an attorney,''[40] concluding that this rested on a ''flawed premise; the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.''[41] Relying on its decision in *Faretta*, it found that a defendant's ability to represent himself ''has no bearing upon his competence to choose self-representation.''[42]

Justice Blackmun dissented on this point as well, concluding:

> A finding that a defendant is competent to stand trial establishes only that he is capable of aiding his attorney in making the critical decisions required at trial or in plea negotiations. The reliability or even relevance of such a finding vanishes when its basic premise–that counsel will be present–ceases to exist. The question is no longer whether the defendant can proceed with an attorney but whether he can proceed alone and uncounselled.[43]

## ***KANSAS V. HENDRICKS***[44]

In 1990, after the state of Washington–responding to a particularly heinous murder[45]–''revamp[ed] and resurrect[ed] its sex offender involuntary commitment system,''[46] other states followed quickly (many in the wake of New Jersey's enactment of the so-called ''Megan's Law''),[47] and by 1997, at least seventeen states had enacted some sort of a ''modern'' sex offender statute.[48]

All of these statutes grew out of a legislative desire to protect the public from a group of offenders that is widely (and universally) despised: criminals who sexually abuse and molest young children;[49] as written, however, almost all of the laws cover *all* sexually violent acts.[50] They differ in content, but share certain elements. In each case, the state must prove–by a quantum of either ''beyond a reasonable doubt'' or ''clear and convincing evidence''–(1) a history of sexually violent acts, (2) a current mental disorder or abnormality, (3) the likelihood of future sexually harmful acts, and (4) a nexus between all of the first three elements.[51] In most of these statutes, commitment is indefinite, and release is allowed when it is shown that the offender is no longer dangerous by reason of a mental disorder.[52]

Kansas enacted its Sexually Violent Predator Act (SVPA) in 1994 as a means of seeking the institutionalization of that ''small but extremely dangerous group of sexually violent predators exist[ing] who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute.]''[53] It established a separate commitment process for ''the long-term care and treatment of the sexually violent predator,'' statutorily defined as:

> [A]ny person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.[54]

''Mental abnormality'' was defined as a ''congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.''[55] The Act initially pertained to the following sorts of offenders: (1) a presently confined person who had been convicted of a ''sexually violent offense'' and was scheduled for release from prison, (2) a person who had been ''charged with a sexually violent offense'' but had been found incompetent to stand trial, (3) a person who had been found ''not guilty by reason of insanity of a sexually violent offense,'' and (4) a person found ''not guilty'' of a sexually violent offense because of a mental disease or defect.[56]

Leroy Hendricks had been convicted of taking ''indecent liberties'' with two teenage boys, and was subsequently sentenced to a term of

5-20 years in state prison.[57] Shortly before his scheduled release from prison, the state invoked the SVPA, seeking to have him civilly committed as a sexually violent predator.[58] At the subsequent jury trial, Hendricks testified as to his past history of sexual offenses and to his self-described inability to refrain from committing such offenses (stating he ''can't control the urge'').[59] Expert witnesses testified that Hendricks' diagnosis was ''personality trait disturbance, passive-aggressive personality and pedophilia,'' and that pedophilia qualified as a ''mental abnormality'' under the SVPA.[60] The state's expert testified that Hendricks was likely to commit sexual offenses against children in the future if he were not to be committed; Hendricks' expert testified that it was not possible to predict with any degree of accuracy the future dangerousness of a sex offender.[61]

The jury unanimously found beyond a reasonable doubt that Hendricks was a sexually violent predator. Following this, the trial judge determined, as a matter of state law, that pedophilia was a ''mental abnormality'' under state law, and Hendricks was subsequently committed.[62]

After the Kansas Supreme Court reversed the order of commitment (agreeing with Hendricks that the SVPA violated the Due Process clause),[63] the Supreme Court, per Justice Thomas, reversed, and reinstated the order of commitment. First, the majority found that the statute's use of the phrase ''mental abnormality'' satisfied substantive due process guarantees.[64] Commitment ordinarily requires proof of dangerousness and ''some additional factor'' such as ''mental abnormality'' or ''mental illness,'' thus limiting involuntary civil confinement to those who ''suffer from a volitional impairment rendering them dangerous beyond their control.''[65] The Kansas statute thus was like other statutes that the Court had previously upheld.[66]

The Court rejected Hendricks' argument that its prior decisions required proof of a *mental illness*, and that his ''mental abnormality'' was not such an illness (but was rather a term coined by the Kansas legislature). Stated the Court:

> Contrary to Hendricks' assertion, the term ''mental illness'' is devoid of any talismanic significance. Not only do ''psychiatrists disagree widely and frequently on what constitutes mental illness,'' but the Court itself has used a variety of expressions to

> describe the mental condition of those properly subject to civil confinement.[67]

Pedophilia, the Court reasoned, was classified by ''the psychiatric profession'' as a ''serious mental disorder''; this disorder–marked by a lack of volitional control, coupled with predictions of future dangerousness–''adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.''[68] Hendricks' diagnosis as a pedophile, which qualifies as a ''mental abnormality'' under the Act, thus ''plainly suffice[d]'' for due process purposes.[69]

The Court also rejected Hendricks' arguments that the SVPA established *criminal* proceedings, and thus violated both the double jeopardy and *ex post facto* provisions of the Constitution. Turning first to Hendricks' double jeopardy arguments, it found that the Act implicated neither ''of the two primary objectives of criminal punishment: retribution or deterrence,''[70] reasoning–as to retribution–that the Act ''does not affix culpability for prior criminal conduct'' (noting further that a criminal conviction is not a prerequisite for commitment under the Act) and that no finding of criminal intent is required as a precedent to a commitment order (''an important element in distinguishing criminal from civil statutes'').[71]

The Court rejected Hendricks' other arguments as to the Act's punitiveness as well. Although the Act allows for potentially indefinite commitment, that possibility is constitutionally trumped by the fact that duration is ''linked'' to the purposes of the commitment (''to hold the person until his mental abnormality no longer causes him to be a threat to others''); moreover, there is a built-in year-long limit to a single commitment (after which time, the court must again determine if the individual still satisfies the commitment standard).[72]

Finally, Hendricks claimed that the Act was punitive because it did not offer any legitimate ''treatment.'' Here, the majority noted that ''incapacitation'' may be a legitimate end of the civil law, and added that it had never held that ''the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others.''[73] It would be of ''little value,'' the opinion continued, ''to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release cer-

tain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.''[74]

Noting that states had ''wide latitude'' in developing treatment regimens, and that a state could serve its purpose ''by committing sexually dangerous person[s] by committing them to an institution expressly designed to provide psychiatric care and treatment,'' the Court concluded that Kansas had thus ''doubtless satisfied its obligation to provide available treatment.''[75] Beyond this, while it conceded that the specific treatment program offered Hendricks ''may have seemed somewhat meager,'' the Court placed great weight on a statement made at oral argument by Kansas' counsel that, by that time, Hendricks was receiving over thirty hours of treatment per week.[76]

Justice Kennedy concurred in judgment to express ''caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application.''[77] Although he found from the record before the Court that the Kansas statute passed constitutional muster, he expressed this concern: ''If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.''[78]

Justice Breyer dissented in an opinion joined in full by Justices Souter and Stevens and in part by Justice Ginsburg. Although the dissenters agreed that the SVPA's definition of ''mental abnormality'' satisfied substantive due process, they concluded that the failure to provide Hendricks with adequate treatment gave the Act a punitive cast, and, as a result, violated the Ex Post Facto clause of the Constitution.

Justice Breyer did not see *Hendricks* as a case that required the Court to determine whether the Due Process clause *always* required treatment (if, for example, it forbade civil confinement of an untreatable, mentally ill, dangerous person), since Kansas argued that pedophilia was a *treatable* disorder, and at least two amicus groups made similar (uncontradicted) assertions.[79] The question to be asked, then, was this: does the Due Process clause require a state to provide treatment that it concedes is potentially available to a person whom it concedes is treatable?[80]

Justice Breyer then turned his attention to the Ex Post Facto clause argument.[81] He found the post-commitment institutionalization under the Act to bear ''obvious'' resemblances to criminal punishment.[82] First, testimony of a state official revealed that ''confinement takes place in the psychiatric wing of a prison hospital where those whom the Act confines and ordinary prisoners are treated alike.''[83] Second, he found that incapacitation–one of the basic objectives of the Act–was also an important purpose of punishment.[84] Third, the Act only imposes its sanctions on an individual who ''has previously committed a criminal offense.''[85] And finally, the procedural guarantees and standards of the Act are those ''traditionally associated with the criminal law.''[86]

These criteria–standing alone–would not be enough to transform a civil commitment into punishment, Justice Breyer conceded. But other factors were sufficient upon which to base a finding that the SVPA was a punitive statute. First, the dissenters looked at the time when the petition for further commitment was filed against Hendricks: ''when a State believes that treatment does exist, and then couples that admission with a legislatively required delay of such treatment until a person is at the end of his jail term (so that further incapacitation is therefore necessary), such a legislative scheme begins to look punitive.''[87] And, they considered the teachings of *Allen v. Illinois*[88]–a case that held that the privilege against self-incrimination was not available in sex offender proceedings, as the latter were not ''criminal'' matters for Fifth Amendment purposes[89]–that the availability of treatment was a ''touchstone'' in distinguishing whether a statute's purpose was civil or punitive.[90]

Considered through this lens, the SVPA, as applied to Hendricks, was a punitive statute, according to Justice Breyer. Treatment was *not* a significant objective of the Act (being ''incidental at best'');[91] at the time of Hendricks' commitment, in fact, the state had neither funded any treatment programs nor entered into treatment contracts and provided ''little, if any, qualified treatment staff.''[92] The commitment program's own director, in fact, had stated that Hendricks was receiving ''essentially no treatment.''[93] In addition, the fact that commitment proceedings under the SVPA did not begin until *after* offenders had served nearly their entire criminal sentence suggested that treatment was *not* a significant concern in the enactment of the law.[94]

Finally, the dissenters took issue with the majority's reading of the

record below that had suggested that Hendricks was *untreatable*. A careful reading of both the trial record and the Kansas Supreme Court's decision, however, revealed to the dissenters that Hendricks was *treatable*, but remained *untreated*.[95]

## *PENNSYLVANIA DEPARTMENT OF CORRECTIONS V. YESKEY*[96]

The Supreme Court has also found that the ADA applies to state prisons. In *Pennsylvania Department of Corrections v. Yeskey*,[97] the Court unanimously–per Justice Scalia–affirmed a Third Circuit decision that had allowed the plaintiff to maintain his suit against the state department of corrections, alleging that he was denied placement in a ''motivational boot camp'' first-offender program because of his medical history of hypertension.[98]

The court found that the ADA's language ''unmistakably includes State prisons and prisoners in its coverage,'' noting that the law contained no ''exception that could cast the coverage of prisons into doubt.''[99] In doing so, it rejected the state's argument, based on *Gregory v. Ashcroft*,[100] that federal courts should be loath, absent an ''unmistakably clear'' expression of intent, to ''alter the usual constitutional balance between the States and the Federal Government.''[101] Although control over state prisons ''may well be: a ''traditional and essential State function,''[102] the explicit language of the ADA defeated the state's *Gregory*-based argument.

The court also rejected arguments by the state that state prison programs were not ''benefits'' under the ADA,[103] that the phrase ''qualified individual with a disability'' was ambiguous as to state prisoners (on the theory that the statute's use of the words ''eligibility'' and ''participation'' implied a level of voluntariness that a prisoner could not meet),[104] and that, because the law's statement of findings did not specifically mention prisons, the ADA should not apply to such facilities.[105]

However, the Court noted that it was *not* addressing the difficult questions of whether application of the ADA to state prisons was a constitutional exercise of Congress's power under either the Commerce Clause[106] or § 5 of the Fourteenth Amendment,[107] as neither of those issues were raised before or considered by the Court of Appeals.[108]

## *OLMSTEAD V. L.C.*[109]

In *Olmstead*, the Court substantially affirmed a decision by the Eleventh Circuit that had provided the first coherent answer to the question of the right of institutionalized persons with mental disabilities to community services under the ADA.[110] Plaintiffs L.C. and E.W. challenged their placement at Georgia State Hospital, arguing that Title II of the ADA entitled them to ''the most integrated setting appropriate to [their] needs.''[111] The district court granted summary judgment to plaintiffs, finding that the state's failure to place them in an ''appropriate community-based program'' so violated the ADA,[112] and the state appealed. On appeal, the Eleventh Circuit affirmed the judgment that the state had discriminated against the plaintiffs, but also remanded for further findings related to the state's defense that the relief sought by plaintiffs would ''fundamentally alter the nature of the service, program, or activity.''[113]

On appeal, the Supreme Court, in a split opinion per Justice Ginsburg,[114] qualifiedly affirmed.[115] After setting out the provisions of the ADA that focused on the institutional segregation and isolation of persons with disabilities, and the discrimination faces by persons with disabilities (including ''exclusion. . . . and segregation''),[116] the Court reviewed the key Department of Justice regulations, including the ''integration mandate'' regulation,[117] pointing out that the case, as presented, did *not* challenge their legitimacy.[118] It then set out its holding:

> We affirm the Court of Appeals' decision in substantial part. Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States' obligation to administer services with an even hand. Accordingly, we further hold that the Court of Appeals' remand instruction was unduly restrictive. In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.[119]

The Court endorsed the Department of Justice's position that ''undue institutionalization qualifies as discrimination 'by reason of . . . disability,'''[120] and then characterized the ADA as having ''stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living,''[121] stressing how much more comprehensive the ADA was than had been ''aspirational'' or ''hortatory'' laws such as the Developmentally Disabled Assistance and Bill of Rights Act.[122] It then focused on what it saw as Congressional judgment supporting the finding that ''unjustified institutional isolation of persons with disabilities is a form of discrimination'':

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Cf. Allen v. Wright, 468 U.S. 737, 755, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (''There can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action.''); Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) ('''In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'''') (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (C.A.7 1971). Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. See Brief for American Psychiatric Association et al. as Amici Curiae 20-22. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice. See Brief for United States as Amicus Curiae 6-7, 17.[123]

The majority immediately clarified some qualifications in its opinion. It emphasized that the ADA did *not* ''condone [] termination of institutional settings for persons unable to handle or benefit from community settings,''[124] that the states ''generally may rely on the reasonable assessments of its own professionals'' in determining whether an individual is eligible for community-based programs,[125] and that there was no requirement that ''community-based treatment be imposed on patients who do not desire it.''[126] None of these issues, however, were present in the case before it: Georgia's professionals determined that community-based treatment would be appropriate for the plaintiffs, both of whom desired such treatment.[127] The Court added one additional word of caution here:

> We do not in this opinion hold that the ADA imposes on the States a ''standard of care'' for whatever medical services they render, or that the ADA requires States to ''provide a certain level of benefits to individuals with disabilities.'' . . . We do hold, however, that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.[128]

The Court then turned to the questions of remedy and enforcement.[129] It rejected the Eleventh Circuit's construction of the ''reasonable modification regulation'' as ''unacceptable'' in that it would leave the State ''virtually defenseless'' if the plaintiff demonstrates she is qualified for the program or placement she seeks.[130] Rather, it concluded, ''Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.''[131]

The ADA, it concluded, ''is not reasonably read to phase out institutions, placing patients in close care at risk,'' nor is the law's mission ''to drive states to move institutionalized patients into an inappropriate setting, such as a homeless shelter.[132] For other patients, ''no placement outside the institution may ever be appropriate.''[133] Because of these factors, Justice Ginsburg concluded that the state must have more leeway than offered by the Eleventh Circuit's remedy:

> If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.[134]

She summarized in this way:

> Under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[135]

Justice Stevens concurred, stating that he would have preferred simply affirming the Eleventh Circuit's opinion, but that, because there were not five votes for that disposition, he joined in all of Justice Ginsburg's opinion, except for the remedy-enforcement portion.[136] Justice Kennedy concurred, urging ''caution and circumspection'' in the enforcement of the *Olmstead* case.[137] After stressing that persons with mental disabilities ''have been subject to historic mistreatment, indifference, and hostility,''[138] he traced what he saw as the history of deinstitutionalization: that, while it has permitted ''a substantial number of mentally disabled persons to receive needed treatment with greater freedom and dignity,'' it has ''had its dark side'' as well.[139] Here he quoted extensively from the writings of E. Fuller Torrey:

> For a substantial minority . . . deinstitutionalization has been a psychiatric Titanic. Their lives are virtually devoid of 'dignity' or 'integrity of body, mind, and spirit.' 'Self-determination' often means merely that the person has a choice of soup kitchens. The 'least restrictive setting' frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies.[140]

It would be a ''tragic event,'' Justice Kennedy warned, if states read the ADA–as construed in *Olmstead*–in such a way as to create an

incentive to states, ''for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision,''[141] and he thus emphasized that opinions of ''a responsible treating physician'' should be given the greatest of deference.''[142] He underscored what he saw as a ''common phenomenon'':

> It is a common phenomenon that a patient functions well with medication, yet, because of the mental illness itself, lacks the discipline or capacity to follow the regime the medication requires. This is illustrative of the factors a responsible physician will consider in recommending the appropriate setting or facility for treatment.[143]

Because of these concerns–and his fear that ''States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition''–Justice Kennedy again urged ''caution and circumspection'' and ''great deference to the medical decisions of . . . responsible, treating physicians.''[144]

He continued[145] by articulating what he saw as the necessary elements of a discrimination finding,[146] and then raised federalism concerns:

> Grave constitutional concerns are raised when a federal court is given the authority to review the State's choices in basic matters such as establishing or declining to establish new programs. It is not reasonable to read the ADA to permit court intervention in these decisions.[147]

Finally, he parted company from Justice Ginsburg on the weight she gave to the Congressional findings. The findings in question, he concluded, ''do not show that segregation and institutionalization are always discriminatory or that segregation or institutionalization are, by their nature, forms of prohibited discrimination.''[148] Instead, he reasoned, ''they underscore Congress' concern that discrimination has been a frequent and pervasive problem in institutional settings and policies and its concern that segregating disabled persons from others can be discriminatory.''[149]

Justice Thomas dissented, criticizing the majority opinion for its

interpreting ''discrimination'' to encompass ''disparate treatment among members of the same protected class,[150] arguing that the Congressional findings on which the majority premised its conclusions were ''vague'' and written in ''general hortatory terms,''[151] that its approach imposed ''significant federalism costs,''[152] and warning that states ''will now be forced to defend themselves in federal court every time resources prevent the immediate placement of a qualified individual.''[153] He concluded:

> Continued institutional treatment of persons who, though now deemed treatable in a community placement, must wait their turn for placement, does not establish that the denial of community placement occurred ''by reason of'' their disability. Rather, it establishes no more than the fact that petitioners have limited resources.[154]

## *IMPLICATIONS*

What are the implications of these decisions when read together?

*Godinez*, when decided, was seen as yet another victory for prosecutors (indeed, the Department of Justice shared time with the Nevada Attorney General at oral argument before the Supreme Court to urge reversal of the Ninth Circuit decision that had granted Moran's petition for a writ of habeas corpus.[155] For a variety of reasons,[156] I believe that, socially, *Godinez* is wrongheaded, and that legally, it is meretricious. But I also believe, from the perspective of correctional psychiatry, that it is dangerous. For it will lead–and by anecdotal evidence already has led–to the incarceration in state prisons of even more mentally ill individuals who committed criminal acts for longer periods of time. The counsel waiver aspect of *Godinez* means that, realistically, plea bargaining in such cases will be a pretextual charade, and that the possibility that mental status defenses will be raised will even be more negligible. The guilty plea aspect of *Godinez* means that fewer of the many complex legal issues that frequently arise in cases involving mentally disabled criminal defendants will ever be litigate.

In short, more mentally ill criminal defendants will go to prison for longer periods of time, frequently in circumstances in which they will receive little or no meaningful treatment, often in circumstances in which the living conditions for all–these defendants, other prisoners,

correctional staff–will become even less tolerable. And this analysis does not even touch on the seemingly-irresoluble dilemma of what would happen if a marginally-competent-to-stand-trial-defendant were to proffer an insanity defense.

*Hendricks* poses other problems. In a recent article, I enumerated eleven pretexts that are at the heart of the *Hendricks* decision.[157] I believe at least three of them are of critical importance to forensic mental health professionals.

First, *Hendricks* fuses civil and criminal commitment law in a new, disturbing and unchartered way. The line between ''treatment'' and ''punishment'' is problematically blurred, and this blurring and fusion both create significant landmines for the institutional psychiatrist. Second, *Hendricks* is relatively blithe about the whole issue of the availability of treatment for sex offenders. What are the ethical implications for the institutional psychiatrist working in a facility in a state that has enacted a sexually violent predator law such as Kansas's, but which provides less than minimally adequate treatment to those classified as such predators? A corollary question is this: what are the implications for the provision of services to *other* patients in jurisdictions–such as Kansas–where the budget to treat sexually violent predators comes from the general state mental health institutional budget?

Finally, *Hendricks* puts pressure on forensic mental health professionals who choose to (or are implicitly coerced to) predict the future dangerousness of sex offenders. Researchers have made tremendous gains in recent years in their understanding of the relationship between ''dangerousness'' and ''mental illness,'' and the implications of these new findings.[158] And more conceptual light has been shed on this entire murky area of the law by the recent publication of research by the MacArthur Foundation's Network on Mental Health and the Law (the ''Network'').[159] For the past five years, the Network has conducted an extensive study of three areas that are essential to an informed understanding of mental disability law: competence, coercion, and risk.[160] On the question of the relationship between mental illness and dangerousness, John Monahan, the director of the MacArthur Network and the leading thinker in this field of study,[161] recently concluded that, while there appeared to be a ''greater-than-chance relationship between mental disorder and violent behavior,''[162] mental health makes ''at best a trivial contribution to the overall level of violence in society.''[163]

The *Hendricks* court largely glides over this issue. But paradoxically, the substance of its decision–placing so many of its chips on the accuracy of certain dangerousness predictions–is likely to ''reignite'' the accuracy-of-prediction debate[164] from the precisely opposite perspective from that taken by Monahan and his colleagues. Its failure to deal with Monahan's recent work is yet another pretext.

Thus *Hendricks* too complicates the lives of institutional and forensic psychiatrists in several troubling ways.

*Yeskey* is an easier and far less controversial case, and poses none of the ethical dilemmas raised by *Godinez* and *Hendricks*. It is, nonetheless, of great importance to correctional administrators. Its erasure of any lingering doubt as to the application of the Americans with Disabilities Act to prisons also means that there can no longer be any question as to the application of the ADA to *all* non-federal institutions[165] in which persons with physical or mental disabilities (or those so perceived) reside.[166] What *this* means is that *all* institutional decision-making will become potentially subject to far greater scrutiny than in the past. Institutional mental health professionals–and to an important extent, forensic mental health professionals–will be operating ''in the fishbowl'' in ways that will bring a new external focus on much that regularly transpires in such institutions. This, of course, is by no means necessarily a bad thing, but it *does* carry with it the capacity of significantly transforming the worklife of institutional mental health professionals.

*Olmstead* poses a new set of concerns for forensic mental health professionals. *Olmstead* is significant for several reasons. First, it is the first time that the Supreme Court has ruled on the applicability of the ADA to community-based treatment programs. Second, it breathes important life into the Congressional findings on questions of institutional segregation, discrimination and exclusion. Third, it specifically focuses on the way that ''unjustified isolation . . . is properly regarded as discrimination based on disability.''[167] Fourth, it comprehends how, in its own words, the ADA had ''stepped up'' prior Congressional efforts in this area.[168] Fifth, it underscores how institutional isolation ''perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life,''[169] and how such isolation ''severely diminishes the everyday life activities of institutionalized individuals.''[170]

On the other hand, the Court's ''qualifiers'' are equally important. It

sanctions reliance on state professionals in determining community-treatment eligibility, thus, implicitly, endorsing a perpetuation of *Youngberg v. Romeo's* ''substantial professional judgment'' standard.[171] It emphasizes that *Olmstead* cannot be read as an opinion designed to ''phase out'' institutions or to move patients to inappropriate community settings.[172] And its ''reasonable modification'' formula–by which a state must be able to ''demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings''[173]–provides an early partial blueprint for the resolution of similar future litigation.

Justice Kennedy's concurrence may turn out to be of critical importance for several reasons. First, he focuses squarely on the specter of inappropriate deinstitutionalization, relying on Fuller Torrey's powerful critique.[174] Second, he raises the concern that the fear of litigation may lead the state to prematurely and inappropriately release patients ''with too little assistance and supervision.''[175] Finally, he links institutional release with patients' subsequent failure to self-medicate in community settings, an argument that resonates in the current debate over involuntary outpatient commitment laws that premise community treatment on medication compliance.[176] It can be expected that these arguments of Justice Kennedy's will be as much a factor in the subsequent debate on community treatment questions as will Justice Ginsburg's majority opinion.

In short, *Olmstead* has the capacity to be a truly transformative ADA case, and one which may serve as the template for future developments in this area. Although the *Youngberg* ''substantial professional judgment'' standard has been an important underpinning of mental disability law jurisprudence for nearly two decades, courts have rarely given much thought to its dimensions, its limits, and its implications for institutional life.[177] *Olmstead's* implicit endorsement of the standard is likely to rekindle interest in this standard. This will clearly have an impact on forensic mental health practice. The Court's focus on institutional segregation and the deleterious effects of institutional isolation will likely lead to greater attention being paid to the ways institutions are run, and the ways institutional mental health professionals provide treatment in institutional settings. If *Olmstead* leads to more ADA litigation on behalf of institutionalized persons seeking community treatment, it is likely that, notwithstanding the cases's implicit endorsement of the *Youngberg* standard, this will also lead to

far greater scrutiny of mental health professionals' institutional practices. And although *Olmstead* deals solely with civil patients, there is nothing in the opinion nor the ADA nor the supporting regulations that suggests that the basic principles would be inapplicable to forensic populations.[178]

## *CONCLUSION*

To the best of my knowledge, no one has ever characterized *Godinez*, *Hendricks*, and *Yeskey* as a ''trilogy.''[179] And it is unlikely that anyone has yet construed *Olmstead* in the context of any or all of these cases. I do so self-consciously because I want to call attention to their (subtle) interplay. This interplay, at the same time, may lead to more dangerous institutions and more scrutinized institutions. It may lead to more demands on forensic witnesses and to more pressures on institutional mental health professionals. *Godinez* and *Hendricks* may also force us to rethink exactly what happens to certain criminal defendants with mental disabilities when they are institutionalized. *Yeskey* and *Olmstead* may force us to reexamine critically the entire role of state institutions in mental health practice. I believe that, in the coming years, the ''ripple effects'' of these cases will be felt by all of us. And their agendas will no longer appear to be hidden.

## AUTHOR'S NOTES

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Professor Perlin plays the clarinet in the Lawrence Township Community Band, is an avid freshwater fisherman, a novice guitarist, a retired youth soccer coach, and is also at work on an article on the jurisprudence of Bob Dylan.

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## NOTES

1. MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL (1999) (in press).
2. MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE (1994).
3. Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 BEHAV. SCI. & L. 111 (1991).
4. 509 U.S. 389 (1993).
5. 117 S. Ct. 2072 (1997).
6. 118 S. Ct. 1952 (1998).
7. 119 S. Ct. 2176 (1999).
8. *Godinez*, 509 U.S. at 390.
9. *Hendricks*, 117 S. Ct. at 2085.
10. 42 U.S.C. § 12101 et seq.; *see generally*, Michael L. Perlin, "*Make Promises by the Hour*": *Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947 (1997).
11. *Yeskey*, 118 S. Ct. at 1953.
12. *Olmstead*, 119 S. Ct. at 2181.
13. This section is generally adapted from Michael L. Perlin, *"Dignity Was the First to Leave"*: Godinez v. Moran, *Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61 (1996).
14. James Ellis & Ruth Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. Rev. 414, 460 (1985).
15. *Id*. at 461.
16. Dusky v. United States, 362 U.S. 402, 402 (1960).
17. *See e.g*., Malinauskas v. United States, 505 F. 2d 64 (5th Cir. 1974); People v. Turner, 443 N.E. 2d 1167 (Ill. App. 1982).
18. 342 N.E. 2d 34, 37 (Ill. 1976).
19. Seiling v. Eyman, 478 F. 2d 211, 215 (9th Cir. 1973).
20. *Id*.
21. *Id*. at 214-15.

22. 422 U.S. 806, 835 (1975).

23. People v. Clark, 213 Cal. Rptr. 837, 840 (App. 1985); *see generally*, 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (1989), § 14.21 at 269-74.

24. Curry v. Superior Court of Fresno County, 141 Cal. Rptr. 884, 888 (App. 1977).

25. *E.g*., People v. Miller, 167 Cal. Rptr. 816, 818 (App. 1980); *Curry*, 141 Cal. Rptr. At 888; State v. Evans, 610 P. 2d 35 (Ariz. 1980).

26. *Dusky*, 362 U.S. at 402.

27. Moran v. Godinez, 972 F. 2d 263, 265-67 (9th Cir. 1992), *rev'd*, 509 U.S. 389 (1993).

28. *Id*. at 265, 267.

29. *Godinez*, 509 U.S. at 390.

30. *Id*. at 398.

31. *Id*.

32. *Id*. at 400.

33. *Id*. at 403.

34. Justice Kennedy and Scalia concurred in a separate opinion. *See* Perlin, *supra* note 13, at 462, discussing that opinion.

35. *Godinez*, 509 U.S. at 410.

36. *Id*. at 410-11.

37. *Id*. at 413.

38. *Id*. at 414.

39. *Id*. at 399.

40. *Id*.

41. *Id*.

42. *Id*.

43. *Id*. at 411-12.

44. This section is generally adapted from Michael L. Perlin, *"There's No Success Like Failure/and Failure's No Success at All": Exposing the Pretextuality of* Kansas v. Hendricks, 92 NW. U. L. REV. 1247 (1998), and 1 PERLIN, *supra* note 23, § 2-3.3 at 75-92 (2d ed. 1998).

45. *See* Raquel Blacher, *Historical Perspective on the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 914-15 (1995). On the impact of the ''vivid'' case in mental disability law reform in general, *see* PERLIN, *supra* note 2 (impact of *Hinckley* case on insanity defense law reform).

46. Jeffrey Klotz, *Sex Offenders and the Law: New Directions*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 131, 133 (David Wexler & Bruce Winick eds. 1997).

47. N.J. STAT. ANN. §§ 2C:7-1 to 7-11 (1998).

48. Kansas v. Hendricks, 117 S. Ct. 2072, 2095 (1997) (Breyer, J., dissenting).

49. *See, e.g*., Jeffrey Klotz, *Sex Offenders and the Law: New Directions*, in MENTAL HEALTH AND LAW: RESEARCH POLICY AND SERVICES 257 (Bruce Sales & Saleem Shah eds. 1996).

50. *But see* N.J. STAT. ANN. §§ 2C:7-1 (1998):
The Legislature finds and declares:

a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.

b. A system of registration of sex offenders and offenders who commit other predatory acts against children will provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons.

51. Eric Janus, *The Use of Social Science and Medicine in Sex Offender Commitment*, 23 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 347, 348-49 (1997) (citing statutes).

52. *Id*. at 349 (citing statutes).

53. *Hendricks*, 117 S. Ct. at 2077, citing KAN. STAT. ANN. § 59-29a01 (preamble).

54. KAN. STAT. ANN. § 59-29a02(a).

55. KAN. STAT. ANN. § 59-29a02(b).

56. KAN. STAT. ANN. §§ 59-29a03(a); 22-322.1.

In the case of an offender who was scheduled to be released from prison, the custodial agency was required to notify the local prosecutor 60 days before that person's anticipated release. *Id*. § 59-29a03. The prosecutor was then obligated, within 45 days, to decide whether to file a petition in state court seeking the person's involuntary commitment. *Id*. § 59-29a04. If such a petition were filed, the court was to determine whether ''probable cause'' existed to support a finding that the person was a ''sexually violent predator'' and thus eligible for civil commitment. Upon such a determination, transfer of the individual to a secure facility for professional evaluation would occur. *Id*. § 59-29a05. After that evaluation, a trial would be held to determine beyond a reasonable doubt whether the individual was a sexually violent predator. If that determination were made, the person would then be transferred to the custody of the Secretary of Social and Rehabilitation Services (Secretary) for ''control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large.'' *Id*. § 59-29a07(a).

In the case of an indigent person, the State was required to provide, at public expense, the assistance of counsel and an examination by mental health care professionals. *Id*. § 59-29a06. The individual also received the right to present and cross-examine witnesses, and the opportunity to review documentary evidence presented by the State. *Id*. § 59-29a07. Once an individual was confined, the Act required that ''the involuntary detention or commitment . . . shall conform to constitutional requirements for care and treatment.'' *Id*. § 59-29a09.

Confined persons were afforded three different avenues of review: First, the committing court was obligated to conduct an annual review to determine whether continued detention was warranted. *Id*. § 59-29a08. Second, the Secretary was permitted, at any time, to decide that the confined individual's condition had so changed that release was appropriate, and could then authorize the person to petition for release. *Id*. § 59-29a10. Finally, even without the Secretary's permission, the confined person

could at any time file a release petition. *Id*. § 59-29a11. If the court found that the State could no longer satisfy its burden under the initial commitment standard, the individual would be freed from confinement.

*See Hendricks*, 117 S. Ct. at 2077-78.

57. Matter of Care & Treatment of Hendricks, 912 P.2d 129, 130 (Kan. 1996), *rev'd*, 117 S. Ct. 2072 (1997). Hendricks had been arrested and convicted at least five prior times on other charges stemming from sexual offenses committed against children or teenagers. *See Hendricks*, 117 S. Ct. at 2078.

58. *Id*.

59. *Id*.

60. *Id*. at 2079 n.2.

61. *Id*.

62. *Id*. at 2079.

63. *Hendricks*, 912 P. 2d at 137-38.

64. *Hendricks*, 117 S. Ct. at 2079-80.

65. *Id*. at 2080.

66. *Id*.

67. *Id*., citing, in part, to Ake v. Oklahoma, 470 U.S. 68, 81 (1985).

68. *Id*. at 2081.

*Hendricks's* language sanctioning predictions of future dangerousness has already been cited approvingly by several courts. *See e.g*., Francis S. v. Stone, 1998 WL 80181 (S.D.N.Y. 1998), at *15 n.126 (''previous instances of violent behavior are an important indicator of future volent tendencies''); United States v. Enjady, 134 F. 3d 1427, 1432-33 (10th Cir. 1998) (same); State v. Rykowski, 1998 WL 66948 (Ohio App. 1998), at *2 (same); State v. Jones, 1998 WL 130209 (Ohio App. 1998), at **2 (same); State v. Fugate, 1998 WL 42232 (Ohio App. 1998), at *1 (''from a legal point of view there is nothing inherently unattainable about a prediction of future dangerousness'').

69. *Hendricks*, 117 S. Ct. at 2081.

Interestingly, in a footnote, the majority noted:

We recognize, of course, that psychiatric professionals are not in complete harmony in casting pedophilia, or paraphilias in general, as ''mental illnesses.'' Compare Brief for American Psychiatric Association as Amicus Curiae 26 with Brief for Menninger Foundation et al. as Amici Curiae 22-25. These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. *Cf. Jones v. United States*, 463 U.S. 354, 365, n.13 (1983) (parallel citations omitted). As we have explained regarding congressional enactments, when a legislature ''undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'' Id. at 370 (internal quotation marks and citation omitted).

*Id*. at 2081 n.3.

*See* State v. Woods, 945 P. 2d 918, 922-23 (Mont. 1997) (discussing *Hendricks's* construction of ''mental abnormality'').

70. *Hendricks*, 117 S. Ct. at 2082.

71. *Id*.

72. *Hendricks*, 117 S. Ct. at 2083.

73. *Hendricks*, 117 S. Ct. at 2084. Added the Court: ''A State could hardly be seen as furthering a 'punitive' purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease.'' *Id*.

74. *Id*.

75. *Id*. at 2085 n.4, citing, in part, Allen v. Illinois, 478 U.S. 364, 373 (1986); *see generally infra* § 2B-4.11c.

76. *Hendricks*, 117 S. Ct. at 2085.

77. *Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring).

78. *Id*.

79. *Id*. at 2090.

80. *Id*.

81. Justice Ginsburg joined in the remainder of the dissent.

82. *Hendricks*, 117 S. Ct. at 2090 (Breyer, J., dissenting).

83. *Id*.

84. *Id*. at 2090-91.

85. *Id*. at 2091.

86. *Id*.

87. *Id*. at 2092.

88. 478 U.S. 364, 367-73 (1986).

89. *Id*. at 375. *See* 1 PERLIN, *supra* note 23, § 2C-4.11c at 364-71 (2d ed. 1998).

90. *Hendricks*, 117 S. Ct. at 2092.

91. *Id*., quoting *Hendricks*, 912 P.2d at 136.

92. *Id*. at 2093, citing *Hendricks*, 912 P.2d at 131, 136.

93. *Id*., quoting *Hendricks*, 912 P.2d at 131, 136.

94. *Id*. at 2094.

95. *Id*. at 2096.

The basis for the majority's conclusion that Hendricks was receiving treatment came from two sources, according to the dissenters: a statement made by counsel for Kansas at oral argument, and a trial judge's statement in the record of a habeas proceeding in Hendricks' case that took place a year after his commitment. Neither, the dissenters concluded, served as appropriate justification for the conclusion that Hendricks was receiving treatment at the time he filed suit. *Id*. at 2096-97.

96. This section is generally adapted from PERLIN, *supra* note 23, § 6.44AA at. . . . (1999 Cum. Supp.) (in press).

97. 118 S. Ct. 1952. (1998).

98. *Id*. at 1953.

99. *Id*.

100. 501 U.S. 452 (1991).

101. *Id*. at 460-61.

102. *Yeskey*, 118 S. Ct. at 1953.

103. *Id*. at 1955.

Under the statute, a qualified individual with a disability is anyone who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids

and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

104. *Yeskey*, 118 S. Ct. at 1955.

105. *Id*. at 1955-56.

106. *Compare* Printz v. United States, 117 S. Ct. 2365 (1997), *with* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). *See Yeskey*, 118 S. Ct. at 1956.

107. See City of Boerne v. Flores, 117 S. Ct. 2157 (1997). *See Yeskey*, 118 S. Ct. at 1956.

108. *Yeskey*, 118 S. Ct. at 1956, quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n. 2 (1970).

109. This section is generally adapted from PERLIN, *supra* note 23, § 6.44AA, at . . .-. . . (1999 Cum. Supp.) (in press).

110. 138 F. 3d 893 (11th Cir. 1998), *aff'd in part, rev'd in part & vacated in part*, 119 S. Ct. 2176 (1999).

111. *L.C*., 138 F. 3d at 895.

Although both plaintiffs were transferred to community settings prior to the court's decision, the court declined to find the case moot as such cases were ''capable of repetition, yet evading review.'' *Id*. at 895 n.2., citing, inter alia, Honig v. Doe, 484 U.S. 305, 318-25 (1988).

112. *Id*. at 895.

113. *Id*., citing 28 C.F.R. §35.130(b)(7).

114. Justices O'Connor, Breyer, Souter and Stevens (the latter in a separate opinion) joined Justice Ginsburg in most of her opinion. Justice Stevens, who would have preferred to simply affirm the Eleventh Circuit's opinion, joined with these four justices in all of the opinion save that portion that outlined the State's obligations in such cases. Justice Kennedy filed a concurring opinion, joined in part by Justice Breyer. Justice Thomas dissented for himself, the Chief Justice, and Justice Scalia.

115. 119 S. Ct. 2176 (1999).

116. *Id*. at 2181, quoting 42 U.S.C. §§ 121101 (a) (2), (3), (5).

117. 28 C.F.R. pt. 35, App. A, p. 540 (1998).

118. 119 S. Ct. at 2183.

119. *Id*. at 2185.

120. *Id*. at 2185-86.

121. *Id*. at 2186.

122. *Id*. at 2186-87, discussing 42 U.S.C. § 6010 (2), as construed in Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 24 (1984).

123. *Olmstead*, 119 S. Ct. at 2187.

124. *Id*.

125. *Id*. at 2188.

126. *Id*.

127. *Id*.

128. *Id*., n.14.

129. Although this section of the opinion was co-signed only by four justices (Ginsburg, Souter, Breyer and O'Connor), a reading of it in tandem with Justice Ken-

nedy's concurrence, *see infra* text accompanying notes 136-38, makes it likely that it will be treated by lower courts as having the weight of a majority opinion.

130. *Id*. at 2188.

131. *Id*. at 2189.

132. At one point, Georgia had proposed such a placement for one of the named plaintiffs, and then later retracted it. *Id*.

133. *Id*. On this point, the opinion cited, inter alia, Justice Blackmun's concurrence in Youngberg v. Romeo, 457 U.S. 307, 327 (1982): ''For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know.''

134. *Id*.

135. *Id*. at 2190.

136. *Id*.

137. *Id*. at 2192.

138. *Id*. at 2191.

139. *Id*.

140. *Id*., quoting E. FULLER TORREY, OUT OF THE SHADOWS 11 (1997).

141. *Id*. at 2191-92.

142. *Id*. at 2191.

143. *Id*.

144. *Id*. at 2192.

145. Justice Breyer joined in the prior portion of Justice Kennedy's concurrence, but not in the portion discussed *infra* text accompanying notes 224-27.

146. If they could show that persons needing psychiatric or other medical services to treat a mental disability are subject to a more onerous condition than are persons eligible for other existing state medical services, and if removal of the condition would not be a fundamental alteration of a program or require the creation of a new one, then the beginnings of a discrimination case would be established.

*Id*. at 2192.

147. *Id*. at 2193.

148. *Id*.

149. *Id*.

150. *Id*. at 2194.

151. *Id*. at 2197.

152. *Id*. at 2198.

153. *Id*. at 2199.

154. *Id*.

155. *See* 1993 WL 751849 (transcript of oral argument in *Godinez*).

156. *See generally*, Perlin, *supra* note 13, at 73-81.

157. Perlin, *supra* note 44, at 1269-75.

158. *See e.g*., Douglas Mossman, *Assessing Predictions of Violence: Being Accurate About Accuracy*, 62 J. CONSULT. & CLIN. PSYCHOL. 783 (1994); Edward Mulvey, *Assessing the Evidence of Link Between Mental Illness and Violence*, 45 HOSP. & COMMUN. PSYCHIATRY 663 (1994).

159. *See e.g.*, John Monahan, *The Scientific Status of Research on Clinical and Actuarial Predictions of Violence*, in 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY §7-2.2 (David Faigman et al. eds. 1997).

160. Bruce J. Winick, *Foreword: A Summary of the MacArthur Treatment Competence Study and an Introduction to the Special Theme*, 2 PSYCHOL., PUB. POL'Y & L. 3, 3 (1996); *The MacArthur Violence Risk Assessment Study*, 16 AM. PSYCHOL.-L. SOC. NEWSLETTER No. 3 (Fall 1996), at 1. *See also, e.g.*, Thomas Grisso & Alan Tomkins, *Communicating Violence Risk Assessments*, 51 AM. PSYCHOLOGIST 928 (1996).

161. Professor Monahan has been characterized as ''the leading thinker on this issue'' in Barefoot v. Estelle, 463 U.S. 880, 901 (1983), and in *id.* at 920 (Blackmun, J., dissenting).

162. Monahan, *supra* note 159, §7-2.2.1 at 314. Clinicians were found to be no better than chance when it came to predicting violence among female patients. *Mental Illness and Violent Crime*, NAT'L INST. OF JUSTICE RESEARCH PREVIEW (Oct. 1996), at 1, 2.

163. Monahan, *supra* note 159, at 315. *See also*, Jeffrey Swanson et al., *Psychotic Symptoms and Disorders and the Risk of Violent Behavior in the Community*, 6 CRIM. BEHAV. & MENTAL HEALTH 309, 210 (1996) (mental disorder a ''modest risk factor'' for the occurrence of interpersonal violent behavior).

164. *See* Joseph McCann, *Risk Assessment and the Prediction of Violent Behavior*, 44 FED. LAW. 18 (Oct. 1997).

165. *Yeskey*, 118 S. Ct. at 1953.

166. *But see*, Alsbrook v. City of Maumelle,.. F. 3d . . . , 1999 WL 521709 (8th Cir. 1999) (Congress lacked authority to abrogate state's Eleventh Amendment immunity in ADA).

167. *Olmstead*, 119 S. Ct. at 2185.

168. *Id.* at 2186.

169. *Id.* at 2187.

170. *Id.*

171. *See supra* text accompanying note 133.

172. *Olmstead*, 119 S. Ct. at 2189.

173. *Id.*

174. In my mind, Torrey's critique is a terribly flawed one. *See* Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness*: *A Story of Marginalization*, 28 HOUS. L. REV. 63, 87 (1991); *see generally*, Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption*? 1 PSYCHOLOGY, PUB. POL'Y & L. 80, 84-118 (1995).

175. *Olmstead*, 119 S. Ct. at 2191. On the impact of ''litigaphobia'' (fear of litigation) on mental disability law jurisprudence, *see e.g.*, Michael L. Perlin, Tarasoff *and the Dilemma of the Dangerous Patient: New Directions for the 1990's*, 16 LAW & PSYCHOL. REV. 29, 61-62 (1992).

176. *See* PERLIN, *supra* note 23, § 2C-7.3, at 491-99 (2d ed. 1998).

177. *See id.*, § 3A-12 to 12.3 (2d ed. 1999) (in press).

178. *See* Michael L. Perlin, "'For the Misdemeanor Outlaw': The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities" (manuscript in progress).

179. A September 14, 1999 search of the ALLCASES, JLR, LRI, and TP-ALL databases on WESTLAW revealed *no* cases or articles citing all three of these cases.

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