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From Law and Bananas to Real Law: A Celebration of Scholarship in Mental Health Law

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FROM LAW AND BANANAS TO REAL LAW: A CELEBRATION OF SCHOLARSHIP IN MENTAL HEALTH LAW

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Scholarship in mental health law, a relatively new specialty by legal standards, is a publishing success story. Law and Psychology and Law and Psychiatry were sometimes called "Law and Bananas" just a decade or two ago.[1] Mental health law has become a high quality, diverse and sophisticated contributor to our understanding of the law and legal system.

It is not just in the last few years that mental health scholarship began, of course. The first issues of the *Index to Legal Periodicals* in 1926 included subject headings in "Psychiatry," "Psychology," "Insane Persons," and "Defective Classes," and in related areas of criminal law and "Sterilization," a major area because *Buck v. Bell*[2] had just been decided. The first couple of volumes indexed a number of topics that are familiar to today's scholar, including the insanity defense, incompetency and guardianship, the cost of mental health services, "truth serum," commitment following NGRI[3], civil liability, "the abuse of science,"[4] and an entry entitled, *Why Has Psychology Failed to Make Greater Contributions to the Law?*[5] The

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1. *See* Steven R. SMITH & ROBERT G. MEYER, LAW, BEHAVIOR, AND MENTAL HEALTH: POLICY AND PRACTICE, ix (1987).

2. Buck v. Bell, 274 U.S. 200 (1927).

3. Not Guilty by Reason of Insanity.

4. Note, *The Abuse of Science*, 31 LAW NOTES 203 (1928), *indexed in* 1 INDEX TO LEGAL PERIODICALS 497 (1928). Interestingly, an earlier index of legal materials, Leonard A. Jones, *An Index to Legal Periodical Literature*, first published in 1888, and indexing periodicals from much of the Nineteenth Century, covered many of the same topics under such headings as "Lunatics," "Insanity," and "Insane Paupers."

5. N.V. Scheidemann, *Why Has Psychology Failed to Make Greater Contributions to Law?*, 13 A.B.A. J. 54 (1927), *indexed in* 1 INDEX TO LEGAL PERIODICALS 497 (1928).

range of topics has increased significantly particularly in recent years, and the volume of work in the field has increased dramatically too. The number of mental health articles indexed in four months is greater than in four or five years in the 1920s.[6]

This symposium is a celebration of the diversity and quality of current mental health law research. The nine articles appearing here represent the range of advanced scholarship the field now enjoys. This article first reviews the principle types of scholarship in mental health law, and then considers some of the reasons that mental health law has developed such impressive literature. Finally, it suggests shortcomings in current mental health law scholarship and looks at what the future might hold for the discipline. Throughout the article, examples from the symposium are used to illustrate the advancement in mental health law research generally. The resulting insult by omission of others is, while substantially certain, quite unintentional.[7]

The general thesis of the article is that although the profession can take great pride in the quality of the scholarship of the last quarter century, it has given insufficient attention to two important areas. These areas include a bundle of topics I refer to as "creative problem solving" in mental health law, and mental health care delivery and the allocation of scarce resources. In addition, there is great opportunity for the specialty to help enhance the understanding of how the law and legal system work, and to continue to develop an increasingly sophisticated philosophical basis for the discipline.

I. TYPES OF MENTAL HEALTH LAW SCHOLARSHIP

Mental health research can be divided into three broad types of scholarship: (1) doctrinal or analytical; (2) empirical; and (3) philosophical or jurisprudential. All three are nicely represented in this symposium.

Doctrinal or analytical studies generally come closest to the traditional form of scholarship in law by analyzing existing law and, not uncommonly, proposing reforms based on preferred policy considerations. A good example of insightful analytical research is Professor Daniel Shuman's, *The Standard of Care in Medical Malpractice Claims, Clinical Practice Guidelines, and Managed Care: Towards a Therapeutic Harmony.*[8] Professor Shuman, who perhaps is the leading mental health scholar studying tort issues, notes that if formal practice standards are not available to courts to

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6. The total number of articles has generally increased, but the increase in mental health-related articles appears to have been at an even faster pace.

7. With apologies to torts scholars, or first-year torts students for that matter, who know that an unintentional certainty is an oxymoron. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).

8. Daniel W. Shuman, *The Standard of Care in Medical Malpractice Claims, Clinical Practice Guidelines, and Managed Care: Towards a Therapeutic Harmony?*, 34 CAL. W. L. REV. 99 (1997).

judge professional standards, then courts, on a case by case basis, are left to determine the appropriate standards. This is despite courts' claims that they do not want to determine such standards, and professionals' claims that the profession should make the decisions.

In an admirable article, *Liability for Failure to Supervise Adequately Mental Health Assistants, Unlicensed Practitioners and Students*, Professor Dennis Saccuzzo explores the legal and ethical bases for imposing liability on the supervisors of mental health students and assistants.[9] His thorough review of liability theories in this topic, which has been somewhat neglected in the past by legal scholars, includes helpful and creative guidelines for a standard of care of supervision.

Dr. David Shapiro provides a unique perspective on major Supreme Court cases in his article, *Ethical Dilemmas for the Mental Health Professional: Issues Raised by Recent Supreme Court Decisions.*[10] Dr. Shapiro is a psychologist practitioner-scholar who brings a practical understanding of the consequences of Supreme Court decisions. Dr. Shapiro has served on the ethics committees of the American Psychological Association and the American Board of Professional Psychology and issues an important reminder that court decisions can raise thorny ethical problems for mental health professionals when the cases move from the marble halls of the Supreme Court to the asphalt streets of everyday life.

Mental health law scholarship has not traditionally had a strong historical element, perhaps because so much of the history of the field is fairly recent. Professor Sheldon Gelman explores the development and early misuse of psychoactive medicines in his remarkable article, *The Law and Psychiatry Wars: 1960 to 1980.*[11] Professor Gelman was counsel in one of the most important "right to treatment/right to refuse treatment" cases[12] and is certainly an expert in the history of these medications. He demonstrates that the hope of both psychiatry and law for a revolutionary end to institutionalization following World War II resulted in both professions ignoring the downsides of these drugs. This article is a portion of Professor Gelman's book, to be published soon, that will undoubtedly ignite a lively debate on the history of the last thirty years.[13]

Empirical research is a mainstay of behavioral science scholarship, although traditionally not common in law. One strength of mental health law scholarship is that it has brought to the scholarly table social science research examining how legal and social services systems work, and some ex-

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9. Dennis P. Saccuzzo, *Liability for Failure to Supervise Adequately Mental Health Assistants, Unlicensed Practitioners and Students*, 34 CAL. W. L. REV. 115 (1997).

10. David L. Shapiro, *Ethical Dilemmas for the Mental Health Professional: Issues Raised by Recent Supreme Court Decisions*, 34 CAL. W. L. REV. 177 (1997).

11. Sheldon Gelman, *The Law and Psychiatry Wars: 1960 to 1980*, 34 CAL. W. L. REV. 153 (1997).

12. *See* Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978).

13. *See* SHELDON GELMAN (untitled) (forthcoming 1998).

perimental studies designed to test assumptions about the legal system or proposed reforms. The range of "descriptive" empirical research (describing how a part of the legal system or other institution works) has been impressive—few areas of mental health law do not include some form of descriptive empirical research. At the same time, "predictive" empirical studies (experimental designs that examine what the consequences of changes in the law would be) have been much less common.

Empirical research has in some ways been the most controversial form of mental health law scholarship, even derided in recent times by members of the Supreme Court.[14] There are undoubtedly many reasons for this,[15] but the apparent inconsistency of conclusions,[16] the potential for manipulation, and the "junk science" aspect of some clinical testimony[17] all contribute to this perception.[18] Perhaps another reason for the frustration of some in the legal profession with behavioral science research has been the limited amount of solid "predictive" social science scholarship which would help guide public policy. Where such empirical research exists (*e.g.*, shadow juries predicting how real jurors will respond to evidence and methods of presentation), it has achieved a measure of acceptance in the legal community.

This symposium includes examples of important empirical research. In *Social Sexual Conduct at Work: How Do Workers Know When it is Harassment and When it is Not?*, Professor Richard Wiener, one of the most prolific psychologists studying legal issues, and doctoral candidate Linda Hurt present an extraordinary interdisciplinary-empirical study of what should make potential "harassment" sufficiently obnoxious to be actionable.[19] Their model of "social analytic jurisprudence" is intended to provide empirical knowledge to law-making bodies. In this instance, they inter-

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14. Justice Scalia, for example, referred with some derision to "socioscientific" data as "ethicoscientific" information, noting, in defining the eighth amendment, "socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon." Stanford v. Kentucky, 492 U.S. 361, 378 (1989). Justice Thomas warned that, "The lower courts should not be swayed by the easy answers of social science." Missouri v. Jenkins, 515 U.S. 70, 122 (1995).

15. *See* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 75, 246 (1985); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 563 (1987).

16. *See* Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 696 (1974); Thomas R. Litwack, *On the Ethics of Dangerousness Assessments*, 17 L. & HUM. BEHAV. 479 (1993) (response to Thomas Grisso and Paul S. Appelbaum, 16 L. & HUM. BEHAV. 621 (1992)).

17. *See* MARGARET A. HAGEN, WHORES OF THE COURT: THE FRAUD OF PSYCHIATRIC TESTIMONY AND THE RAPE OF AMERICAN JUSTICE (1997); David Wallace, Comment, *The Syndrome Syndrome: Problems Concerning the Admissibility of Expert Testimony on Psychological Profiles*, 37 U. FLA. L. REV. 1035 (1985).

18. *See* Steven R. Smith, *Mental Health Expert Witnesses: Of Science and Crystal Balls*, 7 BEHAV. SCI. & L. 145 (1989).

19. Richard L. Wiener & Linda E. Hurt, *Social Sexual Conduct at Work: How Do Workers Know When it is Harassment and When it is Not?*, 34 CAL. W. L. REV. 53 (1997).

viewed men and women regarding behavior these participants found harassing, and discovered some differences in what women and men found harassing, but also very large differences among the women interviewed. They suggest, however, that empirically-based definitions of the elements of harassment hold "great promise" in establishing standards of conduct.

Professor Richard Wiener and Dennis Stolle, both of whom have additional articles in this symposium, present a fascinating jury study in *Trial Consulting: Jurors' and Attorneys' Perceptions of Murder.*[20] Juries are probably the most studied legal institution, but this study demonstrates again that there is still much to be learned. They surveyed jurors in a murder case and compared actual jury attitudes with the predictions of jury attitudes made by experienced criminal defense attorneys. They found correlates of jurors' determinations of verdict and sentence. Not surprisingly, attorneys' intuitive predictions of jury attitudes were not always correct.

Philosophical or jurisprudential studies are "simply the disciplines themselves, carried on at somewhat higher levels of abstraction than those employed by typical practitioners in each."[21] These studies have traditionally received the least attention in the mental health law literature, but arguably in the long run may be the most important or influential.[22] The concept of "therapeutic jurisprudence," developed nearly a decade ago, primarily by David Wexler and Bruce Winick, has focused attention of the field on the potential value of a unique jurisprudence associated with mental health goals and values. It now has its own subject heading in the current *Index to Legal Periodicals.*

Therapeutic jurisprudence essentially says that the law inevitably has consequences for the mental health of those it affects, that these consequences should be studied, and that the law should be reformed to maximize the therapeutic consequences of legal rules and procedures (consistent with other goals of justice).[23] Wexler and Winick have been careful to note the limits of therapeutic jurisprudence, especially noting that other values, beyond therapeutic considerations, must guide the law.[24] In addition, of course, therapeutic principles are not highly developed or well documented for many situations, so therapeutic jurisprudence rests on another disci-

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20. Richard L. Wiener & Dennis P. Stolle, *Trial Consulting: Jurors' and Attorneys' Perceptions of Murder,* 34 CAL. W. L. REV. 225 (1997).

21. MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 423 (1984).

22. John Maynard Keynes suggested that "practical men, who believe themselves quite exempt from intellectual influences, are usually the slaves of some defunct economist." JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY 383 (1936).

23. *See* Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering,* 34 CAL. W. L. REV. 15, 17-18 (1997).

24. *See* DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE, xi (1991).

pline—the therapeutic understanding in mental health disciplines—that is not yet very well understood.

The remarkable team of Dennis Stolle, David Wexler, Bruce Winick, and Edward Dauer present a truly extraordinary use of therapeutic jurisprudence in this symposium. They apply the principles to "preventive law," an important but too often neglected part of the legal profession, in their article, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*.[25] Employing therapeutic jurisprudence in the counseling of clients is among the most powerful applications of therapeutic jurisprudence because it focuses on what the lawyer does with his or her clients. At its most fundamental level, it recognizes that the process of helping people avoid legal problems can have profound effects on other aspects of people's lives. It also recognizes that people do not live to avoid legal problems or enforce their legal rights; rather that legal problems generally represent potential diversions from those ends to which they are devoting themselves. This article suggests that lawyers' sensitivity to the psychological aspects of law practice and to therapeutic jurisprudence can lead to better counseling of clients, the opportunity to avoid serious legal problems, and greater client and attorney satisfaction.

Mental health law's scholarship has benefited from this three-legged stool—doctrinal, empirical and philosophical/jurisprudential research. These research approaches have resulted in high quality analysis and insight in mental health law. The explanations for the strength of this scholarship are several.

II. SOURCES OF STRENGTH IN MENTAL HEALTH LAW SCHOLARSHIP

Mental health law scholarship's quality comes in large measure from its very strong interdisciplinary elements, the outstanding scholars attracted to it, and the diversity of scholarship that has been undertaken. First, there is interdisciplinary strength. The interdisciplinary element arises several ways. Mental health law has a substantial number of scholars with both J.D.s and doctoral degrees in psychology, medicine/psychiatry, social work, and other behavioral sciences. In this symposium, Dr. Bruce Sales, Dr. Dennis Saccuzzo, and Ph.D. candidate Dennis Stolle are examples of this strength. In addition, Dr. Nancy Johnson, the editor-in-chief of the law review in which this symposium appears, has a Ph.D. and will have the law degree shortly. Dr. Richard Wiener has an M.L.S. in addition to his Ph.D. Moreover, Ms. Martha Frias-Armenta holds an M.A. in Psychology and is a licensed attorney in Sonora, Mexico. There are several excellent joint-degree programs, including for example: University of Arizona, University of Nebraska, and Villanova University-Hahnemann. However, many dual degree holders simply earn the two degrees separately, and often at different

25. *See* Stolle et al., *supra* note 23.

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times in their careers. In addition, an even larger number of researchers have master's level degrees in a behavioral science, in addition to a law degree.

These two-doctoral-degree experts have added depth to behavioral science and mental health law research. With a foot in both camps, they are especially well situated to "translate" the insights, assumptions, and jargon of one discipline to the other. In addition, these scholars have been in particularly good positions to conduct empirical research on the legal system because they possess both the understanding of the law that comes from being in that discipline, and the expertise in research design that permits them to undertake or direct such studies. Finally, they are in particularly good positions to analyze and consider afresh the assumptions (often implicit) made by each discipline.

Other scholars, while not technically holding both law degrees and doctoral behavioral science degrees, have done such substantial work in both areas that they have a very deep understanding of both disciplines. These scholars bring the strong perspective of their own discipline with an understanding of the other; they are *in* the other field but not *of* it. Thus, with formal training in one profession but an acquired understanding of the other, they bring a somewhat different perspective than those with doctoral degrees in both.

In this symposium Professors Dan Shuman, David Wexler, and Bruce Winick, who are lawyers, have long demonstrated expertise in a variety of mental health topics about which they have written. Professor Sheldon Gelman, also a lawyer, demonstrates an understanding of psychotropic medications matched by few psychiatrists. From the other side of the professional aisle, Dr. David Shapiro, a clinical psychologist, reveals an important perspective and understanding of the law in his article on recent Supreme Court decisions. It is reassuring to see newer members of the field (attorney Martha Frias-Armenta, and doctoral students Linda Hurt and Dennis Stolle) demonstrate similar inclinations to continue this strong tradition of strong interdisciplinary work.

Another remarkable aspect of the interdisciplinary thrust of mental health law has been the level of joint authorship. Almost every author in this symposium has published articles, chapters or books with another professional, generally someone of the "other" discipline,[26] an unusual record among legal scholars. This, perhaps, represents the influence of science where joint authorship is quite common, and the use of interdisciplinary joint authorship almost surely contributes to the depth of research found in mental health law.

This interdisciplinary work has been fostered by organizations that have

26. Joint degree holders are, in a sense, their own co-authors because they bring the perspectives of two disciplines to their work. Yet, it is interesting how many of the joint degree holders, even in this symposium, are writing with another author (or authors).

successfully integrated the work and research of law and the behavioral science disciplines. For example, the American Psychology-Law Society, Division 41 of the American Psychological Association, has opened membership to lawyers as well as psychologists, and the biennial meeting of that group produces some of the best cross-disciplinary communication available anywhere. These organizations have, in turn, led to more integration of the basic professional organizations. It is, for example, not unusual to see legal scholars in the halls of the annual meetings of the American Psychological Association or American Psychiatric Association, and mental health professionals are seen nowadays at the American Bar Association and Association of American Law Schools meetings. The trend may be expanding: a law professor serves as the public member of the Board of Trustees of the premier specialty recognition organization for psychologists, the American Board of Professional Psychology, and of the Ethics Committee of the American Psychological Association.

Mental health law scholarship also owes its strength, in part, to the very talented faculty members and practitioners attracted to the field. No field is likely to be strong unless it continues to draw excellent scholars, as mental health law has. There are several reasons for the attractiveness of the field. Part is the tradition of quality that has developed. Part is that it deals with some of the most fundamental and important questions of the law—e.g., the nature of individual responsibility; the ability of people to make decisions for themselves; sex, lies (truthfinding), and confidentiality; and jury decision-making. It is a fascinating area of research.

Another strength of the scholars in mental health law is that they usually teach or conduct research in another substantive area of the law in addition to mental health law. Furthermore, the field benefits from having a number of clinical (present or former clinicians) and many experienced practitioners among its ranks. Evidence, criminal law, torts, and law and medicine are among the common areas of additional expertise, but these areas cover virtually the entire range of the law school curriculum and practice. This expertise brings to mental health law a very strong doctrinal understanding of almost all other areas of the law. As a consequence, the field has benefited from scholarship that is solidly related doctrinally to other areas of the law. This symposium demonstrates that the process continues. Dean Emeritus and Professor Edward Dauer, a true expert in preventive law, joins other experts in mental health topics to produce a truly insightful article on lawyering.

Mental health law also is strengthened by the diversity of scholarship. This is illustrated by the major types of scholarship (doctrinal, empirical and philosophical) discussed earlier. In a related way, the field has also benefited from the absence of any single, dominant school of thought. For example, compared with law and economics, in which the overwhelming dominance of the classical school has prevented full exploration of the relevance to the law of the complete range of economic thought, there is no sin-

gle school of thought in mental health law. It is possible to imagine that mental health law might have become a Freudian-legal school. Fortunately, no single approach reigns.

Healthy diversity may also be found in mental health scholarship on a "practicality" scale—in contrast to the view of law and literature which is criticized for not being particularly connected with anything real in the law. Judge Harry Edwards and others cannot legitimately complain that little of mental health law literature is relevant.[27] Mental health law publications generally exist to be *read*, not just written.[28] In fact, the range of mental health literature stretches broadly from purely practice-oriented pieces to the very esoteric/philosophical. There truly is something for everyone. Furthermore, the scholarship collectively has proven to be, as it must be, relevant to two very different professions—law and mental health.

Mental health law has also prospered in part because of the generosity of those in the field. It has been as welcoming and helpful to new scholars as anywhere in legal education. Such icons in the field as David Wexler,[29] Bruce Winick, Dan Shuman, Bruce Sales, and Rich Wiener (to mention but a few of the authors in this symposium) have been extraordinarily open to working with and encouraging new scholars.

Another important strength of mental health law has been the element of international and comparative law. The *International Journal of Law and Psychiatry*, the *Internet Review of Law and Mental Health*, mental health law listserves and other e-mail lists, and the International Academy of Law and Mental Health (which will this summer sponsor the twenty-third International Congress on Law and Mental Health), are examples of the many efforts to provide a comparative and international perspective on mental health issues. More than any other single person, Professor David Weisstub at the University of Montreal deserves commendation. His efforts have resulted in cross-fertilization of ideas, creative cross-cultural thinking, and a steady stream of interesting ideas from other countries.

This symposium includes an interesting international/comparative article, *Discretion in the Enforcement of Child Protection Laws in Mexico*, by Ms. Martha Frias-Armenta and Professor Bruce Sales.[30] The first author is

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27. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

28. Professor Havighurst claimed that, "Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written." Harold C. Havighurst, *Law Reviews and Legal Education*, 51 NW. U. L. REV. 22, 24 (1956).

29. Professor Wexler demonstrates that mental health law scholars are not only generous, they also show unusual candor. In the acknowledgment to one of his books he thanked the dean of his law school who "has taken the step of explicitly tying merit salary increases to scholarly productivity. As much as anything, this book is a test of his good word." DAVID B. WEXLER, MENTAL HEALTH LAW: MAJOR ISSUES, viii (1981).

30. Martha Frias-Armenta & Bruce D. Sales, *Discretion in the Enforcement of Child Protection Laws in Mexico*, 34 CAL. W. L. REV. 203 (1997).

relatively new to mental health law and the second author is one of the leaders in the field. In the article, the authors discuss child abuse enforcement in Sonora, Mexico and contrast it with enforcement in the United States. In particular, they consider the very broad discretionary authority Sonoran officials have and how social science data (derived primarily from the United States) suggest revisions in child abuse policy. The conclusions (i.e., need for better definition of abuse and need to explore alternative mechanisms for addressing abuse), are as valuable for the United States as for Mexico.

As the law of the United States becomes more and more internationalized, mental health law will already have established a tradition of international involvement.

III. IMPROVING MENTAL HEALTH LAW RESEARCH: A LOOK TO THE FUTURE

Despite its strengths, mental health law scholarship has a few missing or under-explored areas. These represent research opportunities and challenges for the field in the twenty-first century, and include the five following areas: (1) several aspects of creative problem solving,[31] (2) mental health delivery issues and the practical consequences of limited resources, (3) understanding of how the law (including mental health law) actually works in practice, (4) techniques for better making mental health expertise available to the legal system, and (5) additional philosophical/jurisprudential approaches and understandings. The first two represent areas too often ne-

31. *See* California Western School of Law's mission statement embodying the concept of "creative problem solving":

> California Western School of Law is committed to using the law to solve human and societal problems. Our mission is to train ethical, competent and compassionate lawyers, representative of our diverse society, who can use the law effectively and creatively. We recognize that, in the twenty-first century, the rapid rate of change will accelerate and create further problems. We also recognize the pervasive perception, and partial reality, that the legal system and lawyers have helped to create, rather than solve, the problems our evolving society confronts.
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> While continuing to graduate lawyers well-equipped to practice law, we also seek to graduate creative problem solvers committed to the improvement of our legal system and society.
>
> Our graduates will not merely react to problems, but will anticipate them and be ready to devise innovative and responsible solutions to serve the needs of their clients and the broader community. Further, by contributing to legal scholarship, participating in public deliberations about legal matters and serving as a community legal education resource, California Western School of Law will make significant, measurable contributions to the solution of problems in our community, our society and our world.

California Western School of Law, *The California Western Mission*, CAL. W. SCH. L. CATALOGUE 2 (1997).

glected in mental health law publications, the last three are areas of important work in the past that are likely to be of even greater importance in the next century.

Mental health law scholarship has paid little attention to a group of issues that may be described collectively as "creative problem solving." Problem solving exists on a "macro level" for societies, communities and groups, and on a "micro level" for individuals and organizations. On either level, problem solving means, first, helping people avoid problems and conflicts. By helping structure relationships that reflect the values of the participants and meet their mutual needs, for example, lawyers are also assisting clients or communities in avoiding problems. By counseling loss prevention, they may be helping avoid or reduce accidents. The fine article by Stolle and colleagues in this symposium provides valuable instruction on how mental health insights can be used in preventive law. The profession needs more such scholarship: it has been far too limited in the past. Mental health law experts seem especially well positioned to make major contributions in this area.

The second part of problem solving is helping clients (whether individuals or society) understand problems that exist in the context of their broader goals, values, and priorities. The third part is helping clients find solutions to problems that are efficient and that promote these values, goals and priorities. Of course, finding such solutions often requires a significant level of creativity. The legal profession is not generally at its best when it is focused almost solely on exonerating someone's legal rights. The profession usually does much better when it is concerned with finding workable, efficient solutions to problems, and it uses the law as one tool available for that purpose.

Reading mental health law cases and articles will convince most readers that mental health law experts have not paid sufficient attention to these issues. The reported cases (and much of the literature) on breach of confidentiality in psychotherapy provide a good example of how the legal system can win battles and lose wars, like the successful surgery that killed the patient. If someone suffers harm (e.g., problems at work) because a therapist illegally revealed confidential information (e.g., to an employer), the legal solution is to sue the therapist for negligence or invasion of privacy. This, of course, is likely to result in the release of even more confidential information from therapy to an even larger audience than the original breach of confidentiality produced. What must the conversation between the attorney and client have been that led to filing such a suit?

On a societal (macro) level, there frequently seems to be an issue of adequately defining the problem, or of finding sensible solutions that genuinely resolve a problem without creating new serious, unintended problems. The debate over the last thirty years about the appropriate standards for civil commitment and "the right to refuse treatment" is an example of not focusing on all of the issues with sufficient clarity to maximize the real interest

and objectives of individuals and society. What, for example, are the *real* (as opposed, perhaps, to the legal) interests of those facing possible involuntary commitment, and of their families and society, and how can we best ensure that those interests are promoted? What are the systemic consequences of devoting more mental health resources to involuntary patients—that is, what services will be diverted to additional involuntary patients? What alternatives are there to civil commitment or forced treatment that would be more efficient and effective at meeting the real interests and goals of the patients and families? These questions have not gone unnoticed, but are often overwhelmed by more technical discussions about rights, "rotting with those rights" and the like.[32] While the literature on these topics has been very good, as far as it has gone, a broader "problem solving" approach would have enriched it and made it potentially more valuable.

Understanding and applying creativity in resolving individual and social problems are additional issues that mental health law needs to promote. Creativity should play a role as we consider individual and social problems; new approaches are called for in many of the areas we study. In addition, mental health experts might bring an understanding of the nature of creativity to the legal profession.

One final word about problem solving. Satisfaction with the legal process and legal assistance is another area in which mental health law experts could make a greater contribution. The insights of cognitive psychology, for example, might prove invaluable in improving the satisfaction of people with the legal system. "Procedural justice" has already provided some understanding of what is satisfying and dissatisfying about legal processes,[33] and the current practice of litigation could hardly be designed in a way to provide for more dissatisfied customers. This is a genuine opportunity for the field to make a significant contribution to the law in the years ahead.

A second area to which scholarship in mental health law has paid too little attention is mental health care delivery and the related issues of the scarcity of mental health resources. Professor Shuman's excellent article in this symposium regarding the standard of care in managed care is an example of the work that is being done in reviewing the new issues surrounding changes in the delivery of mental health services. There are enormous numbers of mental health availability and delivery issues, ranging from licensure and prescribing authority to mental health "parity" and insurance limits, that deserve greater attention. Given these changes in the market for services, this body of literature should, and undoubtedly will, evolve rap-

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32. *See* Thomas Gutheil & Paul Applebaum, *Rotting with Their Rights On: Constitutional Theory and Clinical Reality in Drug Refusal by Psychiatric Patients*, 7 BULL. AM. ACAD. PSYCHIATRY & L. 306 (1979).

33. *See* MICHAEL D. BAYLES, PROCEDURAL JUSTICE: ALLOCATING TO INDIVIDUALS (1990); E. ALLAN LIND & TOM R. TAYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

idly.

Another aspect of mental health resources, however, continues to receive scant attention—the reality that mental health resources are finite and indeed quite limited. Changes in one part of the system may well have a significant impact on other parts of the delivery system. This is particularly true where the government is paying for care, because such funding is not generally adjusted on the basis of demand or need for services, but rather on the basis of unrelated political and economic factors (e.g., changes in state tax revenues). Increasing the number of involuntary patients through civil commitment is unlikely to result in a significant increase in funds appropriate for state mental health facilities, so it may well result in the diversion of funds from voluntary patients to the increased number of involuntary patients.[34] Therefore, the true cost of a change in commitment criteria includes the "opportunity costs" of not being able to provide as many services to voluntary patients. Many public policy issues involving mental health have imbedded in them such distribution of mental health resources issues, but these issues too often go unrecognized.

The limits of resources are thus a much more fundamental driving force in mental health law than scholars have generally recognized. In *The Right Stuff,* astronauts claim that what really makes rockets fly is not the complicated physics the engineers believe, but rather the money for the space program.[35] Similarly, public policy that seems based on complicated values and concerns may reflect more simple economic considerations. Even deinstitutionalization, generally attributed to a move toward community mental health, a greater protection for the rights of the mentally ill and the development of pychotropic drugs, may in significant measure reflect economic reality. After World War II, when it was no longer acceptable to maintain patients in mental warehouses, the costs of hospitalizing large numbers of involuntary patients became prohibitive, creating a strong economic incentive for deinstitutionalization.

Deep Throat's advice in Watergate to "follow the money" might well be taken by mental health scholars. The limits of resources, and the effect of those limits on public policy, deserve greater consideration.

Two areas related to one another that deserve attention by mental health law scholars in the next decade are: (1) increasing our understanding of how the law works in practice and how changes in policy are likely to affect actual practice; and (2) finding better ways of making mental health expertise available to the legal system. Considerable attention has been given to these topics already, but additional work is needed. In the case of understanding how law works, there are so many areas of interest to be studied that the

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34. *See* Mary L. Durham & John Q. LaFond, *The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment,* 3 YALE L. & POL'Y REV. 395, 397 (1985). This is a good example of an article that *does* consider the systemic mental health delivery consequences of changes in the law.

35. TOM WOLFE, THE RIGHT STUFF (1979).

task could be almost never-ending. There is also a need for better experimental methods to shed light on how changes in the law are likely to change people's conduct. In addition, scholars with a deep understanding of mental health research need to continue to "translate" the findings from the mental health literature to the law.

The related issue of making legitimate mental health expertise available to the law includes a range of topics that have received considerable attention from scholars. The current system is also attracting broad public attention, in part because of the broad judicial acceptance of clinical mental health expertise. The suspicion that a mental health expert will testify to anything has become so serious that it hardly needs to be mentioned.[36] Finding practical solutions to the problem is more difficult, but a very important undertaking because dissatisfaction with the current system is at a level that is unhealthy for both the mental health and the legal professions.

Finally, mental health scholars should develop greater philosophical and jurisprudential understandings. The contributions of therapeutic jurisprudence have been significant, but additional theories will give the field additional foundation for the next century.

This symposium suggests that research in mental health law is strong and that the future of the field is bright. There are many fascinating questions to be studied, and talented, creative scholars ready to tackle them. The symposium celebrates the progress mental health law has made. It isn't "Law and Bananas" anymore.

36. *See* HAGEN, *supra* note 17.