WHEN LAW AND MEDICINE COLLIDE

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SIXTEENTH ANNUAL CHARLES E. STEINBERG LECTURE IN PSYCHIATRY AND THE LAW[1]

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This lecture series is named after Charles E. Steinberg. For sixteen years, doctors, lawyers and judges — three from my Court are counted among the group — have come to this great medical school to talk about topics as varied as forensic psychiatry and domestic violence.

What a grand tribute to such a wonderful man. Because this lecture series bears his name and is dedicated to his commitment to medicine/psychiatry and the law, I think it appropriate to begin today with a few reflections on Charlie and how our life paths crossed. In 1987, following my election to New York Supreme Court, I was assigned to hear civil cases in Monroe County. At some point in time, I am not sure when, Charlie Steinberg had a case in front of me. I have no recollection of the issue or the result; however, I distinctly recall Charlie's happy warrior presence. It was clear to me that Charles Steinberg loved being with lawyers and enjoyed the controlled conflict of the courtroom.

In 1991, I was reassigned to hear criminal cases. My new work introduced me to a different segment of the Monroe County Bar, but there was Charlie, representing defendants with the same zeal and good-natured toughness he had shown on the civil side. It was at this time that I came to know Charlie better and received my best view of his skills as a trial lawyer.

Kenneth Brown was charged with murder in the second degree for shooting a woman over a dispute about the price of a stereo. It was my first murder trial and Charlie represented Brown. Just prior to the trial, Charlie's daughter Liz came to my chambers and asked a favor. Charlie

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[1] Charles E. Steinberg was a distinguished lawyer and Clinical Professor of Psychiatry (Law) at the University of Rochester School of Medicine who had a strong commitment to bridging the interface between law and medicine. In 1988, on the occasion of his seventieth birthday, and in recognition of his outstanding contributions to the field of psychiatry and the law, the Department of Psychiatry created the Charles E. Steinberg Fellowship and Lecture in Psychiatry and the Law at the University of Rochester School of Medicine and Dentistry.

was a diabetic and Liz was concerned that the stress of the trial might throw Charlie into insulin shock. She hoped we might be willing to put some orange juice in our refrigerator just in case Charlie needed a boost. My dad was a "brittle diabetic." I was well aware of the early signs of insulin shock — the distracted look and the mood changes. I was more than happy to keep an eye on Charlie and time the recesses to meet his needs.

Charlie tried a good case, but the defendant's guilt was clear. Not once during that trial did Charlie complain of discomfort or concern for himself, although he did like the orange juice during the breaks. During a few of those breaks Charlie would talk about his interest in psychiatry and the law. I never appreciated the depth of that interest until Dr. Ciccone gave me Charlie's curriculum vitae. Charlie clearly understood that doctors and lawyers had a good deal of common ground. This lecture is dedicated to that view.

As you can imagine, I am called upon often to talk about the law and law-related subjects. But I must confess, I am a bit uneasy talking to a group predominantly made up of doctors. It's not that I don't like doctors — I do. I have a great personal physician and I have worked with some wonderful physicians over the years in handling cases involving medical issues. My mother worked as a Licensed Practical Nurse at Highland Hospital in Rochester for many years. I don't have any problem in talking to you about the law, but medicine — let alone psychiatry — that makes me a little nervous. As Dr. Ciccone pointed out, I have a curious public service interest. I drive ambulances instead of chasing them. I have come here to the Strong Emergency Room ("ER") on many occasions, and during those trips often observed the intersection of law and medicine in times of triumph and tragedy. I do so not as a judge or a lawyer involved with a case, but as a volunteer.

On the night before Chief Judge Kaye's Steinberg speech, I had been called out to drive our ambulance to a double fatality involving local teenagers. Despite the efforts of my dedicated crew, we knew the girl in our care, not much younger than my son, would not survive. By the time we reached the emergency room here at Strong, she was gone. A doctor came out to make the call and pronounce her dead. Initially, I did not look at that experience as speech material, but somehow the distance of time and self-healing lets me use it as an introductory example of how medicine and science are intertwined with law.

Medical science plays a key role in many legal determinations. The ER doctor who made the call on the young accident victim was performing both a legal and medical function in declaring her death. Another doctor, a pathologist, would later examine her and determine the cause of death — each function dictated by law — each appropriately delegated

to physicians. The law sorts out the legal ramifications of death while relying on medicine to analyze the facts necessary to make the determination. The law decides who is responsible both civilly and criminally for the death; medicine helps us understand the causes and assists the law in marshalling the facts surrounding that event.

Both disciplines share a common goal — the ultimate well-being of individuals and society as understood by each discipline. Both can exist in harmony. The law has embraced science in many areas and has long used it to help provide answers to serious factual questions. Judge Cardozo noted to the New York Academy of Medicine in 1928, "what divides and distracts us in the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts — the facts which generate the law . . . . We look then to you, to the students of mind and body, for the nutriment of fact, . . . that in many a trying hour will give vitality and vigor to the tissues of our law."[2]

The intersection of law and medical science that night in the ER was a good fit, but that is not always the case. Law does not always easily integrate new knowledge. It must first be proven to be reliable — we lawyers would say valid.[3] Moreover, scientific advances and their implications often present conflicting views. The law is an organic balancing of social and moral concerns that seeks to resolve disputes quickly, fairly and finally.

Medical science can outdistance law, it can change the paradigmatic calculus. It can muddy the analytical waters of legal relationships. Science need not always concern itself with the social implications of new knowledge, but the law must. As one writer noted, the interaction between law and science is "a ballet with its own nuances, rhythms, and delicate steps."[4]

Let's briefly focus on three areas of medical science — each presenting a different degree of "fit" with the law — each challenging lawyers, judges and social planners (a euphemism for politicians) to rethink legal principles and policies. To put the importance of our task today in context, one legal scholar has observed that the interaction between law and science is a most important area of inquiry "for it is at this

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[2] Benjamin N. Cardozo, What Medicine Can Do for Law, Address Before the NY Academy of Medicine (Nov. 1, 1928), *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, at 371, 373–74 (Margaret Hall ed. 1975).

[3] In New York, novel scientific evidence must be accepted as reliable within the scientific community generally. *See* People v. Wernick, 89 N.Y.2d 111, 115 (1996); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). In federal courts, the *Frye* test has been superceded by the Federal Rules of Evidence, which permit scientific evidence if it aids the factfinder in understanding the evidence or determining a fact in issue. *See* Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

[4] Declan McCullagh, *Technology as Security*, 25 HARV. J.L. & PUB. POL'Y 129, 131 (2001).

point that law either becomes a tool for shaping the future or an obsolete inconvenience circumvented by increasing technological innovation."[5]

Let's begin with a look at an area where science and medical technology have outdistanced long-standing legal concepts — reproductive technology. In the last decade, in vitro fertilization has become commonplace. For example, my neighbor and her husband are blessed with a "dish" baby. Today, fertilized eggs are stored and sometimes shared. Now, fathers can come from a sperm bank and large mammals have even been cloned.

Who owns reproductive material in the event of death or divorce? Is genetic material property? Four years ago, my Court confronted these issues.[6] Mr. and Mrs. Kass had stored a number of "pre-zygotes" as part of their regimen to make a baby.[7] When love waned, Ms. Kass wanted to take control of the eggs[8] — she saw it as her last chance at motherhood. Mr. Kass had other ideas; he was not interested in becoming a father with his now former wife.[9] If Ms. Kass prevailed, who would be the father of the child, and would that "father" be required to support the child? Fortunately, the clinic that worked with Mr. and Mrs. Kass had a thoughtful and thorough agreement that resolved the case.[10] While some legislatures have enacted statutes dealing with the problem, most have not.[11]

Current reproductive technology also permits the possibility of a birth long after the death of the biological parent. The laws of inheritance traditionally account for posthumous children by creating a presumption of paternity when the child is born to a spouse within a prescribed time after the father's death. Today, a child born years after a

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[5] James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743, 744 (1998).

[6] *See* Kass v. Kass, 91 N.Y.2d 554 (1998).

[7] *Id.* at 559.

[8] *Id.* at 560.

[9] *Id.* (describing the husband's opposition to any further attempts by Mrs. Kass to achieve pregnancy using the pre-zygotes).

[10] *Id.* at 564–65 (holding the case was not of a constitutional dimension and agreements between gamete donors should generally be presumed valid and binding).

[11] *See id.* at 562–63 (citing FLA. STAT. ANN. § 742.17 (West 2002)) (stating that couples must execute written agreements providing for disposition of stored embryos in the event of death, divorce or other unforeseen circumstances); N.H. REV. STAT. ANN. §§ 168–B:13 to –B:15, –B:18 (2002) (requiring couples to undergo medical exams and counseling, and imposing a fourteen-day limit for maintenance of noncryo-preserved, ex utero pre-zygotes); LA. REV. STAT. ANN. §§ 9:121–9:133 (West 2000) (considering pre-zygotes a "juridical person" that must be implanted; it is not the property of donors or physicians to be owned and cannot be intentionally destroyed). New York is not among the states having legislatively addressed the issue. Proposed legislation to require written directives for the disposition of embryos has consistently died in committee. *See, e.g.*, S.B. 5815, 221st Leg. (N.Y. 1997); S.B. 1120, 222d Leg. (N.Y. 1999); S.B. 671, 224th Leg. (N.Y. 2001).

parent's death — no longer an impossibility — could be problematic, especially if it is clear that the decedent parent intended to create a child posthumously.[12]

The permutations and problems are endless. Human experience has a unique way of creating an exception to every rule as soon as it is formulated. What seems clear is that we have separated the biological function of procreation from the social/legal model of a procreative family. Biological parenthood and its attendant responsibilities can no longer provide the only framework in which to analyze human interaction in this area. We have overcome the limitations of our bodies, not through alternative socio-legal practices such as adoption, but through medical techniques that do not easily fit the legal molds that have worked so well in the past.[13]

One solution that has been suggested would be to retain existing rules for children produced by traditional methods, but define parenthood when created by non-traditional means as the person or persons who *intended* to take parental responsibility when the events that produced the child took place.[14] States might also require a written declaration of parental intent be filed prior to any medically-assisted reproduction.[15] Measuring one's intent is always an interesting exercise. Memories fade or change as time dulls the ardor and the clear light of parenthood dampens one's enthusiasm. The legal and public policy implications of reproductive technology are just beginning to come into focus.

Let's move on and examine a second intersection of law and medicine that portrays the benefits that result when medical science works in tandem with legal process. Faye was raped and sodomized in

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12 *See generally* Bailey, *supra* note 5. Only one high court has considered the question of posthumously-conceived genetic children's inheritance rights under state intestacy laws. See *Woodward v. Comm'r of Soc. Sec.*, 435 Mass. 536 (2002), in which the Massachusetts Supreme Court held that, under specific circumstances, children conceived after a parent's death are entitled to inheritance rights. The case involved twins conceived from frozen sperm and born two years after the father's death from leukemia. The court stated the surviving parent or legal representative must establish a genetic relationship between the child and the decedent and prove that the decedent affirmatively consented to the posthumous conception and the support of any resulting child. *Id.* at 554.

13 See, for example, *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410 (1998), in which one California court was asked to address child support issues in a case where a genetically unrelated child was conceived during the parties' marriage through a donor egg, donor sperm and a surrogate mother. The appellate court wisely rejected the trial court's astounding conclusion that the child had no lawful parents. *Id.*

14 *See* David Friedman, *Does Technology Require New Law?*, 25 HARV. J.L. & PUB. POL'Y 71, 72 (2001). Some courts have used this approach. For example, in *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993), the California Supreme Court held that "she who intended to procreate the child — that is, she who intended to bring about the birth of a child that she intended to raise as her own — is the natural mother under California law.")

15 Friedman, *supra* note 14, at 77 n.20.

her home in Virginia in July of 1985.[16] The day after the attack, Faye looked at photographs, including one of Walter Snyder, a neighbor. She immediately dropped his photo in the discard pile. She was unable to identify her assailant from any other photos. Two weeks after the attack, however, Faye saw Walter washing his car across the street and suddenly recognized him as "the one."[17]

Walter was charged and convicted, but continued to assert his innocence. His family struggled to seek his release. After DNA testing became available, Walter was excluded as the perpetrator and was ultimately granted clemency. Despite the certainty of his exclusion, Faye continued to insist that Walter was her attacker.[18] This case and others underscore the power of DNA evidence and the law's integration of that technology into the factfinding process.

DNA technology and profiling have become an essential component of the criminal justice system. The law has embraced the technology because it gives hard, objective facts that are reliable and valid. If the DNA does not fit, you must acquit. Many criminal justice experts feel that DNA is the single most significant tool since the fingerprint.[19] In less than a decade, DNA evidence had become widely used and accepted by police, prosecutors, defense counsel and a majority of courts.[20] My court, the New York Court of Appeals, approved the use of DNA profiling evidence in 1994 in *People v. George Wesley*[21] — no relation! Although the Court at that time was not unanimous, if *Wesley* were decided today there is no doubt that we would agree with the National Research Council's conclusion that "'[t]he state of the profiling technology and the methods for estimating frequencies and related statistics have progressed to the point where the admissibility of properly collected and

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16 BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 59–100 (2001).

17 *Id.*

18 This case also highlights the current debate on the reliability of eyewitness testimony. *See, e.g.*, People v. Lee, 96 N.Y.2d 157 (2001); Ralph Norman Haber, *Experiencing, Remembering and Reporting Events*, 6 PSYCHOL. PUB. POL'Y & L. 1057 (2000); Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013 (1995).

19 NAT'L INST. FOR JUSTICE, U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 4 (1996), *available at* http://www.ojp.usdoj.gov/nij/for96.htm. Traditional fingerprinting was quickly seen and accepted as enormously powerful, persuasive and virtually certain proof. Interestingly, however, one legal scholar argues the technique received only minimal scrutiny at the time and that challenges to DNA profiling, in connection with doctrinal shifts in the standards governing the admissibility of expert evidence, have now opened the door to new challenges to traditional fingerprint evidence threatening to destabilize that form of proof. *See* Jennifer Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 BROOK. L. REV. 13 (2001).

20 NAT'L INST. FOR JUSTICE, *supra* note 19, at 4.

21 83 N.Y.2d 417 (1994).

analyzed data should not be in doubt.'"[22] Some states have such confidence in this data that they have eliminated the availability of the statute of limitations defense in sex offense and other cases when DNA is available.[23]

The impact of DNA technology is not always as dramatic as setting an innocent defendant free. Almost thirty years ago when I first started practicing law I developed a peculiar specialty — paternity proceedings. At that time blood type testing could only *eliminate* a prospective father from the allegations of paternity. The trials, to be frank, were dicey. The proof was all about access and inclination. The "he said/she said" nature of the proof presented a formidable obstacle to many mothers who sought paternity determinations as part of an attempt to procure child support from reluctant fathers. The Supreme Court of the United States and my Court recognized the difficult nature of these cases.[24]

DNA has changed all that. Paternity determinations no longer hinge on the sordid details of a love affair gone wrong, but rather on statistical probabilities approaching 99.9% that indeed defendant is *the father.* To be honest, it took some of the fun out of my little area of expertise. In my view, it eliminated the need to settle cases through child support agreements that allow putative fathers to disinherit their children by avoiding paternity determinations. The technology has literally reversed the constitutional analysis.

But with the certainty of parenthood, another legal difficulty arises. Many dads are learning that indeed they are not the biological parent of a child born during a marriage or relationship. Who is a parent to a child? The biological progenitor or the fellow who has loved the child as his own because he always thought it was so? A number of fathers' groups have seized on the DNA technology to demand new legislation allowing a father absolution from supporting a child that is not his biological off-

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22 NAT'L INST. FOR JUSTICE, *supra* note 19, at 6 (quoting NAT'L RESEARCH COUNCIL, NAT'L ACAD. OF SCIENCES, THE EVALUATION OF FORENSIC DNA EVIDENCE (prepublication copy) 2:14 [1996]).

23 *See* Panel Two, *Criminal Law and DNA Science: Balancing Societal Interests and Civil Liberties*, 51 AM. U. L. REV. 401, 409 n.12 (2002); *see also* N.J. STAT. ANN. § 2C:1-6(c) (West 2002) (holding that when the prosecution is supported by physical evidence not identifying the actor by means of DNA evidence, the limitations period does not start to run until the State is in possession of both the physical evidence and the DNA evidence necessary to establish the identification of the actor by means of comparison); TEX. CRIM. PROC. CODE ANN. § 12.01(1)(B) (Vernon 2002) (providing no limitation period for felony sexual assaults if during investigation, biological matter is collected and subjected to forensic DNA testing and results show that the sample does not match either the victim or any other person whose identity is readily ascertained).

24 *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91, 97 (1982); Bacon v. Bacon, 46 N.Y.2d 477, 480 (1979).

spring despite the "father's" long-standing view otherwise.[25] Not a ringing endorsement of fathers, I might add. State legislatures and courts across the country will now have to sort that out. In this instance, medical technology has peeled away the cover of little secrets that were often presumed, but never provable.

DNA technology produces a nice tight set of numbers. And while the technology of DNA profiling raises a number of legal and social issues,[26] there is no great tension between the technology itself and the legal process. That is not the case, however, in a third area of intersection between the law and medicine that I suspect is of interest to many of you here today.

Evidence about an individual's mental health presents an interesting contrast to the success of DNA evidence. When judges and juries seek to render legal/factual conclusions about someone's mental health, they generally are not presented with clear-cut descriptions of objective facts. Rather, the proof is often overlaid with difficult interpretations of subtle, subjective evaluations. As one commentator has noted, research indicates that "mental health professionals . . . may disagree more than half the time even on major diagnostic categories such as schizophrenia and organic brain syndrome."[27]

Further, "[c]laims about past mental states relevant to exculpatory criminal law doctrines are very difficult to confirm or disprove scientifically. . . . [O]ur ability to know what was going on in someone's mind at the time of a criminal act is severely limited," requiring "an assessment of the strength of beliefs or urges."[28] Even the American Medical Association has expressed concern about the findings of mental health profes-

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25 Those challenging state child support laws argue that if DNA testing can be used to exonerate wrongfully convicted death-row inmates, it should be able to release men from child support orders entered under a false premise of paternity. A few states have enacted, or are considering enacting, legislation allowing release from paying child support in such cases when paternity is disproved. *See Non-fathers Fight Child Support Laws*, ROCHESTER DEMOCRAT & CHRONICLE, June 17, 2002, at 2A.

26 DNA technology has spun off a number of concerns with regard to criminal justice issues, the creation and maintenance of DNA databanks, the implications for insurance law, eugenics and privacy/discrimination issues in the workplace. *See, e.g.*, Glendora Hughes, *Genetically Incorrect: Genetic Privacy and Protection in the Workplace*, 35 MD. B.J. 34 (Jan./Feb. 2002); Jerry Elmer, *Human Genomics: Toward a New Paradigm for Equal-Protection Jurisprudence, Part II*, 50 R.I. B.J. 11 (May/June 2002); Samuel C. Seiden et al., *The Physician as Gatekeeper to the Use of Genetic Information in the Criminal Justice System*, 30 J.L. MED. & ETHICS 88 (Spring 2002); David H. Kaye, *Two Fallacies About DNA Data Banks for Law Enforcement*, 67 BROOK. L. REV. 179 (2001); Mark A. Rothstein et al., *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127 (2001); Edward J. Imwinkelried et al., *DNA Typing: Emerging or Neglected Issues*, 76 WASH. L. REV. 413 (2001).

27 Christopher Slobogin, *Doubts About* Daubert*: Psychiatric Anecdata as a Case Study*, 57 WASH. & LEE L. REV. 919, 920 (2000).

28 *Id.* at 927–28.

sionals being used as conclusive proof of this ultimate factual question. It noted, "'it is impossible for psychiatrists to determine whether a mental impairment has affected the defendant's capacity for voluntary choice, or caused him to commit the particular act in question.'"[29]

Nevertheless, the medical/scientific view of human behavior does shape the legal view of human conduct to a large extent. Subjective mental states and mental/developmental deficiencies are relevant in the criminal law, both in determining blameworthiness at trial and as mitigating factors at sentencing.[30] For example, under the traditional insanity defense,[31] if a defendant is acquitted by reason of insanity, the state can continue to confine him legitimately as long as he continues to be both dangerous and mentally ill.[32]

In response to data indicating a high degree of recidivism among sex offenders and the public's understandable ever-growing concern about child abduction and pedophilia, some states have enacted statutes that require involuntary commitment of those convicted of certain violent sexual crimes after completion of the criminal sentence if the offender suffers from a mental abnormality and is likely to engage in repeat acts of sexual violence as a result.[33] As of last year, seventeen states had enacted this type of legislation.[34]

In 1984, Leroy Hendricks was convicted of taking "indecent liberties" with two young boys.[35] In 1994, shortly before his scheduled re-

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29 Georgia Smith Hamilton, *The Blurry Line Between "Mad" and "Bad": Is "Lack-of-Control" a Workable Standard for Sexually Violent Predators?*, 36 U. RICH. L. REV. 481, 502 (2002) (quoting Bd. of Trustees Am. Med. Ass'n, *Insanity Defense in Criminal Trials and Limitation of Psychiatric Testimony*, 251 JAMA 2967, 2978 [1984]).

30 *See* Slobogin, *supra* note 27, at 925.

31 *See, e.g.*, N.Y. PENAL LAW § 40.15 (1998) (explaining lack of criminal responsibility to mean that "at the time of such conduct, as a result of mental disease or defect, [the defendant] lacked substantial capacity to know or appreciate either: 1. The nature and consequences of such conduct; or 2. That such conduct was wrong").

32 *See* Jones v. United States, 463 U.S. 354 (1982); Foucha v. Louisiana, 504 U.S. 71 (1991); *In re* David B., 97 N.Y.2d 267, 278–79 (2002). The definition of insanity and what constitutes mental illness has been the subject of much debate, particularly because the prevailing legal standard for the insanity defense was established in the first instance by courts and not the medical profession, beginning in 1843 in England with the *M'Naghten* case. *See* Michael Edmund O'Neill, *Stalking the Mark of Cain*, 25 HARV. J.L. & PUB. POL'Y 31, 34 (2001); Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1208–14 (2000); *see also* M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843) (creating a rule that excused a person who either did not know "the nature and quality of the act he was doing, or if he did know it . . . he did not know he was doing what was wrong").

33 *See, e.g.*, KAN. STAT. ANN. §§ 59-29a01 (1994).

34 *See* John W. Parry, *Shrinking Civil Rights of Alleged Sexually Violent Predators*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 318, 321 (May/June 2001) (listing state statutes authorizing involuntary commitment for sexually violent persons; New York is not one of those states).

35 Kansas v. Hendricks, 521 U.S. 346, 353 (1997).

lease, the state of Kansas sought to have him civilly confined as a sexually violent predator.[36] Hendricks' own testimony at the retention trial revealed a disturbing pattern of repeated child sexual molestation and abuse, including his own stepchildren.[37] He explained he could not control his urge to molest children and the only sure way he could keep from doing so in the future was "to die."[38] The state's psychologist testified that Hendricks suffered from pedophilia and was likely to commit future sexual offenses if not confined and that pedophilia qualified as a "mental abnormality" under the statute.[39] A psychiatrist called by Hendricks, however, stated it was not possible to predict with any degree of accuracy the future dangerousness of a sex offender.[40] The jury found beyond a reasonable doubt that Hendricks was a sexually violent predator and he was retained in a secure facility.[41]

In reviewing Hendricks' case, the United States Supreme Court held the statute's requirements of dangerousness and mental abnormality satisfied due process, rejecting Hendricks' assertion that a specific finding of "mental illness," as opposed to a "mental abnormality," was required.[42] The Court stated that legislatures need not adopt specific medical terms in drafting civil commitment laws and that traditionally legislatures have been given the task of "defining terms of a medical nature that have legal significance."[43] The Court further noted that although legal definitions often do not fit precisely within the definitions employed by the medical community, they need not mirror them.[44] Ultimately, the Court held that the Act's criteria, including a finding of mental abnormality, properly limited confinement to "those who suffer from a volitional impairment rendering them dangerous beyond their control",[45] and that the evidence adduced at the trial established proof of Hendricks' uncontrollable behavior.

In 1993, Michael Crane exposed himself to a tanning salon attendant and a half-hour later to a video store clerk.[46] He grabbed the clerk by the neck, demanded oral sex, and then threatened to rape her.[47] After Crane pleaded guilty, the state of Kansas sought a commitment under its

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36 *Id.* at 354.
37 *Id.*
38 *Id.* at 355.
39 *Id.* at 356 n.2.
40 *Id.*
41 *Id.*
42 *Id.* at 359–60.
43 *Id.* at 359.
44 *Id.*
45 *Id.* at 358.
46 Kansas v. Crane, 534 U.S. 407 (2002).
47 *Id.*

Act.[48] The state's psychiatric experts diagnosed Crane as suffering from exhibitionism and antisocial personality disorder.[49] Crane argued that the personality disorder diagnosis did not lead to the conclusion that he suffered from a volitional impairment which resulted in his inability to control his behavior.[50] On appeal, the United States Supreme Court clarified its decision in *Hendricks* by rejecting a strict volitional control requirement.[51] It held that a finding of complete or total lack of control over one's behavior was not necessary; all that was required was some finding of a lack of control — that is, "proof of serious difficulty in controlling behavior . . . in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself."[52]

These cases present a striking contrast to the judicial use of DNA. Not only is the problem of conflicting expert medical evidence ever present, the terms employed in the statute — for example, "mental abnormality" — do not have a medical genesis.[53] Unlike other commitment statutes, which require a specifically diagnosed mental illness,[54] the requisite mental condition for sexual predators is a fact-based inquiry that is ultimately open to judicial interpretation.[55]

Some within the medical and legal communities have also argued that the required causal link from the presence of a mental abnormality to the "likelihood" of future dangerousness is a difficult prediction.[56] They maintain that the standard of dangerousness should be revised to require only an assessment of current risk posed, not to predict propensities for future dangerousness,[57] which may be beyond the scope of a mental health professional's expertise.[58] Physicians — experts in the field — are not of one voice on causation or predictions of dangerousness.

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48 *See id.* at 411.

49 *See id.*

50 *See id.*

51 *See id.* at 411–13.

52 *Id.* at 413.

53 *See* Hamilton, *supra* note 29, at 491.

54 *See, e.g.*, N.Y. CRIM. PROC. LAW § 330.20(1)(c), (d) (McKinney's 1994); *see also* N.Y. MENTAL HYG. LAW §§ 9.27(a), 9.37(a) (McKinney 2002); *In re* David B., 97 N.Y.2d 267 (2002).

55 *See* Parry, *supra* note 34, at 318.

56 *See id.* at 319. In terms of sexually violent predator statutes, one researcher reported "there have been no reported cases successfully challenging the existence of such a link [from the presence of a mental abnormality to future dangerousness] once any of a wide range of mental conditions has been established." *Id.* at 320.

57 *See, e.g.*, KAN. STAT. ANN. § 59-29a02(c) (2002) (describing a person who is "likely to engage in repeat acts of sexual violence" under the Kansas Sexually Violent Predator statute as a one whose "propensity to commit" such acts is "of such a degree as to pose a menace to the health and safety of others").

58 *See* Hamilton, *supra* note 29, at 505–06 ("[T]he American Psychiatric Association states that any 'psychiatric prediction that someone like Crane presents a near-term threat of

The determination of dangerousness under traditional commitment statutes is different. In a recent Court of Appeals case, *Matter of David B.*, we examined the New York standard for the civil retention of insanity acquittees.[59] The individual must suffer from a mental illness and presently constitute a physical danger to self or others or have such impaired judgment that he or she is unable to understand the need for essential care and treatment.[60] The standards are similar under our involuntary civil commitment statutes.[61] The likelihood of harm in those cases includes an impaired understanding of the necessity for immediate care and treatment of a mental illness[62] or a substantial risk of physical harm that has already manifested itself in threats or other actual, specific violent conduct towards oneself or others.[63] Similarly, New York's Sex Offender Registration Act, known as Megan's Law,[64] also attempts a calibrated method of current risk assessment for sex offenders.[65]

The new statutes create a tension that produces a curious result from the standpoint of traditional criminal culpability. An offender can first be subject to a criminal conviction, signifying that he deserved punishment for blameworthy conduct because his conduct was a product of his own choosing. Thereafter, however, upon a finding that an offender has a mental abnormality that makes it likely he will not be able to control his conduct in the future, the state may civilly commit him. Taking Hendricks as an example, if he were unable to control his conduct, as determined after the commitment hearing, was he criminally responsible in the initial proceeding?[66] It seems that the two statutes, one allowing the conviction and the other requiring commitment, envision different kinds of control. Criminal liability is absolved only when you cannot appreciate the "wrongfulness" of your acts, whereas civil commitment is premised on the likelihood that you will act even though you know the act to be wrong.

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serious harm is inherently uncertain.'"); *see also* Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment After* Kansas v. Hendricks, 25 AM. J.L. & MED. 117, 143 (1999) (indicating one element of the civil commitment standard should be present dangerousness).

59 *In re* David B., 97 N.Y.2d 267 (2002).

60 *See id.* at 278–79; *see also* N.Y. CRIM. PROC. § 330.20 (McKinney 1994).

61 *See* N.Y. MENTAL HYG. Law §§ 9.27, 9.37 (McKinney 2002).

62 *See id.* §§ 9.27(a), 9.01.

63 *See id.* at §§ 9.37(a), 9.01.

64 *See* N.Y. CORRECT. §168 (McKinney 2002).

65 *See id.* at § 168–l(5). In assessing the risk of a repeat offense by a convicted sex offender, the statutory Board of Examiners considers several factors in addition to whether the offender has a mental abnormality, including detailed criminal history, counseling or treatment received or to be received, the response to treatment, and the offender's age and physical condition, among others. *Id.*

66 *See* Falk, *supra* note 58, at 119–20.

What does all of this tell us? That psychiatric medicine informs legal determinations of mental health issues to a great extent, but the law/medicine relationship in this area is often strained. We humans are an interesting species; the diseases of our minds are subtle and complex. Should we expect the problems those diseases create to be any less? At the end of the day, we must recognize what separates us and what binds us. Doctors diagnose and treat patients; courts assess conduct and determine its implications for the individual and society.[67] In performing our respective functions, we are often cast together whether we like it or not.

Henry is a young African-American who clearly has a number of issues in his life. His physical appearance in court — head down, voice at a whisper — raises questions in my mind. Does he hear me? Does he understand what I am saying? Henry has been institutionalized before for psychotic episodes. Now he is living alone and when he does not go to clinic and take his medicine, he gets into trouble.

Henry steals lawn mowers and sells them to buy crack. His latest lawn mower campaign has brought him before me on a burglary charge. Henry entered an attached garage, a major tactical mistake because an attached garage under the law is considered part of a residence. Now Henry is charged with a violent felony.

What am I to do with Henry? In 1993, when Henry was before me, my options were limited; put him in jail or risk another crime spree because probation supervision was not structured to address Henry's problems.

Today, under the leadership of our Chief Judge, a new model of legal/medical cooperation is being tested in Brooklyn. The Mental Health Court seeks to address the underlying mental health issues of a number of criminal defendants, while processing their cases.[68] Modeled on the highly successful drug courts and domestic violence courts, this court seeks to bring the judicial process to focus on the defendant's mental health needs and to act as an aggressive clearinghouse for a number of mental health services. The hope is that the court will be able to intervene and stop the cycle of crime and institutionalization while addressing the defendant's illness and its often interrelated dependencies on

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67 Pauline Newman, *Law and Science: The Testing of Justice*, 57 N.Y.U. ANN. SURV. AM. LAW 419, 427 (2000) ("Ultimately, law is revered not for its ability to ferret out objective truth, but for its reflection of societal concerns, its powerful moral underpinnings, its sustenance of the ideal of justice").

68 *See* Center for Court Innovation, *Brooklyn Mental Health Court Synopsis*, *at* www.courtinnovation.org/demo_mhealth.html (last visited March 4, 2003); *see also* Elizabeth Stull, *Brooklyn Mental Health Court Opens: A New Part in the Criminal Justice System*, BROOKLYN DAILY BULL., Mar. 27, 2002, at 12.

drugs and alcohol.[69] There are skeptics who maintain mental illness is just that, an illness. Drug courts and domestic abuse courts address volitional conduct even though it has a mental health component. Will the mental health court be able to utilize its legitimacy and authority to alter the behavior of defendants with mental health issues? The jury is still out.

But what is startling is that the court steps beyond its adjudicative responsibilities to act as a one-stop center where one's legal problems and mental health concerns are addressed together. It recognizes that your job and my job have common ground, treating Henry and reducing crime while assessing social responsibility for antisocial conduct. There are a lot of Henrys out there.

It was the Henrys of the world that fascinated Charles Steinberg. He knew that law and medicine each had a vital role in his client's well being. His was a world not just of statutes and cases, but of people and the problems they faced. He did his best to merge the two for the benefit of those who asked for his help. It is in his honor that we gather here today, we will continue to honor him by realizing that law and medical science have much to give to each other.

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69 *See* DEREK DENCKLA & GREG BERMAN, *Rethinking the Revolving Door: A Look at Mental Illness in the Courts* (2001), *at* http://www.courtinnovation.org/pdf/mental_health.pdf (last visited March 4, 2003).