what to do with the "insane" who are not mentally ill. Obviously, such patients are more abundant in jurisdictions where insanity acquittals more routinely result from plea agreements rather than trials, so that some of the insane were not even insane at the time of the crime. Jason Weed is not the only insanity acquittee nationwide being "treated" for a "condition" no one can identify. In 18 months, his treaters will have to return to court and opine on whether the "treatment" is "working."

More broadly, this case spotlights, once again, the uneasy meshing of law and psychiatry. By operation of the statutory standard for commitment ("present mental illness"), the forensic experts, assuming they were correct in excluding malingering, had little to contribute to this case: Weed may have a mental illness but we do not know what, and he may be dangerous in the future but we do not know how or when. At the same time, confined by their forensic role, the experts made no mention, so far as the court's opinion suggests, of what, in a clinical consultation, would be at or near the top of the suspected etiologies. This, if not malingered, was a sudden manic-psychotic episode in a 27-year-old male with no psychiatric prodrome, which promptly remitted, with no further symptoms for 17 solid months afterward.

Surely, this could be Bipolar Disorder, unmasked by the stress and possible sleep deprivation of Weed's "participation in an exhaustive self-awareness program the week prior to the shooting. . . ." Alternatively, it seems at least plausible that "Weed's previous steroid use," was not all that "previous" (389 F.3d at 1064).

Courtroom rules and custom spurn clinical intuition based on experience, in favor of concretely defensible "reasonable medical certainty." Moreover, medicine (and especially psychiatry) answers questions as the answers come, whereas the law commands an answer from psychiatrists within 40 days and thereafter every 18 months.

Leaving the court in the dark about these plausible clinical scenarios—Bipolar Disorder or ongoing steroid dabbling—could well lead to inadequate probation terms when, after a decent interval, Weed is inevitably released, possibly without provision for the potentially helpful elements of mood-stabilizing medication and prohibition of steroid possession or use.

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Psychotherapist-Patient Privilege

Licensing Board Investigating Social Worker's Alleged Misconduct May Inspect Treatment Records

In *Jane Doe et al. v. Maryland Board of Social Work Examiners*, 862 A.2d 996 (Md. 2004), the Maryland Court of Appeals weighed the authority of a professional licensing board against statutory privilege and confidentiality protections and the federal constitutional right of privacy afforded the clients of a clinician under investigation. The court's resolution is murky, owing to an unelucidated factual disagreement between the majority and the dissent.

Facts of the Case

The Maryland Board of Social Work Examiners (Board) received a credible complaint that Ms. F., a licensed social worker, had unlawfully failed to report her client John Doe's admissions during therapy of child abuse. The Board issued a subpoena *duces tecum* to Ms. F. for her treatment records, pursuant to its statutory investigative authority.

Here, the five-judge majority and the two-judge dissent part company as to the facts. The majority opinion clearly states that the subpoena sought the charts only of John Doe and his wife Jane Doe, also a client of Ms. F. The dissent flatly disagrees, reading the subpoena as calling for the charts of all of Ms. F.'s clients. (Curiously, neither side simply quotes the subpoena itself, which presumably would settle the issue.)

Ms. F., joined by John and Jane Doe, moved in the Baltimore city circuit court to quash the subpoena, which was denied, and they appealed. In the meantime, Ms. F. settled the Board's complaint, admitting that she "knowingly failed to report suspected child abuse" and related transgressions (862 A.2d at 1012), and accepting a license suspension of one year. This did not moot the issue of her records,

however, as the board still sought them in pursuance of a specific provision in the settlement agreement:

> [I]f the Board is able to obtain [the] records, the Board will not be precluded from taking further action involving Ms. F.'s license if [the] records provide probable cause to support violations in addition to those investigated and pursued in these proceedings [862 A.2d at 1012].

This language appears to support the dissent's view that the Board was on "a fishing expedition" and "a witch hunt into the emotional lives" (862 A.2d at 1014), "of *all* treatment files for *all* of Ms. F.'s clients (862 A.2d at 1017; emphasis in original).

Ruling and Reasoning

Following an intermediate excursion through the Court of Special Appeals, the Maryland Court of Appeals affirmed the judgment of the Baltimore city circuit court, declaring:

> If. . .a privilege or privacy right were to take precedence over the Board's interest in investigating allegations that one of its licensees was acting in violation of his or her professional obligations, the lack of access to client treatment records could impede a meaningful investigation into that conduct and discovery of a further basis for disciplinary action [862 A.2d at 1013].

As to the privilege and confidentiality claims, the court cited no less than four separate Maryland statutes clearly establishing an investigation of suspected child abuse as an exception to both privilege and confidentiality. In an exercise of judicial overkill, the court also cited statutory and case law from Ohio and Rhode Island that parallels Maryland's.

The federal constitutional privacy argument, based on *Whalen v. Roe*, 429 U.S. 589 (1977), was more substantial. *Whalen* established two kinds of privacy interests: "One is the individual interest in avoiding disclosure of certain personal matters, and another is the interest in independence in making certain kinds of important decisions" (429 U.S. at 600). Medical records, particularly mental health records, clearly fall within the first of these interests.

Under Maryland law, strict scrutiny applies to this right. That is, government action limiting it, such as the subpoena in this case, is permissible only if "justified by a 'compelling state interest' " (862 A.2d at 1008). In turn, this "compelling state interest" evaluation is *sui generis* (case specific). *U.S. v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980), enunciates the pivotal considerations:

> . . .the type of record requested, the information it does or might contain, the potential for harm in subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access [862 A.2d at 1014, dissenting opinion].

Judged by these factors, the majority of the court easily concluded that an official investigation into whether a social worker unlawfully suppressed evidence of child molestation constituted a "compelling state interest."

Dissent

The two dissenting judges agreed that an investigation of nondisclosure of child abuse clearly is an exception to statutory privilege and confidentiality and that compulsory disclosure of patient records in such a situation does not traduce a constitutional right of privacy.

They parted company with the majority only, but crucially, as to the breadth of the subpoena that the court upheld, which they read to reach the records of all of Ms. F.'s patients, noting that no "indicia of systemic wrongdoing by Ms. F." existed, only the alleged failure to report statements by one particular client. As such, the dissent forcefully protested an

> . . .intru[sion] on the sensitive and highly personal information of *all* people who sought treatment by [Ms. F.]. . .[based on] mere interest by the Board in the files. . .of people who have not been notified nor been given the opportunity to be heard about the disclosure of their mental health records. . ." [862 A.2d at 1014, emphasis in original].

Discussion

The court slightly bobbled the issue of privilege by remarking that privilege "affords social workers and their clients similar protections. . ." (862 A.2d at 1014). In fact, of course, privilege accrues only to the client, who may freely waive it, irrespective of the wishes of the therapist. A comparison of the resulting rhetoric in this case is interesting. The majority, consistent with its misconception that privilege exists to shield the psychotherapist as well as the patient, emphasized the regulation of psychotherapy:

> [T]here may exist other violations in addition to those investigated and pursued by the Board. The Board's desire for these records is. . .an understandable need by the Board to have all the relevant facts regarding Ms. F.'s conduct as a licensed social worker before it so that it can best decide if additional discipline is proper. . . [862 A.2d at 1012, interior quotation marks omitted].

The dissent, by contrast, appears more attentive to the healing potential of psychotherapy, and its fragility:

> Without something more than mere unsupported suspicion, disclosure would result in chilling the free discourse required between any treatment provider and her clients and deter clients from seeking help from any other treatment provider. It could irreparably harm the relationship and deprive all such clients of much needed counseling and services (862 A.2d at 1015).

Perhaps the dispute within the court is not solely factual but, more fundamentally, as with the judiciary generally, an underlying philosophical divide over the nature and value of mental health care.

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Court-Ordered Psychotherapy and the Privilege Against Self-Incrimination

Confessions of Past Criminal Activity, Made During Obligatory Inpatient Counseling Pursuant to a Sex Offender Sentence, Are Inadmissible to Prosecute Such Activity

In *Welch v. Kentucky*, 149 S.W.3d 407 (Ky. 2004), the Kentucky Supreme Court held, by a four-to-three margin, that admissions of past criminal acts made by an adjudicated juvenile sex offender during his court-ordered inpatient psychiatric treatment are inadmissible for the prosecution of the acts.

Facts of the Case

Following adjudication as a juvenile sex offender, Christopher Welch was ordered to undergo inpatient sex offender treatment at a state facility.

According to the majority opinion, the treatment is "not voluntary" because, "by court order [participants, including Welch] must follow the rules and procedures of the program, [which] uses group therapy and group dynamics as a means to further the goals of the program. Participants are strongly encouraged, by counselors and other group members, to admit and disclose all prior sexual misconduct." Further, "participation in this part of the program" is "essential to progress toward completion of the program as ordered by the court," and "[p]rogress in the program is required to obtain and keep certain privileges during treatment" (149 S.W.2d at 409). Moreover, though the majority does not say so, the dissent implies (as Welch would reasonably have assumed) that noncooperation would lengthen his confinement.

No notice or warnings were given, before or during any of the treatment sessions, that criminal charges could ensue from any statements made. "During the treatment program, the counselors intensely questioned [Welch], not only about the offense that resulted in the commitment, but also about any other sexual misconduct" (149 S.W.2d at 410). Whether in group or individually (the opinion does not make clear), Welch "disclosed to his counselor several uncharged [and previously unknown] acts of sexual misconduct" (149 S.W.2d at 409), on an identified five-year-old child. Police were promptly notified, confirmed the acts by interviewing the victim, and came to the facility to interrogate Welch, who confessed after a *Miranda* warning.

Charged as an adult on the newly discovered offenses, Welch moved unsuccessfully to have his statements in therapy suppressed, along with his Mirandized confession and the victim's identity and testimony, as "fruit of the poisonous tree " (*Wong Sun v. United States*, 371 U.S. 471 (1963)). He pled guilty conditionally, preserving his right to appeal and was sentenced to 20 years in prison.

Ruling

The court held that Welch's statements emanated from what amounted to a "custodial interrogation" without the requisite warnings and therefore were inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966). His subsequent confession to police and the victim's testimony were thus "fruit of the poisonous tree" under *Wong Sun*. The conviction was reversed.

Reasoning

The court persuasively labeled Welch's admissions in group therapy, under the circumstances of this case, coerced. This does not establish the group therapy as "custodial interrogation" *per se*, requiring *Miranda* warnings, but certainly court-ordered treatment that leads, without some kind of warning, to 20 years in prison raises a question of fundamental fairness under the Due Process clause.