

The expanded scope of liability created by *Moses* is not limited to harm caused by psychiatric patients. Hospital liability would similarly create a factual issue if, for example, a patient with a seizure disorder was seemingly stabilized in the hospital and then 10 days later had a seizure while driving and killed a bystander. In this example, as in *Moses*, there may well be opposing testimony on the liability question.

Second, the circuit court's holding that the Act requires a hospital to stabilize a patient, as opposed to simply admitting and treating, places a burden on physicians to predict accurately the prognosis of a patient and even more, the patient's future dangerousness. After all, some might argue that a patient has not really been stabilized if he decompensates soon after discharge from the hospital. It is arguably easier for physicians to approximate stability for patients with medical problems, where objective laboratory and imaging studies provide some measure of medical status. A patient admitted for seizures might be discharged after the EEG is normal and/or there have been no seizures for some time. However, there are no such objective data for psychiatric patients. Psychiatrists must rely on patient reports of mood and thought content. Sometimes, the report to a psychiatrist is colored by the patient's motive to be discharged from the hospital sooner than might be psychiatrically appropriate. Nonetheless, patients are not always adherent to the medications that stabilized them in the hospital, and sometimes medical and psychiatric problems recur even when patients are adherent. If such a patient harms another person 10 days after discharge from the hospital, secondary to recurrence of medical illness or psychosis while off of medication, should this make the hospital liable? At what point should psychiatrists in hospitals feel comfortable, legally, that their patients are not at risk for further deterioration? Should the report of a family member who claims to be afraid of a patient change a psychiatrist's decision to discharge a patient?

In short, psychiatric patients have less measurable and more unpredictable courses during and following their hospital stays, which puts psychiatric hospitals at higher risk for liability under the court's interpretation of EMTALA. Psychiatry as a field has generally been modest in describing its ability to predict future dangerousness, and empirical research justifies such modesty. Yet, in cases such as *Moses*, some plaintiffs' psychiatric experts engage in post-

diction and are not so modest. This post-diction may have the consequence of imposing undue liabilities upon inpatient psychiatric practice.

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Scope of Juvenile Courts' Contempt Authority

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A Juvenile Court Does Not Have Statutory Authority to Impose Criminal Contempt Judgments on Parents or to Order Their Incarceration

In *In re Nolan W.*, 203 P.3d 454 (Cal. 2009), the Supreme Court of California considered whether a criminal contempt judgment and resultant imposition of a 300-day jail sentence handed down by the superior court, juvenile division, of San Diego County to Ms. W. for her failure to adhere to the voluntary drug treatment that was part of a parental reunification plan was authorized by the state statute that governed juvenile court proceedings (the Welfare and Institutions Code). The state's court of appeal had already determined in the instant case that the juvenile court's criminal contempt order was an abuse of discretion, but it did not reach the general question of whether the juvenile court had the authority to impose incarceration on a parent for failure to comply with the terms of a voluntary reunification plan (*In re Nolan W.*, 68 Cal. Rptr. 3d 242 (Cal. Ct. App. 2007)).

Facts of the Case

On the day of his birth, both Nolan W. and his mother, Kayla W., tested positive for amphetamines. Ms. W. admitted to using drugs and alcohol during her pregnancy and agreed that she needed residential treatment. The San Diego County Health and Human Services Agency then filed a juvenile dependency petition asserting that her substance usage constituted neglect of her child. The child was placed with a maternal aunt, and Ms. W. agreed to partici-

pate in a reunification plan. She was then ordered to obtain drug treatment through the San Diego County Court's Substance Abuse Recovery Management System (SARMS), a court-implemented substance abuse treatment program. The juvenile court warned Ms. W. that if she did not follow the program she could be held in contempt and sentenced to five days in jail for each violation of the court-ordered treatment. The contempt and incarceration authority relied on by the juvenile court was pursuant only to a local county court rule (Superior Court San Diego County Local Rule 6.1.19).

On July 31, 2006, her first day in SARMS, Ms. W. tested positive for methamphetamine and was instructed to take part in counseling sessions. Over the next month, she continued to be out of compliance with the requirements of the SARMS program. She missed both counseling sessions and drug testing appointments. Further, she failed to appear for scheduled court hearings. Her failure to participate in the SARMS program resulted in her removal from the program on October 18, 2006. Her inability to adhere to the program was a significant breach of the reunification plan that had been set out at the time that the juvenile court took jurisdiction of her child. Ms. W. appeared in court on December 4, 2006, for a hearing related to a petition to change her son's placement. At that time, she admitted to her SARMS violations and was found in criminal contempt of court on 60 counts of noncompliance and sentenced to five days each per violation. Enforcement of this 300-day incarceration sentence was deferred pending her enrollment and compliance with a residential drug treatment program. She failed to comply with the mandated treatment, and she failed to appear at a contested six-month review hearing. The juvenile court then terminated reunification services and set the matter of Nolan for a permanency planning hearing.

Ms. W. was subsequently arrested and returned to court. The court then imposed the 300-day sentence, notwithstanding arguments from her attorney and Nolan's guardian *ad litem* (GAL) that the sentence should not be imposed because she was no longer receiving any reunification services and that the reunification program had ended. Indeed the court was moving forward toward termination of her parental rights. Despite that, the juvenile court then enforced the previously deferred criminal contempt sentence and ordered Ms. W. to 300 days in custody because

she "broke her promise" of entering treatment (*Nolan*, p 459). Ms. W. served only 32 days of an ordered 75-day sentence, as counsel was successful in arguing that further confinement was worthless, because reunification services had been terminated. The juvenile court expressed its intent to impose future contempt sentencing for noncompliance.

Ms. W. then appealed the contempt order by a petition to the court of appeal. The appellate court noted jurisdiction, since the juvenile court had not vacated its contempt order and the dependency proceedings had not reached finality. The court of appeal ruled that the 300-day sentence, imposed after reunification services were terminated, was an abuse of discretion. It did not reach the broader question as to whether a juvenile court had the authority to impose a criminal contempt sentence on a parent for failure to comply with a voluntary reunification plan.

With the broader question of the juvenile court's claim of contempt authority left unanswered by the appellate court, Ms. W. then petitioned the California Supreme Court for review of two issues: whether a juvenile court has authority to require a parent to participate in a drug abuse program as part of a reunification plan and whether the state's Welfare and Institution Code authorizes contempt charges and incarceration for noncompliance with a reunification plan.

Ruling and Reasoning

The supreme court began its analysis of the incarceration of the parent due to contempt by reviewing the law relating to the contempt power of the courts, noting that the contempt power is inherent to the courts to allow them ". . .to exercise a reasonable control over all proceedings connected with the litigation before it . . ." (*Nolan*, p 462). The court then noted that its precedents allowed for the incarceration of juveniles who violated lawful orders (*In re Michael G.*, 747 P.2d 1152 (Cal. 1988)). It went on to distinguish the incarceration of minors, who fall directly under the jurisdiction of the juvenile court, from that of parents, over whom it has jurisdiction only by reason of the court's jurisdiction over the child. The court then noted that its means of obtaining a parent's compliance with a court order is by making compliance a condition of reunification of child and parent. Because only the child becomes the ward of the juvenile court, the power to incarcerate as

found in *In re Michael G.* applies only to the child, not the parent.

Thus, any jurisdiction that the court has over parents is ancillary to its jurisdiction over the child. In dependency proceedings, the juvenile court has the authority to issue orders to parents, but the leverage for compliance with those orders is the juvenile court's power to affect and determine whether there will be parent-child unification. The supreme court went on to note that reunification is not a compelled process and that a parent's participation in a reunification plan is voluntary (Cal. Welf. & Inst. Code § 361.5(b)(14)).

The supreme court next ruled that there was no California published appellate authority bearing on the juvenile's court power to punish parents for non-compliance with reunification orders. The court observed that "reunification orders are unlike orders in other types of civil cases" and "reunification orders also differ from court orders in criminal cases" (*Nolan*, p 463). Citing the unique nature of the exercise of contempt powers against parents in reunification orders and observing that a parent's participation in the reunification process is voluntary, the supreme court held that the imposition of a criminal contempt punitive incarceration of a parent for failure to participate in a voluntary reunification plan exceeded the powers of the juvenile court. Indeed the court implied that the imposition of a criminal (punitive as against civil) contempt sanction violated the parent's constitutional rights. "The routine imposition of criminal contempt sanctions for noncompliance with SARMS underscores the troubling aspect of injecting punitive measures into reunification. Dependency proceedings are not designed to prosecute parents" (*Nolan*, p 467).

The court then held:

Rule 6.1.19 of the San Diego Superior Court Local Rules is disapproved to the extent that it calls for imposition of a fine or jail sentence under the mechanism of contempt solely for the purpose of punishing a parent's failure to comply with a condition of a reunification case plan [*Nolan*, p 467].

The court also held that the juvenile court could issue orders for a parent's participation in the SARMS program for drug abuse treatment, but consistent with its holding on punitive contempt, it held that the sanction for a parent's noncompliance with such orders would be the negative impact that the noncompliance would have on the likelihood of re-

unification, an impact potentially leading to termination of parental rights.

Discussion

This case explores the scope of the juvenile court's contempt power in its ancillary jurisdiction over parents as it pursues the goal of family reunification. In *In re Nolan W.*, the California Supreme Court specifically addressed the juvenile court's use of criminal contempt merely to punish a parent who failed to comply with certain orders of the court. Specifically, the punitive power was used after the goal of reunification had been foreclosed by the court. The California Supreme Court held that neither the inherent powers of the juvenile court nor any state statute relating to that court permitted the punitive jailing of parents. There is an odd but familiar symmetry between *Nolan* and the U.S. Supreme Court landmark case concerning the powers of juvenile courts. In *In re Gault*, 387 U.S. 1 (1967), the Supreme Court examined and critiqued the way in which juvenile courts exercised their authority over juveniles. The Court found that juveniles were sometimes treated harshly and that the juvenile courts sometimes acted in an arbitrary and unfettered exercise of judicial decrees. The *Gault* decision strictly limited the juvenile courts' power over juveniles by providing them basic due process protections. In *Nolan*, the California Supreme Court limited the juvenile court's arbitrary exercise of the contempt power over parents by simply taking away that power.

The Supreme Court of California did not object to the juvenile court's decision to mandate treatment; the disagreement is focused on how to enforce a reunification order. In fact, the supreme court noted that there is an appropriate use of contempt orders when directly imposed on juveniles (*In re Michael G.*), holding that the juvenile courts have the power to enforce their orders. In an interesting dissenting opinion in *In re Nolan W.*, which recognizes that reunification services are not mandated and need not be provided to a disinterested parent, the argument was made that the use of criminal contempt over parents might be justified as furthering the over-arching goal of family reunification, for example in punishing a parent for failure to participate in a drug treatment program. The dissent argues that if there are no adverse consequences such as punitive

jailing, the power of the juvenile court is marginalized and it will be less able to achieve its basic goals.

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Constitutionality of the Federal Sex-Offender Law

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Supreme Court Reverses the Fourth Circuit Court of Appeals and Allows Federal Civil Commitment of Sex-Offenders

In *United States v. Comstock*, 130 S. Ct. 1949 (2010), the United States Supreme Court reversed and remanded the decision of the U.S. Court of Appeals for the Fourth Circuit that Federal Statute 18 U.S.C. § 4248 (2006) is unconstitutional by intruding on powers reserved for the states by the Constitution.

Facts of the Case

Federal Statute 18 U.S.C. § 4248 (2006) was originally enacted by Congress to establish guidelines for the civil commitment of federal prisoners or persons in federal custody who had been deemed “sexually dangerous.” A “sexually dangerous person” is defined as one who has “engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others; and [who] suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty refraining from sexually violent conduct or child molestation if released” (§ 4247 (a)(5)–(6)). On the basis of this statute, a mentally ill, sexually dangerous federal prisoner can be indefinitely civilly committed to the custody of the Attorney General, beyond his release date, by a district court until he is deemed no longer dangerous or able to return to his home state for his care, custody, and treatment. To commit, a hearing is scheduled at which the government must prove that the prisoner meets such con-

ditions by clear and convincing evidence. The prisoner is entitled to be represented by counsel, have an opportunity to testify and present evidence, and to cross-examine the government’s witnesses. Should the prisoner be found to be a sexually dangerous person, the court will civilly commit the prisoner to the custody of the Attorney General. The Attorney General must then “make all reasonable efforts” to return the prisoner to the custody of the state where he was tried or previously lived, in order for the state to “assume responsibility for his custody, care and treatment.” If this is not possible, the prisoner will remain in the custody of the Attorney General at a federal treatment facility.

When this statute was originally instituted, five respondents, including Graydon Earl Comstock, Jr, questioned the statute’s constitutionality. In four of the five cases, the respondents were certified as sexually dangerous persons and held in federal custody past their original prison sentence completion dates. The respondents moved to dismiss their commitments, stating that § 4248 was unconstitutional in that it violated the Double Jeopardy Clause, the Ex Post Facto Clause, and the Sixth and Eighth Amendments. Also, they alleged that the statute violated their substantive and procedural due process rights by exceeding Congress’s enumerated powers. The United States District Court for the Eastern District of North Carolina agreed that § 4248 was not constitutional and granted dismissal. The U.S. Court of Appeals for the Fourth Circuit affirmed the district court’s decision, stating that the statute was not based on enumerated congressional powers, particularly those justified by the Commerce Clause or the Necessary and Proper Clause. The United States Supreme Court granted *certiorari* in July 2009 to determine specifically whether the Necessary and Proper Clause of the Constitution grants Congress the authority to enact such a federal civil commitment program under § 4248.

Ruling and Reasoning

The Supreme Court initially reviewed its rationale for granting *certiorari* for the case, stating that since the Fourth Circuit’s decision in *Comstock*, two other courts of appeals had decided that § 4248 was constitutional, thereby creating a split of authority among the circuit courts (*United States v. Volungus*, 595 F.3d 1 (1st Cir. 2010); *United States v. Tom*, 565 F.3d 497 (8th Cir. 2009)). Before those cases, there