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Determining the Competency of the Neediest

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This is a qualitative descriptive study of how competency to take care of oneself and one's financial affairs was evaluated in New York City during the years 1989–1991 by the Human Resources Administration's Visiting Psychiatric Service (VPS). Most VPS clients are indigent senior citizens. A visit by VPS can result in forced institutionalization or lost control over one's finances. Data were collected from interviews with key informants (e.g., staff of VPS, chairperson of the City Council Committee on General Welfare, attorneys and staff of the City Council), written materials about VPS, court cases and a report summarizing a recent City Council investigation of VPS. Major problems concerning how VPS operated were found. VPS conducted competency evaluations in such a way that some people's rights may have been suspended inappropriately and others may not have been given the type of intervention they needed. These problems appear to stem from several interlocking factors. VPS operates with very little public exposure of its work. Most clients served had in essence little recourse to respond through legal channels to VPS recommendations that may have been based on faulty evaluations. In most cases the court approved the actions recommended by VPS. This study highlights dangers of the system and the need to change the way that competency is evaluated.

Some have suggested that the medical model in psychiatry makes it well suited to answer the needs of courts for scientific evidence (Gerard, 1987; Hoge and Grisso, 1992). Others have attacked the role of psychiatry in the court room (Ennis and Litwak, 1974; Faust and Ziskin, 1988; Ziskin and Faust, 1988) because it does not meet legal standards of scientific evidence since it is not based on observable repeatable facts. One of psychiatry's most problematic roles in the court room is judging mental competency. Mental competency refers to a person's ability to take care of his or her affairs based on a legal standard. This issue arises in different legal contexts. The most well-known are competency decisions relating to criminal trials: competency to stand trial and competency at time of committing a crime (Golding,

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Roesch, and Schreiber, 1984). In these cases, competency judgments are made public in a court of law and are subject to due process.

Competency decisions are also made outside the criminal courtroom and can result in suspension of rights. Two examples are civil commitment (involuntary hospitalization), and cases of guardianship (when responsibility for a person's property or person are taken over by the state). In these cases competency evaluations are typically not subject to public scrutiny and are generally aimed at some of the most vulnerable people in society. This paper explores the role of psychiatrists in determining mental competency in incompetency proceedings.

While competency is a legal question that is ultimately determined by the court, courts have depended on mental health practitioners to assist them in making this determination. This has led to confusion because incompetency has no psychiatric diagnostic equivalent (Golding, Roesch, and Schreiber, 1984), and mental health practitioners are trained to diagnose mental illness, but not necessarily to apply legal standards. Roesch and Golding (1980), in a review of court cases, found that court-appointed examiners and judges erroneously tended to equate incompetency to stand trial with mental retardation and psychosis. In response to these problems they developed a structured interview schedule to be administered jointly by a legal and a mental health professional to determine competency to stand trial. Berlin and Canaan (1991) have suggested a method for assessing mental competency of elderly patients in the hospital by involving families. It has proven helpful in avoiding the need to go to court. Anderer (1990) has suggested a model for determining competency in guardianship proceedings designed primarily to assist judges and lawyers to critically evaluate whether information gathered meets statutory standards to determine competency. Anderer's model divides competency into a three-part inquiry: disorder/disability; functional capacity; and decision-making/communication capacity, with specific guidelines for each part.

Alleged incompetency to take physical care of oneself or to manage one's financial affairs can lead to the assignment of a guardian. Frequently the municipal welfare department is charged with evaluating people alleged to be incompetent and to take measures necessary to insure their safety. A typical case is a senior citizen who is believed to be unable to take care of his or her own affairs. The municipal welfare department may, as a result of psychiatric evaluation, petition the state court asking that a guardian be appointed to look after the well-being of the person and to manage that person's finances.

Spring and Dubler (1990) conducted a retrospective study of all 558 conservatorship cases filed in New York city in 1983. Despite the urgency of such cases, as of 1988 only 92 cases had final determinations. In only one case the application was denied. In only two cases, the temporary court-appointed guardian did not waive the prospective ward's right to be present at the hear-

ing, despite the fact that 17 of the prospective wards were legally competent to make decisions and that eight objected to the proceeding. In most of the cases the guardians used the money to transfer the person to long-term care rather than to try to provide for the person's needs in the community. Law and Kosberg (as cited in Schmidt et al., [1981]) have documented cases where guardians physically or mentally abused their wards or could not provide them with adequate care.

This paper is a case study of one pathway leading to the guardianship system in New York City, the Visiting Psychiatric Service (VPS) of the Human Resources Administration (HRA) of that city. VPS provides psychiatric evaluations primarily of HRA clients. Most of these clients are referred by the Protective Services for Adults (to be referred to as Protective Services), an HRA agency charged with administering to mentally infirm at-risk adults. VPS has a staff of nine field psychiatrists (Office of Legal Affairs, 1991) and conducts approximately 3,000 at-home evaluations annually (HRA, 1990).

VPS evaluates each case and is responsible for making far reaching recommendations about what is needed to protect and help the individual. The process typically begins with a phone referral from a city or other agency. These calls are taken by VPS social workers who assess, over the phone, the severity of the case and set priorities for VPS intervention. Usually they schedule a home visit by a VPS psychiatrist. The psychiatrist makes recommendations to the referring agency. When VPS psychiatrists determine that a client is incompetent to take care of him or herself or to manage his or her own finances, VPS recommends that the HRA legal department petition the state court for guardianship. The results of a visit by VPS can be as extreme as recommending forcible institutionalization with concomitant loss of civil liberties; or recommending revoking of a person's control over his or her finances. In other cases less drastic measures are recommended.

Guardianship in New York State is covered by Article 81 of the Mental Hygiene Law (1994) which took effect in April 1993. The law covers guardianship proceedings which can result in appointing a guardian. The proceedings are initiated by a petition filed by any person concerned about the welfare of the subject who is alleged to be incapacitated. The cases reviewed in this paper were covered by the previous Mental Hygiene Law of 1972 Articles 77 and 78. The Mental Hygiene Law covers the way in which the court decides on guardianship, but does not specify how VPS or other petitioners evaluate competency. A guardian is appointed when a judge finds, on the basis of clear, convincing evidence, that the subject of the proceedings is incapable of taking care of his or her person and/or property.

The latest Mental Hygiene Law may eventually be found to have an impact on the way competency evaluations are performed in various settings, including VPS. However, bureaucratic systems at the interface of law, wel-

fare, and psychiatry are not known to respond quickly and diligently to legal developments. Naturally, data allowing us to evaluate the impact of the law will lag behind the law's implementation.

Method

This is a qualitative descriptive study of VPS. Data were collected from different sources. Interviews were conducted over the last three years with four staff members of VPS, a City Council member (officially Council of the City of New York) who was the chairperson of the Committee on General Welfare, four legal service attorneys who had represented VPS clients, and two staff members of the City Council who were involved in an investigation of VPS. Written materials provided by VPS describing its operations were reviewed, as were other materials about VPS on public record with the City Council of New York. These included policy and procedure manuals of VPS, operations statistics, a series of legal cases and a report summarizing a recent investigation of VPS by the New York City Council's Office of Oversight and Investigations. It should be noted that all cases cited are public record and thus have not been disguised.

Results

The major findings are that serious problems characterize the way that VPS operates. VPS has conducted competency evaluations in such a way that some people's rights may have been inappropriately suspended and others not given appropriate attention. These problems appear to stem from interlocking factors: VPS operates with little public exposure of its work; most of the clients served had little recourse to VPS recommendations that may have been based on faulty evaluations; and, in most cases the court approved the actions recommended by VPS. The evidence to support these statements is presented, followed by seven cases illustrating how some competency evaluations have been conducted.

The City Council investigated VPS operations for approximately three years. This included conducting extensive hearings about VPS. The report of this investigation (Council, 1992) notes that ". . . there is substantial danger that HRA can use incorrect psychiatric diagnoses to have these people's [VPS clients] freedom and rights denied, particularly in view of the lack of resources of most HRA clients to counter incorrect evaluations" (p. 1). The report also warns that because of the current VPS procedures the danger of substandard psychiatric evaluations continues. The conclusion of the council hearings was characterized by the then-Committee on Aging Chairperson, Susan D. Alter, as follows: ". . . if this agency is run in such a way . . . then

you have just admitted that this agency, the way that it operates and its goals are very wrong and are very bad and in need of overhauling" (p. 3).

Most VPS cases were never reviewed by mental health practitioners outside of HRA. VPS is not audited by any external body (Council, 1992) as would be the case for any other mental health service receiving public funds. For example, the Department of Mental Health, which audits every mental health facility, has never formally evaluated VPS work (Council, 1992). VPS is apparently not required to adhere to routine recording and accountability standards. The only exposure that VPS has is when cases are brought to court to have a person's rights suspended. Yet most of these people did not have the resources to challenge VPS recommendations by hiring a private psychiatrist to get a second opinion (Council, 1992). In addition, the law at the time did not give respondents in competency hearings the right to an attorney. Attorneys were appointed only if the court-appointed guardian so recommended. In practice, attorneys were virtually never appointed (Spring and Dubler, 1990).

The number of cases in which HRA sought a ruling of incompetency appears to be on the rise. The number of such case hearings increased by almost 65% from 1988 to 1991; in 1988 there were 154 such petitions filed; in 1989, 204; in 1990, 208; and in the first six months of 1991, 120 petitions were filed. HRA estimates that in 90% of these cases the court accepts VPS's recommendations, at least in appointing a fiduciary. These are estimates because HRA does not routinely record this information (Office of Legal Affairs, 1991).

The City Council investigation identified seven cases in which VPS appeared to have misjudged competency. In three cases (*Flowers v. Verde, 1990; Flowers v. Weitzner, 1990; Jonas v. Brunelle, 1991*) judges criticized VPS for outright incompetency by unnecessarily recommending guardianship or by failing to recommend needed assistance. These cases probably are representative of a larger class of cases. Cases were routinely adjudicated unchallenged and in the absence of the individuals whose rights were suspended. A review of the seven cases follows. In the first three cases to be reviewed VPS apparently underdiagnosed disability and failed to recommend needed treatment. In the remaining four cases, VPS apparently evaluated competent clients as being incompetent, leading to unwarranted petitions to appoint a guardian.

Failure to Recommend Needed Treatment

Mr. and Mrs. Brunelle (Jonas v. Brunelle, 1991). In 1988 Mr. Brunelle, aged 70, a retired steamfitter, and his wife aged 48, who had never been employed outside of her home, stopped paying rent on the apartment where they had

lived for 20 years. Before this they had always paid their rent on time. Protective Services became involved in the case and to avoid eviction Protective Services paid the back rent and closed the Brunelle case. In 1989 the Brunelles were again threatened with eviction for not paying rent and were again referred to Protective Services. Protective Services asked VPS to conduct a psychiatric evaluation of the couple. According to an evaluation cited in the trial record dated March 5, 1989, Mrs. Brunelle suffered from "major mental illness with a probable diagnosis of schizoaffective disorder and it was felt that she would be at great risk to life and limb if evicted" (p. 5). According to an evaluation of Mr. Brunelle dated April 14, 1989, he suffered from "mild organic brain syndrome" (p. 5). From this evaluation Protective Services arranged for the payment of rent arrears.

The next documented Protective Services intervention was in January of 1990 when an Assessment Services Plan was prepared for the couple. Mr. Brunelle's plan noted that he was suspicious, had distorted thinking, impaired judgment and that he was unable to manage his finances and needed assistance to manage his resources and to carry out activities of daily living. It was suggested that Protective Services impose financial management if client refused casework services. The Assessment Service Plan for Mrs. Brunelle noted distortion in thinking and impaired judgment and that she was being treated with antipsychotic medication for schizophrenia.

Apparently in response to lack of cooperation from the Brunelles, in April 1990, Protective Services petitioned the Supreme Court for an Order granting access to the couple's apartment. The petition noted the results of the psychiatric evaluation of the couple and their difficulties in self management. It also noted that Mrs. Brunelle was in outpatient psychiatric treatment and had been diagnosed as bipolar disorder with mixed dependent personality disorder and hypertension. The court granted an access order.

As part of PSA's follow-up on this case VPS was asked to evaluate the couple again. According to court records the evaluating psychiatrist, Dr. Joseph, was informed that the couple was not paying rent, had not cooperated with Protective Services and that Mrs. Brunelle was under psychiatric care. Despite the concurrent psychiatric treatment Dr. Joseph made no attempt to contact the therapist or review Mrs. Brunelle's psychiatric record. At the trial Dr. Joseph testified that it was not her practice to try to obtain medical history, psychiatric history or other information before conducting a competency evaluation.

Dr. Joseph arrived at the couple's apartment escorted by a locksmith, a caseworker, and the police. The couple would not open the door until the locksmith began drilling out the lock. The psychiatrist testified in court that her record of that visit noted that once they opened the door it was "very difficult to get any relevant information from him [Mr. Brunelle]; he keeps yelling at the top of his voice pointing his fingers and pointing at the case-

worker's chest" (p. 7). After 20 minutes of "interviewing" Mr. Brunelle in the presence of the others, Dr. Joseph concluded that the Mr. Brunelle had no major impairment and that he was capable of making decisions.

Mrs. Brunelle was similarly evaluated. Dr. Joseph reported that she was only able to speak to Mrs. Brunelle when her husband "moved to the door to argue with the locksmith" and that she was "unable to obtain detailed information about her psychiatric history due to interference of Mr. Brunelle." Dr. Joseph found Mrs. Brunelle to be "competent to make decisions for herself" and that Mrs. Brunelle "says she is too anxious and depressed to even clean the apartment" (p. 8). Based on this evaluation HRA declined to take further action. Legal Services acting on behalf of Mrs. Brunelle challenged HRA's non-intervention in court.

At the trial the judge asked Dr. Joseph how she could have found Mr. Brunelle competent, when, at the very least, he placed himself under the risk of becoming homeless for non-payment of rent. Dr. Joseph replied that people harm themselves all the time, for example by smoking, without being classified as incompetent. The judge in Jonas v. Brunelle (1991) found that Dr. Joseph's evaluation:

> was based upon a perfunctory examination which was conducted under adverse conditions, in the presence of other individuals and was of a short duration. Her findings were contrary to prior medical reports and recommendations. The Court finds that her testimony lacked any probative value. (p. 13)

The Court ruled that since all other evidence supported the Brunelle's need for HRA's intervention, HRA needed to intervene to help the couple. Despite this, HRA continued to refuse to accept the couple as clients. On May 19, 1992 the couple was evicted from their home. As of September 1992 Mrs. Brunelle was living in a homeless shelter for mentally disabled women. Mr. Brunelle was living in temporary quarters and according to his Legal Aid attorney was reportedly having a difficult time finding permanent housing.

This case illustrates mismanagement, misjudgments and poor clinical practice. Such problems have plagued other cases as well. For example, Dr. Joseph indicated at the trial that she does not review a client's psychiatric and medical records. Also, City Marshals told City Council investigators that psychiatric evaluations had been conducted even as clients were being physically evicted from their homes.

Monroe case (Council, 1992). Mr. Monroe, then aged 71 and living in west Harlem, was referred to HRA by the New York State Department of Mental Health's mobile geriatric team in December 1989. He had stopped paying his rent in 1987 and was regularly flooding his apartment, causing extensive damage to the apartment building that he lived in. Home visits by City Council Investigative staff and Protective Services records showed that Mr.

Monroe lived in unsanitary conditions, was unable to care for himself, and had no family who could assist him. His landlord was unsuccessful in evicting him because the judge felt that Mr. Monroe would not be able to fend for himself. Protective Services caseworkers reported that Mr. Monroe needed help with personal hygiene and required occasional human contact, but that he would not cooperate in applying for homecare. Protective Services staff noted that unless Mr. Monroe's trust was attained, he was not likely to accept homecare or to care properly for his apartment.

Twice during March of 1990, and once in August and once in February 1991, Mr. Monroe was interviewed by VPS psychiatrists. He was diagnosed as having degenerative dementia. Despite his peculiar and dangerous behavior and lack of self-care, VPS did not recommend any kind of intervention. As a result Protective Services supervisors said that they did not intervene, as they are not qualified to offer psychiatric care and must wait for VPS to do so. They also noted that in this case, as in many others, VPS failed to recommend treatment. This case, like the preceding, illustrates failure to recommend treatment. It is difficult to imagine that a helping professional could resist responding to such an obvious need.

Bushwick case (Council, 1992). When his case came to the attention of HRA, Mr. Bushwick was a 70 year old wheelchair-bound widower who lived on Manhattan's lower East Side. He suffered from tuberculosis, heart disease and other serious ailments. HRA had been paying for a homecare service to administer to Mr. Bushwick more than eight hours daily. Between 1987 and 1989 the homecare agency complained to HRA that Mr. Bushwick's son, an alleged crack addict, was physically abusing his father and intimidating the homecare worker. The son had already served time in prison for abusing his father. According to homecare records the son had smashed furniture in his father's apartment and had broken his father's bones and bruised him. The homecare agency filed for an Order of Protection but Mr. Bushwick would not sign the order of protection. He later stated that he was afraid of what would happen to the son if he went to jail.

In November 1989, Mr. Bushwick's physician, Dr. Weiner, complained to Protective Services that the patient was being beaten by his son. Dr. Weiner told investigators from the City Council that his patient would break down crying in the examining room while telling the doctor about the physical abuse that he and his deceased wife had endured from their son. Dr. Weiner also noted that Mr. Bushwick refused to protect himself. This lead to Dr. Weiner's contacting Protective Services. Protective Services arranged for a VPS examination of Mr. Bushwick.

In February 1990, Mr. Bushwick was examined by Dr. Joseph (same Dr. Joseph as in Brunelle case). The written evaluation noted that client ". . . denies his son has ever threatened or abused him . . . . [There was] no

evidence suggestive of abuse by his son," and that client's "[i]nsight and judgment [are] good" (p. 19). The report makes no mention of the discrepancy between medical and homecare reports of abuse and Mr. Bushwick's denial of abuse. An internal HRA memo from a Protective Services supervisor indicated that, based on Dr. Joseph's evaluation, no further action was taken.

In May 1990, an HRA medical examination of Mr. Bushwick noted abrasions and a swollen arm. At about this time the case came to the attention of New York City Council's Office of Oversight and Investigation. They sent a letter to HRA warning that Mr. Bushwick was in danger and that HRA was responsible. On July 10, 1990 Mr. Bushwick called the City Council investigators saying that he would no longer conceal the abuse and that he feared for his life. He reported that the previous night his son had returned home drunk and had beaten him. The City Council investigators called the police who went to Mr. Bushwick's apartment and found a shaking Mr. Bushwick with teeth marks on his arm. The police forcibly removed the son from the apartment. Several months later the son pleaded guilty to attacking his father and was sentenced to prison.

Dr. Joseph and his supervisor, the VPS Deputy Medical Director, were interviewed by City Council investigators. Investigators asked Dr. Joseph to "reconcile" her findings that Mr. Bushwick had "good judgment" with the fact that he remained silent while sustaining years of abuse. Dr. Joseph said that Mr. Bushwick had good judgment but failed to use it. She was not able to explain how she concluded in her report that there had been no indication of abuse in the face of medical and homecare documentation. She was also asked why she had not recommended therapy to help Mr. Bushwick realize that he did not need to endure such suffering. She replied that this was not her responsibility. Dr. Joseph's supervisor stated that HRA guidelines did not require psychiatrists to make treatment recommendations.

Summing up the failure to recommend treatment, Council Member Susan D. Alter noted at the Council hearings (Council, 1992):

> My fear is people die because of this. People wind up homeless because of this. And people wind up in their apartment, if they're lucky, under terrible conditions, ad nauseam, while nobody [at HRA] does anything about it. (p. 22)

This case of failure to recommend treatment is even more extreme than the other cases. The psychiatrist failed to recommend treatment even when a colleague, another physician, had alerted HRA of the dire need for help. The concern of the general practitioner is contrasted by the indifference of the psychiatrist and compounded by the uncaring response of Dr. Joseph's supervisor, who defended this outrage by saying that policy did not require recommending treatment.

Unwarranted Incompetency Findings

In the following four cases clinicians recommended suspending people's basic rights based on serious errors in clinical judgment.

Verde case (Flowers v. Verde, 1990). On May 10, 1990 the Acting Commissioner of Social Services of the City of New York petitioned the Supreme Court of New York asking that a guardianship of person and property be granted for Mrs. Verde (Flowers v. Verde, 1990). A VPS psychiatric evaluation alleged Mrs. Verde to be incompetent. The Court dismissed the petition for lack of prima facie evidence.

During September of 1989 Dr. Joseph (not the same Dr. Joseph as in the Brunelle case) of VPS examined Mrs. Verde and concluded that "she is incapable of managing her person and property with no meaningful hope of recovery" (p. 1). At the preliminary hearing he diagnosed her illness as organic brain disorder not otherwise specified and noted that she had been treated in a psychiatric hospital and was currently taking an antipsychotic medication.

Yet under cross-examination Dr. Joseph admitted that seven times during October 1989 he certified before a notary public that the respondent was "of sound and disposing mind, and capable of understanding the nature of a [savings bank] transaction" (p. 1). Cross-examination also revealed that the respondent had a hearing impairment and primarily speaks Italian. Dr. Joseph testified that he conducted his examination in English.

In addition to Dr. Joseph's determination that Mrs. Verde was mentally incompetent, HRA also argued that Mrs. Verde's son, who lived in her home, was a threat to her. Her son was arrested and charged with assault and unlawful imprisonment of the respondent. However, all charges were dismissed, primarily because the judge noted the inconsistency in Dr. Joseph's evaluation. The judge also pointed out a basic flaw in HRA reasoning and admonished HRA. The judge noted (Flowers v. Verde, 1990) that:

> Assuming as alleged in the petition, that the presence of respondent's son in her apartment creates a risk of physical harm to the respondent, the solution is not to declare the respondent incompetent, have a committee appointed, and remove her involuntarily. A more preferable resolution would be for the proper authorities to use whatever means are available to remove the risk. A proceeding for a determination of incompetency and the appointment of a committee is one of utmost seriousness involving depriving one of the free and normal exercise and use of his or her personal conduct, liberty and property. Great care should be taken to protect the alleged incompetent to guard him or her against being deprived of such substantial and basic rights upon insufficient and unjustified grounds. (p. 3)

In this case it appears that the clinician diagnosed incompetency as an expediency measure to remedy a situation in which he thought that the person was at risk from abuse by her son. Instead of contending with the son, which

would have probably been more difficult, the physician chose to blame the victim by suggesting her rights be removed to protect her safety.

Colter case (Sabol v. Colter, 1991). Mrs. Colter was found incapable of handling her financial affairs based on VPS evaluation. She challenged HRA guardianship petition with the help, *pro bono*, of a well-known law firm. In contrast to the findings of VPS, that she suffered from severe mental impairment, a private psychiatrist retained by the law firm diagnosed her as being in the early stages of Alzheimer's disease. The private psychiatrist recommended that Mrs. Colter continue to live at home, where her son, who lived with her, had agreed to continue to help her. This case, like the previous, highlights the callous use of guardianship as an expediency measure, as opposed to a last resort. It also shows how evaluations have been centered on the person and how VPS ignored the person's support system in evaluating his or her need for guardianship.

Politis case (Grinker v. Politis, 1989). When her case went to court, Ms. Politis was in her early seventies and lived alone. She was referred to Protective Services by an employee of the Red Cross who was concerned about her welfare. Protective Services arranged for a VPS evaluation. VPS psychiatrist visited Ms. Politis and diagnosed her as "chronic schizophrenic paranoid with grossly impaired judgment" and found her "unable to care for herself or manage her affairs" (p. 2). As an example of her disturbed behavior, the psychiatrist noted that she spoke nonsensically about something called "Zoom" and about "radiation." On the basis of the psychiatric examination HRA petitioned for a guardian of person and property. Ms. Politis fortunately had *pro bono* legal assistance to fight the suspension of many of her civil rights. The psychiatrist retained by the attorney found no indication of psychiatric disorder. The trial record also included sworn depositions from Ms. Politis's banker and Social Security Administration claims representative attesting to her ability to conduct her financial affairs.

The trial record also includes a very articulate deposition from Ms. Politis, who described her history and the details of how she managed her life and her household. It presented a description of her pastimes, which include listening to classical music and reading Poe, Byron, Shelly, and Oscar Wilde. She discussed the tremendous grief that this intrusion on her life had caused. About the VPS psychiatric exam she commented that the doctor's "reference to 'Zoom' was taken from my mentioning — in passing conversation — a peculiar Austrian cheese commercial I had heard. Additionally, when I used the term 'radiation,' I was referring to electromagnetic radiation — light — from the very bright fluorescent parking lot lights directly outside my windows" (p. 6).

One piece of supporting evidence of Politis's inability to manage her affairs presented by the VPS psychiatrist and used in the petition to the court was her rent delinquency. But in fact Politis's landlord had refused to accept her

rent because she was disputing a rent raise that she believed to be illegal while she continued to give landlord checks for the old amount.

HRA workers attempted to persuade the Social Security Administration to send Ms. Politis's checks to their office. That was because, as the HRA unit coordinator wrote in her letter, "Ms. Politis does not believe in paying rent" and also because of the findings of mental incompetency by VPS psychiatric evaluation. The Social Security Administration director refused. In a letter to HRA, the director dismissed the findings of the VPS psychiatric evaluation based on her staff's contacts with the client and the private psychiatric evaluation that they believed to be "more recent, more thorough, and more consistent with the observations of their office." The letter also noted that:

> It appears that Protective Services wishes to circumvent a court remedy by using the Social Security Administration as an instrument to resolving the rent dispute. This is not a valid reason to suspend Ms. Politis's right to receive her own checks.

In this case, and the Weitzner case that follows, it appears that the psychiatrist may have been seeking evidence to confirm incompetency and thus tended to ignore counterevidence. It also appears that the psychiatrist guided by this confirmatory evidence diagnosed the person as suffering from psychosis and then assumed that the person had other characteristics typical of people who suffer from psychosis. These attributed characteristics were then used to give more substance to the finding of incompetency.

Weitzner case (Flowers v. Weitzner, 1990). This case highlights some classic pitfalls of psychiatric judgment. VPS psychiatrist Dr. Gorham stated that Mrs. Weitzner was incompetent to take care of herself and her affairs in an evaluation that was characterized by the judge as "superficial and error-filled." The judge also noted that HRA allowed itself to be "duped" into filing the petition by the client's landlord. The judge had serious reservations about what appeared as HRA collusion with Mrs. Weitzner's landlord.

Mrs. Weitzner, at the time of her court case, was a 68 year old resident of a Manhattan town-house. She was involved in a longstanding dispute with her landlord, who had purchased the building in 1979. By 1989 all tenants except Mrs. Weitzner had vacated their apartments in keeping with the landlord's wishes to occupy the building himself. The landlord began to take action against Mrs. Weitzner, which included disallowing her access to the elevator and initiating law suits against her, for which he was fined $16,000 by the New York State Division of Housing and Community Renewal.

The landlord's girlfriend contacted Protective Services, reporting that Mrs. Weitzner was psychotic. A Protective Services caseworker visited Mrs. Weitzner with Dr. Gorham. According to Mrs. Weitzner, Dr. Gorham did not identify herself as a psychiatrist. Based on this interview HRA petitioned the court for guardianship for property and person.

The judge rejected HRA's guardianship petition. The judge, in a very critical opinion, noted that Dr. Gorham was "confused" as to what incapacitated the client. Dr. Gorham contradicted herself several times during her deposition. The case was further confounded because while Dr. Gorham recommended that Mrs. Weitzner's financial affairs be taken from her, HRA was petitioning for guardianship of person and property.

The judge noted that the evaluation was flawed because Dr. Gorham jumped to conclusions. Under cross-examination by Mrs. Weitzner's attorney in a pre-hearing deposition (as quoted in Council [1992]), Dr. Gorham said that she "determined that she [Mrs. Weitzner] was psychotic within the first minute of meeting her" (p. 33). To support her opinion that Mrs. Weitzner was psychotic (as suggested by the landlord's girlfriend to the Protective Services caseworker who brought Dr. Gorham into the case) Dr. Gorham cites Mrs. Weitzner's claim to have 35 patents. Yet, as the judge noted in his decision, Mrs. Weitzner does have 35 patents. Furthermore, to support the psychotic diagnosis Dr. Gorham noted Mrs. Weitzner's "delusion" that her landlord was secretly taping her. An officer of the court subsequently found that the landlord was secretly taping Mrs. Weitzner.

Segments of the following exchange between Mrs. Weitzner's attorney and Dr. Gorham, which are also from the pre-hearing deposition (as quoted in Council [1992]), further reveal the unsoundness of Dr. Gorham's conclusions:

Gorham: I believe she can't manage her financial affairs.
Attorney: You believe she can't?
Gorham: No.
Attorney: Are you aware of any creditors who are after her?
Gorham: No.
Attorney: Did you contact the phone company to find out if she pays her bills on time?
Gorham: No.
Attorney: Did you contact her brother?
Gorham: No.
Attorney: Do you know where her money is in escrow?
Gorham: No.
Attorney: Do you know who puts it in escrow?
Gorham: No.
Attorney: Do you know who pays her bills?
Gorham: No.
Attorney: Did you ask her?
Gorham: No. (p. 33)

Not surprisingly the judge dismissed the case from court in a sternly worded decision (Flowers v. Weitzner, 1990) :

> In view of this grossly irresponsible conduct, where petitioner allowed itself to be used as an agent for an unhappy landlord through the exploitation of its broad power to affect the liberty of a human being, simple fairness demands that I exercise my power under the statute to direct petitioner to pay the entire . . . [court] fee. (p. 9)

The case shows how easily the clinician's judgment can be manipulated. The first impressions planted by the landlord's girl friend made the determination of incompetency a probable conclusion. This case also illustrates how such proceedings are vulnerable to becoming a tool of social control. For Mrs. Weitzner's landlord this was a way of removing an obstacle to ceasing control of his investment. If Mrs. Weitzner had lacked means like many, if not most, of the subjects of these proceedings, her landlord would probably have succeeded.

Discussion

The findings are distressing. Perhaps even more distressing is that according to VPS in almost all cases its recommendations were accepted by the court. The influence in court of the VPS evaluations is in keeping with the influence of competency-to-stand-trial evaluations, which are almost always accepted by judges (Bluestone and Mella, 1978; Reich and Tookey, 1986; Steadman, 1979). Similarly, in many states the state-appointed psychiatrist's opinion of competency to be executed (mental incompetents cannot be executed as they can not present vindicating evidence) cannot even be challenged (Brakel, Parry, and Weiner, 1985). The VPS psychiatrist's role has been even more influential than in other competency proceedings because in guardianship cases the subject of the proceedings was rarely present. Under such a situation the psychiatrist's description is the only impression the judge receives of the person. The chance for appeal — let alone a successful appeal — seems unlikely.

Problems in VPS competency evaluations highlight some of the serious problems in how competency is evaluated and determined. We argue that these cases are not unique to New York and are probably representative of what occurs in many other cities as well. Problems noted in these evaluations are similar to problems of clinical judgment noted in literature (for a review see Rabinowitz [1993]). Problems that seemed to be present in the cases were the susceptibility to be influenced by irrelevancies, tendency to search for confirmatory evidence and to ignore counterevidence, and influence of first impressions and inaccurate use of diagnoses.

Clearly the way that mental competency of citizens is evaluated needs to be restructured. The City Council report included recommendations that did little more than assure that VPS adopt measures that are basic standards of medical and psychiatric care. It recommended that VPS psychiatrists famil-

iarize themselves with client medical and psychiatric histories as part of their evaluations. In addition, psychiatric evaluations should include treatment recommendations. Overall, the City Council recommended initiating an independent review of the Visiting Psychiatric Service, its standards, procedures and personnel. VPS, at least in the cases reviewed, diverged greatly from the procedures outlined for conducting competency evaluations as described in the literature, such as interviewing family members (Berlin and Canaan, 1991), and carefully weighing the probative value of patient behavior (Anderer, 1990).

The difference between theory, as represented by the frameworks for conducting competency evaluations in the literature, and practice, as represented by VPS, is striking. This gap points to the need for reforms in the way that competency is evaluated in guardianship cases. The evidence presented in this paper suggests that abuses are occurring.

Perhaps underlying some of the problems with these evaluations is role ambiguity that stems from misplaced ethics. The ethics of the helping professions prescribe that a practitioner working with people at risk assume a paternal role, i.e., act to protect the client by deciding what is best for the individual. On the other hand, the role of forensic evaluator is to objectively compile facts that answer a specific legal question. The helping professional is not trained primarily to compile facts in such a way, but to help people. Therefore, the paternal role is problematic, as it may contradict the fact-finding role. This problem is compounded because courts tend to view competency as more of a mental health determination than a legal one. Evidence of this is that courts rely so heavily upon experts. The consequence is that individuals are denied due process, as has been noted elsewhere (Schmidt, Miller, Bell, and New, 1981; Smith and Meyer, 1987).

Another peculiarity in the way that incompetency is determined is that evaluations are conducted and recommendations are made in the absence of an operational definition of competency. VPS likewise appeared to lack any such definition. An operational definition would include observable behaviors of competency, for example, paying bills, eating properly, attending to adequate hygiene. Such a definition would lead to determining to which domain competency evaluations belong: medical, social, legal, or psychological. The new law in New York in recognition of the lack of an operational definition has been more specific in guiding judges to consider the "functional level and functional limitations of the person" to include an assessment of the person's "management of the activities of daily living." What is clear from the law is that legal incompetency is not the same as mental illness, although the two are frequently confounded (Parry, 1985; Roesch and Golding, 1980). Even a diagnosis of schizophrenia does not mean that the person is legally incompetent.

Formulating a legal operational definition of competency is not an easy task. A study by the National Law Center of George Washington University found statutory definitions for incompetence to be vague (Allen, Ferster, and Weihofen, 1968). In this study attorneys and physicians with experience in competency cases could not agree on how to interpret the legal criteria. They observed that criteria had "no psychiatric meaning" and were "ambiguous as hell" (p. 39). Alexander (1977) points out that in many states laws defining incompetency bias evaluators and judges since old age or illness are explicitly mentioned as causes of incompetency.

Some attempts have been made to correct the injustices of incompetency proceedings by changing laws. For example, laws were changed in California (Alexander, 1977) and recently, as we have noted, in New York (Mental Hygiene Law, 1994). These new laws deleted all status considerations, such as old age, and replaced them with non-medical functional tests focusing on the ability of a person to provide him or herself with food, clothing or shelter and to manage his or her property. These laws generally also require the presence of the subject of the proceedings in court; that the subject be interviewed by a court evaluator; and the right to counsel and periodic review of guardianship.

In addition to the need for an operational definition of incompetency, changes are needed in how evaluations are conducted. Evaluators should be required to present evidence and counterevidence of competency based on tests derived from the operational definition. Even when evaluators conclude that the person is incompetent they should be required to recommend the least restrictive way to provide the needed supervision. Evaluators should receive special training in gathering objective information in keeping with the operational definition of competency.

Since no one professional group has demonstrated more accuracy in assessing and predicting competency than others, a priori designations of which professionals should conduct evaluations do not seem justified. Based on the operational definition of competency, and the parameters that need to be examined, the traditional role of psychiatrists in this process is not self-evident. It is possible that continuing to have evaluations conducted by psychiatrists will have the undesirable effect of perpetuating the heavy reliance of courts on these evaluations. This may be because of the high status given to psychiatry in competency proceedings, which has diverted the court from assuming its responsibility of determining competency. Courts need to consider taking a more active role in making these determinations.

Oddly enough the guardianship systems have treated indigent people in ways that would not be acceptable with criminals. Essentially "verdicts" are determined on the basis of a single psychiatric evaluation. There is limited due process; there are no clear definitions of competency; and the individual may be subject to intense supervision. As Schmidt (1984) has pointed out, the

loss of rights due to a finding of legal incompetency reduces the person's status "to that of a child, or even a non-person" (p. 352). The reasons for these inequities are not for lack of solutions. VPS, for example, seems to be satisfied with the lack of objective and specific guidelines for establishing incompetence. When asked by the City Council (Office of Legal Affairs, 1991) for handbooks or instructions that VPS gives to its psychiatrists, VPS submitted a general outline for psychiatric evaluations and commented that "the format meets uniform professional standards as described in psychiatric textbooks" (p. 2). Yet this outline was not geared for evaluating competency.

One possible reason that such a system goes unchallenged is that only individuals with a vested interest in the outcome of such determinations are involved in these cases, such as the landlord in the case of Mrs. Weitzner. Alexander (1977) has pointed out

> . . . the ward is not the only person concerned with the maintenance of his wealth. Those who are potential beneficiaries of the ward's affluence take a natural interest in its waste . . . . What is important about these interests is that they are interests adverse to the interests of the ward. The present process, with its focus on the benefits to the ward, inadequately and inarticulately deals with such interests. In consequence, beneficiaries find themselves in the cynical position of being forced to plead in court for surrogate management premised on benefit to the object of the proceedings rather than, candidly, benefit to themselves. (p. 1)

In some respects, society's right to declare a person legally incompetent has been used as a quick fix for solving problems. For example, declaring Mrs. Verde incompetent "saved" her from physical harm. Alexander (1977) cites a study conducted in Los Angeles by the National Senior Citizens Law Center that found that 80% of subjects of guardianship proceedings were over 65. The City Council report noted that the subjects of proceedings in New York "oftentimes" were elderly. The distribution of elderly in mental incompetency cases is not consistent with the expected distribution of incompetency in society.

This paper illustrates some of the dangers of mixing law and psychiatry. This paper describes situations in which the law essentially handed over its responsibility to determine the presence or absence of a legally defined condition — competency — to the mental health experts. Mental health experts, who as a group have problems in making accurate diagnoses using diagnostic entities with which they are familiar, such as those in DSM-III and DSM-IIIR (Rabinowitz, 1993), are being called upon to diagnose a condition that has not been well-defined and which they are not trained to diagnose. Competency evaluations and hearings have denied certain members of our society due process of the law while stripping them of their fundamental rights.

References

Alexander, G.J. (1977). Who benefits from conservatorship? *Trial, 30,* 30–32.

Allen, R.C., Ferster, E.Z., and Weihofen, H. (1968). *Mental impairment and legal incompetency.* Englewood Cliffs, New Jersey: Prentice-Hall.

Anderer, S.J. (1990). A model for determining competency in guardianship proceedings. *Mental and Physical Disability Law Reporter, 14,* 107–114.

Berlin, R.M., and Canaan, A. (1991). A family systems approach to competency evaluations in the elderly. *Psychosomatics, 32,* 349–354.

Bluestone, H., and Mella, J. (1978). A study of criminal defendants referred for competency to stand trial in New York City. *Bulletin of American Academy of Psychiatry and Law, 7,* 166–178.

Brakel, S.J., Parry, J., and Weiner, B.A. (Eds.). (1985). *The mentally disabled and the law* (third edition). Chicago: American Bar Foundation.

Council. (1992). *Incorrect psychiatric examinations performed by HRA's visiting psychiatric service: A report of the Committee on Aging and the Committee on General Welfare.* New York: Council of the City of New York.

Ennis, B.J., and Litwak, T.R. (1974). Psychiatry and the presumption of expertise: Flipping coins in the courtroom. *California Law Review, 62,* 693–752.

Faust, D., and Ziskin, J. (1988). The expert witness in psychology and psychiatry. *Science, 241,* 31–35.

Flowers v. Verde. In the Matter of the Application of Doby L. Flowers, as Acting Commissioner of Social Services of the City of New York, Petitioner, For the Appointment of a Committee of the Person and Property of Verde, Incompetent Respondent, Supreme Court, Kings County, Index Number 98005/90 [1990].

Flowers v. Weitzner. In the Matter of the Application of Doby L. Flowers, as Acting Commissioner of Social Services of the City of New York, Petitioner, For the Appointment of a Committee of the Person and Property of Weitzner, Alleged Incompetent, Supreme Court, New York County, Index Number 41412/90 [1990].

Gerard, J.B. (1987). The usefulness of the medical model to the legal system. *Rutgers Law Review, 39,* 377–423.

Golding, S., Roesch, R., and Schreiber, J. (1984). Assessment of competency to stand trial: Preliminary data on the Interdisciplinary Fitness Interview. *Law and Human Behavior, 8,* 321–334.

Grinker v. Politis. In the Matter of the Application of William J. Grinker, as Commissioner of Social Services of the City of New York, Petitioner, For the Appointment of a Committee of the Person and Property of Politis, an Alleged Incompetent, Respondent, State Supreme Court, New York County, Index Number 45276/89 [1989].

Hoge, S.K., and Grisso, T. (1992). Accuracy and expert testimony. *Bulletin of American Academy of Psychiatry and Law, 20,* 67–76.

HRA. (1990). *Executive management plan.* New York: Human Resources Administration of the City of New York.

Jonas v. Brunelle. Civil Court of the City of New York, County of Queens, Trial Term, Part 4, Index Number L & T 65890/90 [1991].

Mental Hygiene Law. (1994). *McKinney's Consolidated Laws of New York, Book 34A, Mental Hygiene Law.* Saint Paul: West Publishing.

Office of Legal Affairs. (1991, January 18). Human Resources Administration of the City of New York, Letter to Oversight and Investigation Unit.

Parry, J. (1985). Incompetency, Guardianship, and Restoration. In S.J. Brakel, J. Parry, and B.A. Weiner (Eds.), *The mentally disabled and the law* (third edition, pp. 369–393). Chicago: American Bar Foundation.

Rabinowitz, J. (1993). Diagnostic reasoning and reliability: A review of the literature and a model of decision-making. *The Journal of Mind and Behavior, 14,* 297–314.

Reich, J.H., and Tookey, L. (1986). Disagreements between court and psychiatrist on competency to stand trial. *Journal of Clinical Psychiatry, 47,* 29–30.

Roesch, R., and Golding, S.L. (1980). *Competency to stand trial*. Champaign: University of Illinois Press.

Sabol v. Colter. In the Matter of the Application of Barbara J. Sabol, as Commissioner of Social Services of the City of New York, Petitioner, For the Appointment of a Conservator of the Property of Colter, Proposed Conservatee, Respondent, State Supreme Court, Bronx County, Index Number 817/91 [1991].

Schmidt, W.C. (1984). The evolution of a public guardianship program. *Journal of Psychiatry and Law, 12*, 349–373.

Schmidt, W., Miller, K., Bell, W., and New, B.E. (1981). *Public guardianship and the elderly*. Cambridge, Massachusetts: Ballinger Publishing Company.

Smith, S.R., and Meyer, R.G. (1987). *Law, behavior, and mental health: Policy and practice*. New York: New York University Press.

Spring, J.C., and Dubler, N.N. (1990). Conservatorship in New York State: Does it serve the needs of the elderly? *Record of the Association of the Bar of the City of New York, 45*, 288–338.

Steadman, H.J. (1979). *Beating a rap? Defendants found incompetent to stand trial*. Chicago: University of Chicago Press.

Ziskin, J., and Faust, D. (1988). *Coping with psychiatric and psychological testimony* (Volumes 1–3). Venice, California: Law and Psychology Press.