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FUNDING FAVORED SONS AND DAUGHTERS: NONPROSECUTION AGREEMENTS AND “EXTRAORDINARY RESTITUTION” IN ENVIRONMENTAL CRIMINAL CASES

by Paul J. Larkin, Jr. 1

Over the past eight years, the federal government has entered into more than two hundred nonprosecution agreements with corporations in white-collar crime cases. In such agreements the government promises to cease its investigation and forego any potential charges so long as the corporation agrees to certain terms. And there’s the rub: given the economic realities of just being charged with a white-collar crime these days, corporations are more than willing to accept nonprosecution agreements. Prosecutors are cognizant of this willingness, as well as of the fact that these agreements are practically insulated from judicial review. This results in the prosecution possessing a seemingly unfettered discretion in choosing the terms of a nonprosecution agreement. The breadth of this discretion is nowhere more apparent than in environmental criminal cases. Nonprosecution agreements in such cases have begun to require corporations to donate monetarily to a nonprofit of the government’s choosing. Indeed, in 2012 British Petroleum agreed to pay more than \$2.394 billion to nonprofit agencies. This Article critiques this practice by highlighting the inconsistencies between nonprosecution agreements and plea bargaining—the latter are subject to judicial review while the former are not—and unearthing the differences between these payments and any common-law understanding of restitutionary principles. The Article then suggests that

the practical result of these nonprosecution agreements is that prosecutors are diverting money that ought to be paid to the Treasury to government-chosen nonprofit agencies, a power constitutionally granted to legislative actors. Finally, the Article concludes by suggesting a modest reform: judicial review by a United States magistrate judge, so as not to run into any Article III concerns, to ensure that prosecutors do not take advantage of the nonprosecution-agreement process.

EAGLES, INDIAN TRIBES, AND THE FREE EXERCISE OF RELIGION

by Kathryn E. Kovacs 53

The Bald and Golden Eagle Protection Act prohibits the taking or possession of eagles and eagle parts. Recognizing the centrality of eagles in many Native American religions, Congress carved out an exception to that prohibition for “the religious purposes of Indian tribes.” The problems with the administration of that exception are reaching crisis proportions. At the Fish and Wildlife Service’s National Eagle Repository, which collects dead eagles from around the country and distributes them to members of federally recognized Indian tribes, more than six thousand tribal members are on a waiting list for eagles. That list grows each year. Frustration with the current system feeds a burgeoning black market that threatens the viability of eagle populations. Neither of the Eagle Act’s goals is being met: eagles are not adequately protected, and tribal religious needs are not satisfied.

Scholarship in this area has neither fully elucidated the cross-cutting tensions in the administration of the Eagle Act nor prescribed a realistic solution. This Article fills that gap. First, the Article examines a series of tensions: between species preservation and religious freedom; between accommodating the religious needs of tribal members and not accommodating others with the same religious needs; within the case law itself; and between the government’s effort to accommodate tribal religion and the deep dissatisfaction of the tribal community. This Article then proposes a solution: changing the Fish and Wildlife Service’s administration of the exception from permitting individuals to permitting tribes and ultimately turning over much of the administration of the Indian tribes exception to the tribes acting collectively. The Article explains how scholarship on indigenous cultural property, community property solutions to the tragedy of the commons, and tribal self-determination supports this proposal. Finally, the Article shows how this proposal will alleviate some of the tension in the administration of the Eagle Act’s Indian tribes exception.

THE *MYRIAD* REASONS TO HIT “RESET” ON PATENT-ELIGIBILITY JURISPRUDENCE

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This Article explores the Supreme Court’s recent decision in *Association for Molecular Pathology v. Myriad Genetics, Inc.* in the historical context of the Court’s jurisprudence regarding the scope of patent-eligible subject matter under 35 U.S.C. § 101, including the broad, judicially created “exceptions” to the statute which exclude “laws of nature, physical phenomena, and abstract ideas” from patent eligibility. The authors posit that the *Myriad* decision was a significant departure from the Court’s prior jurisprudence regarding patent-eligible subject matter. The authors welcome this departure and contend that *Myriad* more accurately adhered to the letter and the spirit of § 101 than did many of the Court’s prior rulings. The authors further propose that *Myriad*’s bright-line test for patent eligibility can provide a foundation for a clear and workable framework, grounded firmly in statute, that would at last bring order and consistency to an area of patent law that has long been riddled with confusion and uncertainty.

A RIGHT TO REMAIN PSYCHOTIC? A NEW STANDARD FOR INVOLUNTARY TREATMENT IN LIGHT OF CURRENT SCIENCE

by Elizabeth Bennion 251

Mass shootings, such as the killing of school children and staff in Newtown, Connecticut, have provided brutal reminders of inadequacies in our nation’s mental health system. In the wake of these shootings, President Obama asserted that “[w]e are going to need to work on making access to mental health care as easy as access to a gun.” But what should society do when the person needing mental health treatment refuses care—when the problem is not rooted in access but in free will? When is involuntary treatment justified? In deciding whether to forcibly medicate, multiple interests come into play, including patient autonomy, public safety, and the patient’s medical welfare. As a society, we have overemphasized patient autonomy and underemphasized patient welfare to the detriment not only of the patient’s well-being but also of public safety—and even to the detriment of patient autonomy itself. This Article briefly examines the history of the involuntary treatment debate and how society arrived at the present imbalance. It then considers the implications of current scientific research on the brain and the nature of severe mental illness, using schizophrenia as an illustrative example. The Article explains how current involuntary treatment standards could be revised to reflect this scientific understanding and continue protecting a patient’s civil rights without making undue sacrifices of the patient’s long-term health and well-being. It also defends the proposed new standard against potential constitutional challenges.

The new standard would allow involuntary treatment for a limited number of years after onset of severe psychotic symptoms under specified conditions. It would also provide for more access to medical information by patients' immediate family members and primary caretakers. The standard reflects (1) research showing the vital importance of early treatment for long-term prognosis and prevention of irreversible injury to the brain; (2) statistics suggesting the particular vulnerability of a maturing brain; (3) a respect for autonomy and the patient's ultimate agency to reject treatment if no satisfactory treatment option can be found; (4) consideration of factors that uniquely affect autonomy concerns when patients are severely psychotic; and (5) research demonstrating that family involvement can greatly benefit treatment outcomes. Because brain science is currently an area of explosive growth and discovery, this Article recognizes that any involuntary treatment standard will need to be continually re-examined and revised in light of scientific progress.

NOTES

WHAT'S IN A NAME? A CASE FOR INCLUDING BIOMETRIC IDENTIFIERS ON ARREST WARRANTS

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Too often, innocent individuals sharing the same name and physical characteristics as the subject of an arrest warrant are misidentified and mistakenly held by law enforcement. The use of biometric identifiers, commonly known as fingerprint identification numbers, would help reduce the number of false arrests because a person's fingerprints are entirely unique to that individual. Harkening back to 1894, the Supreme Court's prevailing interpretation of the particularity requirement of arrest warrants mandates only that the warrant include a subject's name or general physical description. With such a low threshold to establish a facially valid warrant, law enforcement officers are essentially immunized from civil liability and mistakenly arrested individuals are without legal recourse. Such consequences do not accord with the Fourth Amendment's "right of the people to be secure in their persons." This Note argues that biometric identifiers, which have been used in law enforcement and have the ability to singularly identify the actual subject of an arrest warrant, should be included on arrest warrants. This embellishment of the "particularity" standard faithfully accords with the guarantees of the Fourth Amendment and would advance the rights of individuals who are wrongly arrested.

THE FEDERAL CIRCUIT’S UNBOUNDED CONCEPTION OF INHERENCY IN
PATENT LAW

by Matthew Kaiser 345

This Note examines the doctrine of inherency in patent law, which relates to the Patent Act’s novelty requirement, and—theoretically—seeks to ensure that inventions that are already within the public domain are not wrenched away from the public through a later patent grant. Unfortunately, a lack of recent Supreme Court guidance and a conflict within the Federal Circuit concerning what is necessary to prove inherency have led to a confusing and unpredictable body of inherency law. This Note begins by outlining the increased concern for uniformity and predictability in patent law; it then traces the early treatment of inherent anticipation by the Supreme Court, as well as the Federal Circuit and its predecessor court. Next, it argues that the Federal Circuit’s more recent inherency jurisprudence has expanded the scope of inherency, particularly with respect to patents covering pharmaceuticals, introducing dangerous and costly unpredictability into the patent system. Finally, it proposes a common-sense solution aimed at abrogating the current boundless conception of inherency in order to allow patent law and inherency to perform their central functions: to provide predictability and ensure the important patent policy of rewarding new inventions that are not already within the public domain.