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Defending the Mentally Ill in Maryland: The Guilty Plea vs. the Insanity Defense

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by Paul Handy

The decision to enter a plea in a criminal proceeding is fraught with constitutional, ethical and strategical dilemmas. Consider the following situation: counsel has been retained by a client accused of committing a serious crime. Preliminary discovery and investigation indicate that the State has a strong case for conviction. However, one or more psychiatrists who have evaluated the client conclude that he was mentally impaired at the time of the alleged criminal act. The defendant is found competent to stand trial. How should he be advised to plead?

Before advising the client on the plea, defense counsel should consider some recent developments in Maryland law. There is no longer an appeal as of right from a guilty plea.[1] The defendant now carries the burden of persuading by a preponderance of the evidence on the insanity issue.[2] A successful insanity defense carries the collateral consequence of a criminal conviction as well as an adjudication of "not criminally responsible."[3] An individual found both guilty and insane may be confined for a period longer than the maximum sentence for the offense committed.[4]

Even if the defendant has a meritorious insanity defense, there are numerous reasons to forego its use. These reasons include: (1) a jury is unlikely to return an insanity verdict where the act was egregious; (2) the defendant might prefer a definite prison term to indefinite confinement in a mental institution; (3) the defendant might wish to avoid the double consequences of the "guilty" and "insane" verdicts; and (4) if it is a political crime, an insanity defense would diminish its impact.[5]

Nevertheless, the insanity defense does have certain advantages for the defendant. A guilty verdict alone is insufficient to determine sentencing where the defendant requires psychiatric assistance. Also, in a capital case, the insanity defense excuses the defendant from criminal responsibility, thus removing the peril of the death penalty.

This article will explore some of the factors to be considered in choosing either to plead guilty or to raise an insanity defense. The issues of civil commitment,[6] competency to stand trial,[7] and plea bargaining will not be discussed except where relevant. Defense counsel should attempt to convince the State's Attorney to enter a stet or nolle prosequi and refer the defendant for civil commitment. This article will focus on the procedural requirements, ethical considerations, and consequences of the guilty plea and of the insanity defense.

The Guilty Plea

In Maryland, the defendant may plead not guilty, guilty, or, with the court's permission, nolo contendere.[8] In addition, under the new statute, the defendant may interpose the defense of insanity,[9] which is titled "not criminally responsible."[10]

The plea of guilty involves the waiver of the defendant's constitutional rights to a trial by jury, confrontation of witnesses, and the privilege against self-incrimination.[11] Unlike the plea of nolo contendere,[12] the guilty plea is an admission of actual guilt,[13] and the admission of guilt has significance for collateral proceedings. For example, under the doctrine of collateral estoppel, the guilty plea operates as a rebuttable presumption as to common factual issues.[14]

The United States Supreme Court has upheld the validity of an "*Alford* plea" in which the defendant pleads guilty but asserts his actual innocence.[15] In *North Carolina v. Alford*,[16] the defendant pled guilty to second-degree murder rather than face a possible death sentence for first-degree murder. The Supreme Court held that such a plea may be accepted, so long as it is made voluntarily and knowingly, and a factual basis for the charge is established for the record.[17]

Due to the constitutional implications involved, the trial court has broad discretion to reject a guilty plea,[18] but limited discretion to accept such a plea.[19] In Maryland, the court must first determine that the plea is being made "[v]oluntarily, with the understanding of the nature of the charge and the consequences of the plea."[20] The court must question the defendant on the record,[21] but the court is not required to obtain an express waiver of the three above-mentioned constitutional rights.[22] (Other jurisdictions have adopted a broader interpretation of the Due Process Clause of the United States Constitution and require express waiver of these rights on the record.[23])

The American Bar Association Project on Minimal Standards for Criminal Justice takes the position that the decision to enter a plea belongs to the defendant, not to defense counsel.[24] The ABA Project also recommends that decisions involving constitutional rights be made by the accused as these decisions are "so crucial to the accused's fate."[25] On the other hand, it is also recommended that decisions involving trial strategy be made by defense counsel, who is expected to have experience and familiarity with basic legal principles.[26] Under this standard, the guilty plea is the personal choice of the defendant.[27] The defendant, however, is entitled to effective representation of counsel in the course of pleading guilty. The parameters of such representation have only recently been addressed by the Supreme Court.[28]

Despite the personal character of the guilty plea, the defendant may not withdraw a properly entered plea without the court's approval. Maryland Rule 4-242 (f) provides that the court may allow the withdrawal of a guilty plea "where justice requires."[29] In Maryland, the trial court's decision to permit withdrawal will not be disturbed unless the record shows that the State or the court acted to prejudice the defendant, or that constitutional guidelines were not followed.[30] The court may permit withdrawal at any time before sentence has been imposed.[31] The Court of Appeals of Maryland recently held that in a capital case where the defendant obtains reversal of a death sentence, he then may withdraw his guilty plea at the court's discretion before the subsequent sentencing proceeding.[32]

If the trial court does not permit withdrawal of the guilty plea, the defendant must now obtain leave of court to appeal the validity of a guilty plea.[33] The defendant must set out, in his motion, the specific grounds for the appeal, and must file the motion within thirty days.[34]

Finally, the defendant's competency to plead guilty becomes an issue where there is evidence that the defendant has suffered from mental illness. Maryland's competency statute requires that the defendant have the capacity both to un-

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derstand the nature of the proceedings and to assist in his own defense.[35] There are different standards for competency to waive constitutional rights than for competency to stand trial.[36] In *Massey v. Moore*,[37] the Supreme Court per Justice Douglas held: "One may not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without the benefit of counsel."[38]

Recently, in *Mann v. State's Attorney for Montgomery County*,[39] the Maryland Court of Appeals held that a defendant found incompetent to stand trial cannot be competent to waive his privilege against self-incrimination.[40] In dicta, the court observed that even a finding of competency to stand trial "does not automatically result in a conclusion that an accused is also competent to waive substantial rights, such as the right to plead not guilty, the right to a jury trial, and the right to assistance of counsel."[41]

In some circumstances, the decision to plead guilty merely demonstrates that the defendant is incompetent to assist in his own defense.

Thus, defense counsel should be wary of assenting to the defendant's election to plead guilty if there is evidence that he is mentally ill. The decision may be defective under the voluntary and knowing standard. In some circumstances, the decision to plead guilty merely demonstrates that the defendant is incompetent to assist in his own defense.

The Insanity Plea

Maryland has adopted substantially the Model Penal Code standard for the insanity defense.[42] Under this standard the defendant is not criminally responsible for his conduct if "at the time of that conduct, the defendant, because of a mental disorder or mental retardation, lacks substantial capacity: (1) to appreciate the criminality of that conduct; or (2) to conform that conduct to the requirements of law."[43] However, "a 'mental disorder' does not include an abnormality that is manifested only by repeated criminal or otherwise antisocial conduct."[44]

Under the new statute, effective July 1, 1984, the burden to establish insanity is placed on the defendant by a preponderance of the evidence.[45] Although *Mullaney v. Wilbur*[46] requires that the State carry the burden of establishing the elements of the offense, the Maryland appellate courts have held that the insanity plea is no more than an affirmative defense[47] and that it does not defeat the element of mens rea.[48] If it is merely a defense, the burden may constitutionally be placed on the defendant.[49]

Maryland does not actually have a plea of not guilty by reason of insanity. The issue of insanity is interposed as an "affirmative defense,"[50] in addition to the "pleas" of not guilty, guilty and nolo contendere.[51] The insanity defense may be asserted by either defense counsel or the defendant.[52] Once the issue is generated, the trier of fact issues two verdicts: a general verdict on the issue of guilt, and a special verdict on the issue of insanity.[53] The defendant, however, is not entitled to a bifurcated trial on the issues.[54]

In *Langworthy v. State*,[55] the Court of Appeals of Maryland addressed three possible dispositions of an insanity defense: (1) if the verdict on the general issue plea is not guilty, the plea of insanity becomes moot; (2) if the general verdict is guilty and the special verdict is sane, the judge may impose sentence; and (3) if the general verdict is guilty and the special verdict is insane, the defendant's conduct is criminally excused, but he has failed on the general plea.[56] Thus, if the defendant is found guilty but insane, he may appeal the guilty verdict.[57]

The question whether a judge may impose an insanity defense on a defendant is not well settled in Maryland or in other jurisdictions.[58] The District of Columbia Circuit has ruled that the trial judge may raise *sua sponte* an insanity defense, even where the defendant and his attorney have decided not to pursue it.[59] The problem with this rule is that there is great potential for prejudice to defense trial strategy and to the decision on the plea.[60] In *Lynch v. Overholser*,[61] a case arising under the D.C. insanity statute,[62] the United States Supreme Court interpreted the statute as not providing for criminal commitment of a defendant on an insanity plea involuntarily raised.[63] The Court indicated that under any other interpretation, the statute would violate the Due Process Clause.[64] As a result of *Lynch*, there appears to be little purpose in imposing an insanity defense on a defendant, except perhaps to steer a dangerous individual into the civil commitment system for a new hearing.

The Maryland Court of Special Appeals apparently would allow defense counsel to impose this defense on his client. In *List v. State*,[65] the Court ruled expressly that defense counsel may pursue an insanity defense over the defendant's refusal to consent and express objections.[66] The insanity issue is an affirmative defense and a matter of trial strategy, the province of the defense attorney.[67] The Court of Appeals in *List*, however, dismissed the appeal and vacated the lower appellate court's opinion.[68]

The Court of Special Appeals has also held that defense counsel may exercise independent discretion to withdraw an insanity defense,[69] and that the trial court may allow withdrawal without inquiring as to the defendant's waiver of constitutional rights since none are implicated.[70] The same standard for the withdrawal of a guilty plea under Maryland Rule 4-242(f)[71] applies to the withdrawal of an insanity plea,[72] and broad discretion to accept or reject the withdrawal of an insanity plea vests in the trial judge.[73] The trial judge may not, however, strike an insanity defense on a motion by the State.[74]

An individual found both guilty and insane may be confined for a period longer than the maximum sentence for the offense committed.

Assuming the defendant prevails on the insanity defense, it may be a pyrrhic victory. At this point, it become necessary to distinguish between civil and criminal commitment.

Involuntary civil commitment occurs where the individual is confined in a mental health institution as a result of the signed certificates of two physicians,[75] or an emergency petition by the court, peace officers, health officers or other interested persons.[76] *Addington v. Texas*[77] requires that the committed person be granted a hearing at which the State carries the burden by clear and convincing evidence that he poses a danger to himself or others.[78]

Criminal commitment occurs where the individual is confined after a criminal adjudication of insanity.[79] *Jones v. United States*[80] permits the burden of proving dangerousness to be placed on the defendant by a preponderance of the evi-

dence, since the verdicts of "guilty" and "insane" are probative of his potential harm to others.[81]

Under the new Maryland statute, effective July 1, 1984, a defendant who is found "not criminally responsible" is automatically committed to a mental health institution[82] and granted a release hearing within fifty days.[83] He is then entitled to a hearing within one year and then one each year thereafter,[84] although he may be confined indefinitely.[85] At each hearing, the committed person carries the burden of proving by a preponderance of the evidence that he is no longer dangerous.[86] It is constitutionally permissible for a defendant to be committed for a period longer than the maximum sentence for the substantive offense.[87] Thus, in terms of length of incarceration, an insanity verdict may have more oppressive consequences than a guilty verdict for many offenses.

Ethical Problems

As has been shown, the decision to plead guilty belongs to the defendant alone,[88] but an insanity defense apparently is a tactical decision for the attorney.[89] Since the guilty plea and the insanity defense are usually alternative decisions, the distinction in decision-making authority can result in conflicts between the defendant and his attorney.[90] Serious ethical problems can arise. For example, the defendant who is mentally impaired may decide to plead guilty over counsel's objections. There may be a conflict between the attorney's duty to represent his client zealously[91] and his duty not to disclose his client's confidences and secrets, where the attorney attacks his client's competency to plead guilty.

These are but a few of the problems arising from the decision of how to plead. The ethical dilemmas involved in representing the mentally ill are too complex to handle here with specificity,[93] but there are some guidelines to consider.

The Code of Professional Responsibility requires that the attorney investigate all defenses available to the client.[94] There is no duty to advance possible defenses if, in the attorney's professional judgment, the defendant's rights are better served by other means.[95] The insanity defense, however, is more like a plea than any other defense and has important consequences for the defendant. Therefore, notwithstanding *List v. State*,[96] defense counsel should be reluctant to decide on pursuing an insanity defense without the consent of the client.

The Supreme Court recently ruled on issues of effective assistance of defense counsel at trial in two cases; *United States v. Cronic*[97] and *Strickland v. Washington*.[98] In *Strickland*,[99] the Court per Justice O'Connor established certain basic duties of counsel:

> Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.... From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of prosecution. Counsel also has a duty to bear such skill and knowledge as will render the trial a reliable adversarial testing process. (citations omitted).[100]

The Court indicated that prevailing standards, such as the ABA Project on Minimal Standards for Criminal Justice,[101] are only guides to determine reasonable attorney practices.[102]

Although it is the accused who must decide whether to plead guilty,[103] as a practical matter the accused will probably rely on the attorney's advice concerning the consequences of the plea and the likelihood of acquittal at trial. Such advice is often speculative, and the Supreme Court has granted broad latitude to defense counsel in advising the client on the decision to plea.[104] Ineffective assistance of counsel has been found where the attorney told the client he could receive the death penalty but the death penalty had been declared unconstitutional.[105] The defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense.[106]

While a successful insanity defense will excuse the client's criminal conduct[107] and cause him to receive psychiatric care,[108] it may result in a longer period of confinement than a guilty plea would.[109] A guilty plea may be advantageous in terms of length of incarceration, but a guilty plea does not by itself result in the defendant receiving treatment for his mental illness. Ultimately, the choice of plea or defense will rest on such factors as the client's age, the criminal charge, the nature of his illness, extent of cooperation by the State and the court, the psychiatric facilities available, the client's family situation, and various other factors.

The defense attorney should not assume that the defendant is capable of pleading guilty or making informed decisions on strategy merely because he has been found competent to stand trial. Defense counsel's assent to a guilty plea or insanity defense is critical where the defendant is suffering from mental disease or disorder. In special circumstances, the defense attorney may be forced to attack the competency of his own client. In any event, an active role by counsel is required to assist the mentally ill defendant in reaching a decision on the plea.

Conclusion

The decision to plead guilty or interpose an insanity defense is a difficult one, especially in light of the new Maryland insanity statute.[110] As of July 1, 1984, the burdens for the defense of "not criminally responsible" and subsequent release from criminal commitment have shifted to the defendant by a preponderance of the evidence.[111] The individual who has been adjudicated insane in a criminal proceeding may be incarcerated for a period longer than the maximum sentence for the charged offense.[112] The criminal defendant may be adjudicated both "guilty" and "insane" and suffer the collateral consequences of both verdicts.[113]

In appropriate circumstances, defense counsel may consider advising the client to plead guilty as an alternative to raising an insanity issue at trial. A guilty verdict results in a definite period of confinement while criminal commitment can last indefinitely.[114] On the other hand, an insanity defense is advisable where the defendant is in present need of psychiatric care, or where he faces a possible death sentence.

Because this decision is so crucial to the defendant's personal liberty and involves basic constitutional rights, the decision should be made by the defendant after consultation with defense counsel concerning the alternatives available and their consequences. Defense counsel must take an active role in the decision-making process, particularly where the defendant is still suffering from mental illness.

Notes

[1] MD. [CTS. & JUD. PROC. CODE ANN.] §12-302(e) (1984); Md. R. 1096.

[2] MD. [HEALTH GEN.] CODE ANN. §12-109(b) (1984).

[3] Pouncey v. State, 297 Md. 264, 269, 465 A.2d 475, 478 (1983); Langworthy v. State, 284 Md. 588, 599 n.12, 399 A.2d 578, 584 (1979), *cert. denied,* 450 U.S. 960 (1981).

[4] Jones v. United States, ___ U.S. ___, *103 S.Ct. 3043, 3052 (1983).*

[5] For a thorough discussion of these factors *see* Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant,* 41 OHIO ST. L.J. 637 (1980).

[6] MD. [HEALTH GEN.] CODE ANN. §§10-616-622 (1982).

[7] *Id.* at §§12-103-107 (1984).

[8] Md. R. 4-242(a).

[9] *Id.*

[10] MD. [HEALTH GEN.] CODE ANN. §§12-108-121 (1984).

[11] Boykin v. Alabama, 395 U.S. 238, 243 (1969).

[12] Md. R. 4-242(a).

[13] Brady v. United States, 397 U.S. 742, 748 (1969).

[14] Brohawn v. Transamerica Insurance Co., 276 Md. 396, 403, 347 A.2d 842, 848 (1975).

[15] North Carolina v. Alford, 400 U.S. 25 (1970).

[16] 400 U.S. 25 (1970).

[17] *Id.* at 37.

[18] *See id.* at 38 n.11; Lee v. State, 36 Md. App. 249, 258-259, 373 A.2d 331, 336 (1977).

[19] Boykin v. Alabama, 395 U.S. 238, 243 (1969); State v. Priet, 289 Md. 267, 275, 424 A.2d 349, 353 (1981); *see* Md. R. 4-242(c).

[20] Md. R. 4-242(c); Hudson v. State, 286 Md. 569, 595, 409 A.2d 692, 705 (1979).

[21] Md. R. 4-242(c); Hudson v. State, 286 Md. at 595, 409 A.2d at 705.

[22] State v. Priet, 289 Md. at 288, 424 A.2d at 360 (interpreting former Md. R. 731(c)); Davis v. State, 278 Md. 103, 114, 361 A.2d 113, 119 (1976) (interpreting U.S. Const. Amend. XIV).

[23] *See, e.g.,* In re Tahl, 1 Cal.3d 122, 81 Cal. Rptr. 577, 460 P.2d 449 (1969); *cert. denied,* 398 U.S. 911 (1970).

[24] ABA PROJECT ON MINIMAL STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: THE DEFENSE FUNCTION, Standard 4-5.2(a)(i) (Approved Draft 1982) (*hereinafter cited as* "ABA STANDARDS").

[25] *Id.* at Standard 4-5.2 commentary.

[26] *Id.* at Standard 4-5.2(b) & commentary.

[27] *Id.* at Standard 4-5.2(a)(i).

[28] *See* United States v. Cronic, 52 U.S.L.W. 4560 (U.S. May 14, 1984); *see also* Strickland v. Washington, 52 U.S.L.W. 4565 (U.S. May 14, 1984).

[29] Md. R. 4-242(f)(1).

[30] Blinken v. State, 46 Md. App. 579, 583, 420 A.2d 997, 1000 (1980).

[31] Md. R. 4-242(f)(1).

[32] Harris v. State, No. 83-74 (Md. Filed May 8, 1984).

[33] MD. [CTS. & JUD. PROC. CODE ANN.] §12-302(e) (1984); Md. R. 1096(a).

[34] Md. R. 1096(a)(1), (2).

[35] MD. [HEALTH GEN.] CODE ANN. §12-101(d) (1984).

[36] *See* Westbrook v. Arizona, 384 U.S. 150 (1966); *see also* State v. Renshaw, 276 Md. 259, 267 n.3, 347 A.2d 219, 225 (1975).

[37] 348 U.S. 105 (1954).

[38] *Id.* at 108.

[39] 298 Md. 160, 468 A.2d at 129.

[40] *Id.,* 298 Md. at 169, 124 (1983).

[41] *Id.,* 298 Md. at 168-69, 468 A.2d at 128-29.

[42] MD. [HEALTH GEN.] CODE ANN. §12-108(a) (1984); Strawderman v. State, 4 Md. App. 689, 693, 244 A.2d 888, 890 (1968).

[43] MD. [HEALTH GEN.] CODE ANN. §12-108(a) (1984).

[44] *Id.* at §12-108(b).

[45] *Id.* at §12-109(b).

[46] 421 U.S. 684 (1975).

[47] White v. State, 17 Md. App. 58, 61-62, 299 A.2d 873, 875 (1973); *see* Langworthy v. State, 284 Md. at 592-93, 399 A.2d at 580-81.

[48] Langworthy v. State, 284 Md. at 599 n.12, 399 at 584.

[49] Patterson v. New York, 432 U.S. 197, 210 (1972); Leland v. Oregon, 343 U.S. 790, 797 (1952).

[50] Md. R. 4-242(a).

[51] *Id.*

[52] MD. [HEALTH GEN.] CODE ANN. §§12-109(a), (d) (1984).

[53] *Id.* at §12-109; Pouncey v. State, 297 Md. at 267, 465 A.2d at 477.

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[54] Morris v. State, 11 Md. App. 18, 272 A.2d 663 (1971).
[55] 284 Md. 588, 399 A.2d 578 (1979), *cert. denied*, 450 U.S. 960 (1981).
[56] *Id.*, 284 Md. at 593-594, 399 A.2d at 581-82.
[57] *Id.*, 284 Md. at 594, 399 A.2d at 582.
[58] For a thorough discussion, *see* Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant*, 41 OHIO ST. L.J. 637 (1980).
[59] United States v. Robertson, 430 F. Supp 444, 446-47 (D.D.C. 1977); Whalem v. United States, 346 F.2d 812, 818 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 862 (1965).
[60] *See* ABA STANDARDS, Standards 5.1, 5.2; *accord*, Frendak v. United States, 408 A.2d 364, 376-79 (D.C.Ct.App. 1979).
[61] 369 U.S. 705 (1962).
[62] D.C. CODE ANN. 24-301(d) (1959).
[63] *Lynch v. Overholser, 369 U.S. at 719.*
[64] *Id.* 369 U.S. at 711.
[65] 18 Md. App. 578, 308 A.2d 455 (1973); *vacated as moot*, 271 Md. 367, 316 A.2d 824 (1974).
[66] *Id.*, 18 Md. App. at 586-587, 308 A.2d at 460.
[67] *Id.*, 18 Md. App. at 585, 308 A.2d at 459; White v. State, 17 Md. App. at 61-62, 299 A. 2d at 875.
[68] List v. State, 271 Md. 367, 316 A.2d 824 (1974).
[69] White v. State, 17 Md. App. at 58, 299 A.2d at 873.
[70] *Id.*
[71] Md. R. 4-242(f).
[72] Walker v. State, 21 Md. App. 666, 671, 321 A.2d 170, 174 (1974).
[73] *Id.*
[74] Riggleman v. State, 33 Md. App. 344, 363 A.2d 1159, (1976).
[75] MD. [HEALTH GEN.] CODE ANN. §10-615 (1982).
[76] *Id.* at §10-622.
[77] 441 U.S. 418 (1979).
[78] *Id.* at 433; *see* Dorsey v. Solomon, 604 F.2d 271, 276-77 (4th Cir. 1979)(applying *Addington* to Maryland's criminal commitment system); *see also* Coard v. State, 288 Md. 523, 419 A.2d 383, (1980).
[79] MD. [HEALTH GEN.] CODE ANN. §12-111 (1984).
[80] ___ U.S. ___, 103 S.Ct. 3043 (1983).
[81] *Id.*, ___ U.S. ___, 103 S.Ct. 3051.
[82] MD. [HEALTH GEN.] CODE ANN. §12-111(a) (1984).
[83] *Id.* at §12-114(a).
[84] *Id.* at §12-118(a).
[85] *See id.* at §§12-113(b),(c).
[86] *Id.* at §12-113(d).
[87] Jones v. United States, ___ U.S. at ___, 103 S.Ct. at 3052.
[88] *See* ABA STANDARDS, Standard 4-5.2(a)(i).
[89] *See id.* at Standard 4-5.2(b).
[90] For a thorough discussion, *see* Chernoff & Schaeffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 AM. CRIM. L. REV. 505 (1972).
[91] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1979).
[92] *Id.* at Canon 4.
[93] *See* n.89, *supra; see also* ABA STANDARDS, Standards 1-1.1-8.6.
[94] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC6-4, EC7-6, DR6-101(3) (1979); *see also* ABA STANDARDS, Standards 4-1.1-8.6
[95] *See e.g.*, People v. Gonzalez, 20 N.Y.2d 289, 294, 282 N.Y.S. 538, 542, 229 N.E.2d 220, 223 (1967); *see also* List v. State, 18 Md. App. at 586-87, 308 A.2d at 459-60.
[96] 18 Md.App. 578, 308 A.2d 455 (1973), *vacated as moot*, 271 Md. 367, 316 A.2d 824 (1974).
[97] ___ U.S. ___, 104 S.Ct. 2039 (1984).
[98] ___ U.S. ___, 104 S.Ct. 2052 (1984).
[99] *Id.*
[100] *Id.* at 2065.
[101] ABA STANDARDS, *supra.*
[102] Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2065 (1984).
[103] ABA STANDARDS, Standard 4-5.2(a)(i).
[104] *See* United States v. Cronic, ___ U.S. ___, 104 S.Ct. 2039 (1984); *see also* Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984).
[105] Kennedy v. Maggio, 34 Crim. L. Rptr. 2430 (5th Cir. February 21, 1984).
[106] Strickland v. Washington, 104 S.Ct. at 2068.
[107] *See* MD. [HEALTH GEN.] CODE ANN. §12-108 (1984).
[108] *See generally, id.* at §§12-108-21.
[109] *See id.* at §12-113; *see also* Jones v. United States, ___ U.S. at ___, 103 S.Ct. 3052.
[110] MD. [HEALTH GEN.] CODE ANN. §§12-101-120 (1984).
[111] *Id.* at §12-109(b), §12-113(d).
[112] Jones v. United States, ___ U.S. at ___, 103 S.Ct. 3052.
[113] Pouncey v. State, 297 Md. 269, 465 A.2d 478; Langworthy v. State, 284 Md. at 599 n.12, 399 A.2d 584.
[114] MD. [HEALTH GEN.] CODE ANN. §12-113(b), (c) (1984).

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rights of any persons except former slaves. *See* Nowak, *supra* note 5 at 540-48.
[20] 98 U.S. 145 (1878).
[21] *Id.* at 164.
[22] *Id.* at 164, 166.
[23] *Id.* at 164-66.
[24] For an analysis of the further refinement of Supreme Court standards in this area *see* Nowak, *supra* note 5, at 849-94.
[25] 310 U.S. 296 (1940).
[26] For an analysis of the application of free speech concepts by analogy to many of the early religion cases, *see* Nowak, *supra* note 5, at 728-40, 809, 849, 873-74.
[27] Malnak v. Yogi, 440 F. Supp. 1284 (D. N.J. 1977) (Transcendental Meditation).
[28] *E.g.*, Turner v. Unif. Church, 473 F. Supp. 367 (D.R.I. 1978), *aff'd*, 602 F.2d, 458 (1979); Van Schaick v. Church of Scientology, 535 F. Supp. 1125 (D. Mass. 1982).
[29] *Cf.* People v. Patrick, 126 Cal. App. 3d at 960-61, 179 Cal. Rptr. at 282 (consent and prejudice issues raised but not reached).
[30] For example, see the nisi opinion in Turner v. Unif. Church, 473 F. Supp. 367 (D.R.I. 1978). *See also* Unif. Church v. Rosenfeld, 458 N.Y.S.2d 920 (App. Div. 1983)(church's deceit justifying denial of special use permit).
[31] *See, supra* note 1.
[32] *See* text accompanying notes 20 *et seq.*
[33] An estoppel based upon a reasonable belief that consent was valid could also be argued. *See* text accompanying notes 36-46 *infra; contra*, RESTATEMENT OF TORTS § 61 (1934)(invalid consent of "invalid personality").
[34] Technically, the defense would be valid only as against the victim which would arguably privilege the religious society to engage in the activities upon which third party claims such as those of the parents in *George* were based.
[35] *See, supra* note 1; *Cf.* Note, *Role of the Child's Wishes in Custody Proceedings*, 6 U.C. DAVIS L. REV. 332, 337 (1973)(fourteen years old as a reference age).
[36] *See*, Note, *Abduction, Religious Sects and the Free Exercise Guarantee*, 25 SYRACUSE