

**How the Legal System Can Help
Create a Recovery Culture in
Mental Health Systems**

Alternatives 2005
Leading the Transformation to Recovery
October 28, 2005

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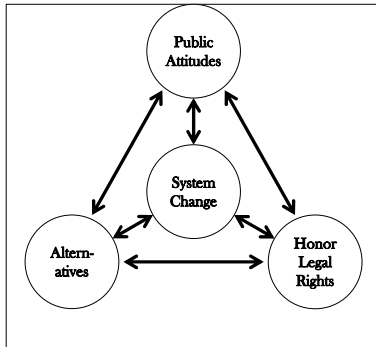
Coercion Impedes Alternatives

- Path of Least Resistance.
- Therapeutic Alliance Most Important Thing.
- Involuntary Commitment and Forced Drugging (& Electroshock) Should be Exception and Hard to Obtain.
- Strategic Litigation can be a key part of transformation.

**Legal System is One of Three
Key Areas**

- Public Education
- Alternatives
- Strategic Litigation

Three Areas Reinforce Each Other



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Due Process

Fifth Amendment U.S. Constitution

No person shall be . . . be deprived of life, liberty, or property, without due process of law.

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Procedural Due Process

- Neutral Decisionmaker
- Meaningful Notice
- Meaningful Opportunity to Respond

Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 2648-9 (2004)

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Substantive Due Proces

- To Justify Deprivation of Fundamental Rights:
 - Must Further Compelling State Interest
 - Least Restrictive Alternative

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Involuntary Commitment and Medication Are Deprivations of Fundamental Rights

- Involuntary Commitment: *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)
- Involuntary Medication. *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028 (1990)

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When Involuntary Commitment Constitutionally Permissible

1. Confinement takes place pursuant to proper procedures and evidentiary standards,
 2. Finding of "dangerousness either to one's self or to others," and
 3. Proof of dangerousness is "coupled ... with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'
- Kansas v. Crane*, 534 U.S. 407, 409-10, 122 S.Ct. 867, 869 (2002).
- Incapable of surviving safely in freedom. *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373, 1383 (1996).

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When Forced Drugging Constitutionally Permissible?

Court Must Conclude:

1. Important governmental interests are at stake,
2. Will significantly further those state interests - substantially unlikely to have side effects that will interfere significantly (with achieving state interest),
3. Necessary to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results, and
4. Medically appropriate, i.e., in the patient's best medical interest in light of his medical condition. The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.

Sell v. United States, 539 U.S. 166, 177-8, 123 S.Ct. 2174, 2183 (2003) (Competence to Stand Trial Case).

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The Reality

- Legal Proceedings are a Sham
 - Meretricious Testimony
 - Enabled by Attorney Abdication
 - No Actual Access to Independent Expert

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Meretricious Testimony

Courts accept . . . testimonial dishonesty, . . . specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." . . .

Experts frequently . . . and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment . . .

This combination . . . helps define a system in which (1) dishonest testimony is often regularly (and unthinkingly) accepted; (2) statutory and case law standards are frequently subverted; and (3) insurmountable barriers are raised to insure that the allegedly "therapeutically correct" social end is met. . . . In short, the mental disability law system often deprives individuals of liberty disingenuously and upon bases that have no relationship to case law or to statutes.

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The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone? by Michael L. Perlin, *Journal of Law and Health*, 1993/1994, 8 12 JLHEALTH 15, 33-34.

Importance of Effective Attorney

"Empirical surveys consistently demonstrate that the quality of counsel remains the single most important factor in the disposition of involuntary civil commitment cases." . . . Without such [adequate] counsel, it is likely that there will be no meaningful counterbalance to the hospital's "script," and the patient's articulated constitutional rights will evaporate.

Perlin, "And My Best Friend, My Doctor/Won't Even Say What It Is I've Got": The Role And Significance Of Counsel In Right To Refuse Treatment Cases, 42 San Diego Law Review 735 (2005)

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Attorney Abdication

"Traditionally, lawyers assigned to represent state hospital patients have failed miserably in their mission"

Houston Law Review January, 1991 Health Law Issue COMPETENCY, DEINSTITUTIONALIZATION, AND HOMELESSNESS: A STORY OF MARGINALIZATION Michael L. Perlin

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Strategic Litigation

- 10% of Commitments; No Forced Drugging (or Electroshock) Legal (jg)
 - Effective Representation
 - Facilitate Alternatives
 - Appeals
 - 42 USC § 1983

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10% of Involuntary Commitments Legally Justified?

- Proof of Dangerousness?
- Illegality (unconstitutionality) of Gravely Disabled Standard

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No Forced Drugging Legally Justified?

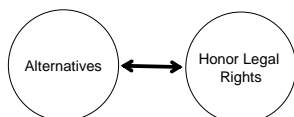
- Best Interests
 - Can't meet evidentiary standard
 - Very Limited Effectiveness
 - Extreme Harm
- Least Restrictive Alternative

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Alternatives

- Need for Own Sake
- Litigation Can Facilitate
 - Make coercion harder
 - Least Restrictive Alternative
- Litigation Needs



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There Are Effective Non-Coercive, Non-Drug Alternatives

- This Conference's Agenda Needs to Be the System's Agenda
 - Tokenism Now?
- Choice Driven
- Users/Peer Driven System
- Soteria
 - Being Done In Europe
 - Italy Abolished Hospitals in 1970's
- Michigan Psychotherapy Study
- Community Mental Health: A Practical Guide
- <http://psychrights.org/Research/Digest/Effective/effective.htm>

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Myths to Be Busted

- Dangerousness
- Hopelessness
- Effectiveness of Psych Drugs (in aggregate)
 - However, some people find them useful
- No Effective Alternatives
- Defective Brain theory of Mental Illness?????

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Psychiatric Drugs at Least Halving Recovery Rate

- Anatomy of an Epidemic, *Ethical Human Psychology and Psychiatry*, Volume 7, Number 1: 23-35, Spring 2005
 - 6 times Per Capita Disability increase for Mental Illness since 1955 when Thorazine Introduced.
 - Ritalin, etc., Cause Psychotic Reactions in Significant Number of People → DX Serious MI
 - SSRI Anti-Depressants Cause Psychotic Reactions in Significant Number of People → DX Serious MI

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Neuroleptics Increase Relapse Rate

- Undrugged People diagnosed with mental illness no more dangerous than general population.
- Drugged people slightly more likely to relapse
- Abrupt withdrawal significantly increases relapse rate

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Changing Public Attitudes

- Must Be Done on National as Well as Local Level
- Establish Relationships
- Speakers (Talking Heads)
- Promote Stories
- Make Stories

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PsychRights Efforts to Mount Legal Challenges

- State Coordinators (8 States, 3 Countries)
 - AK - NY - IL - Canada (BC)
 - MA - OK - WI - UK
 - MN - KY
- Looking for Coordinators for Other States
- Recruiting Attorneys & Experts

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Natural Allies???

- MindFreedom
- ICSP
- PsychRights
- NARPA
- NEC
- Clearinghouse
- AHRP
- USPPA/NYAPRS
- New York -- Alliance Empowerment Coalition
- Mass. Freedom Center
- California -- Coalition Advocating for Rights Empowerment and Services (CARES)
- Wisconsin -- Friends and Families of Psychiatric Survivors of Wisconsin
- Others?

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Suggested Reading

- *The Hidden Prejudice: Mental Disability on Trial*, (2000) by Michael L. Perlin
- *Mad in America: Bad Science, Bad Medicine and the Enduring Mistreatment of the Mentally Ill* (2001) by Robert Whitaker
- *Rethinking Psychiatric Drugs: A Guide to Informed Consent*, by Grace E. Jackson, MD, (2005)
- *Brain Disabling Treatments in Psychiatry: Drugs, Electroshock, and the Role of the FDA* (1997) by Peter Breggin, MD.
- *Community Mental Health: A Practical Guide* (1994) by Loren Mosher and Lorenzo Burti
- *Soteria: Through Madness to Deliverance*, by Loren Mosher and Joyce Hendrix with Deborah Fort (2004)
- *Psychotherapy of Schizophrenia: The Treatment of Choice* (Jason Aronson, 1996), by Bertram P. Karon and Gary R. Vandenbos

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