

Strategic Litigation to Achieve Meaningful Change: The *Myers* Case, Alaska, and a National Initiative

NARPA Annual Rights Conference
Social Justice-The Time is Now!
November 16, 2006

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Overview

- Legal Standards & Their Lack of Enforcement
- A Framework for Change
- The Alaska Experience
- National Initiative

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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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Involuntary System Operates Largely Illegally

- Estimate (JG) No More Than 10% of Involuntary Commitments Meet Statutory and Constitutional Requirements
- Doubt Forced Drugging Can Ever Meet the Best Interest/Least Intrusive Alternative Standards

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Corruption in the Courts

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.

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

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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

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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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Some Results

- Massive Amount of Harm
 - Six Fold Increase in Disability Rate Attributed to Mental Illness
 - 20 million dead?
- Pharmaceutical Stranglehold on Approaches
- Involuntary Psychiatry Infects Entire System
- Legal Rights Ignored as A Matter of Course

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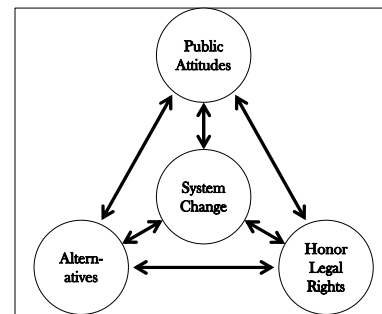
Why?

“If my client wasn’t crazy, She’d know this is good for her.”

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Framework For Change



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Coercion Impedes Alternatives

- Path of Least Resistance.
- Effective Representation Changes Balance
 - No Longer Path of Least Resistance
 - Have to Do Something Else
 - Least Restrictive/Intrusive Alternative Requirement
 - Less Than 10% of Involuntary Commitments Meet Legal Standard
 - Forced Drugging/Electroshock Can Never Meet Legal Standard

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Key Legal Attack Points

- Dangerousness
- Best Interests
- Least Restrictive/Intrusive Alternative
- Representation

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Alaska

- Some Advantages
 - Trust Authority
 - Small Population
 - JG Credibility
- Coordinated Approach
 - PsychRights
 - Soteria-Alaska
 - CHOICES, Inc.

Public Education

- Whitaker in 2002 & 2003
- Perlin in 2003
- Numerous Newspaper & Some Broadcast Coverage
 - Myers Case
 - Feature Front Page Story in November 2005
- Accept All Speaking Invitations

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Opinion Shift: Soteria-Alaska as Alternative

- 2002: Not Endorse -- Just Educational
- 2003: Implies Need Non-Drug Alternative
- 2004: Needs More Development
- 2005: Not If, But How
- 2006: Trust Formally Supports
 - Recognizes State Participation Essential to Sustainability

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Legal Pressure

- Myers Four Month All-Out Legal Battle in Trial Court
 - Gotten Some People Out Since With E-mail or Phone Call
- Myers Supreme Court Decision
 - Best Interests/Least Intrusive Alternative
 - \$80,000+ Attorney Fee Award
- Wetherhorn I: Vigorous Representation (Pending Decision)
- Wetherhorn II: Attorneys Fees (Briefing Stage)

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Myers (Decided)

- “Valid debate exists in the medical/psychiatric community as to the safety and effectiveness [of the drugs].”
- Constitution Requires Court to Find:
 - Best Interests
 - No Less Intrusive Alternative Available
- Deferred Substituted Judgment Decision because Advance Directive Attempts to Address Same Issue.

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Wetherhorn I

- Trial Court Proceeding a Travesty
- Attempting to Obtain Right to Vigorous Representation
 - (Also challenges part of Gravely Disabled statute)

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Escalation Possibilities

- Could "break" API's Involuntary Commitment/Forced Drugging Assembly Line.
- Possible 42 USC § 1983 Litigation??
- Ethics Complaints Against Public Defenders?
- Kid Drugging Lawsuit(s)?
- Recruit Private Bar
 - Pro Bono Attorneys
 - Atty's Fees from 2nd Wetherhorn Case
- Many State Court Legal Challenges Possible
 - Ex Parte Process
 - Use of Probate Master
 - No Stay of Forced Drugging Orders
 - Informed Consent Lawsuit Drafted
 - Bavilla – Forced Drugging in Prison (Need New Case)
 - Etc.

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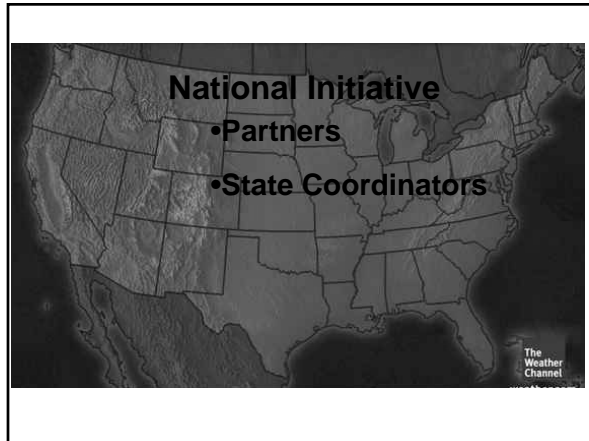
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Alaska Status

- Widespread Support for Non-Drug Choices
- Soteria-Alaska More Likely Than Not
- CHOICES, Inc., in vulnerable start-up phase
- Least Restrictive/Intrusive Alternative Enshrined in Recent Supreme Court Decision
- Escalating Litigation Option Available

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Partners

- PsychRights
- MindFreedom
- ICSP
- NARPA

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State Coordinators

- Working Closely with MindFreedom
- State Coordinator System
 - Recruit Lawyers & Expert Witnesses
 - Strategic Cases
 - Also Work on Education and Choices
 - Alaska and Freedom Center Are Models
- PsychRights Recruiting Executive Director to Advance Effort

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Needed:

- State Coordinators
 - Other Volunteers
- Attorneys
- Expert Witnesses

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