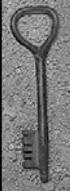


**For Panel Discussion of
Involuntary Treatment in the
U.S.**

ISPS Annual Conference 2005
The Validity of Experience
November 11-13, Boston, MA.

James B. (Jim) Gotstein, Esq.
Law Project for Psychiatric Rights
jim@PsychRights.org
http://PsychRights.org/

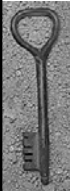


Due Process

**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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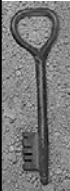


Procedural Due Process

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

- ◆ Neutral Decisionmaker
- ◆ Meaningful Notice
- ◆ Meaningful Opportunity to Respond

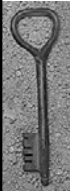
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Substantive Due Process

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

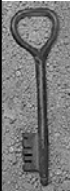
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**Involuntary Commitment and
Medication Are Deprivations of
Fundamental Rights**

- ◆ 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**

Kansas v. Crane, 534 U.S. 407, 409-10, 122 S.Ct. 867, 869 (2002):

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.'

- ◆ Gravely Disabled—"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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Parens Patriae Justification

- ◆ Take care of someone incapable of doing so
- ◆ In non-emergency civil context everyone has the absolute right to decline medication.

...

- ... except if incompetent to decide

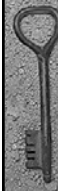
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Proper Procedures

- ◆ Court/Judge?
- ◆ Effective Assistance of Counsel?
- ◆ Truthful Psychiatrists?
- ◆ Right to Independent Expert?
- ◆ *Ex Parte* Proceedings?
- ◆ Discovery (Depositions)?


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Proper Evidentiary Standards (*Frye* and *Daubert*)

- ◆ *Frye*—Generally Accepted in the Particular Field.
- ◆ *Daubert*—Scientific Reliability
 - Scientific Method
 - More Than Subjective Belief Or Unsupported Speculation
 - Capable Of Empirical Test
 - Known Or Potential Rate Of Error
 - Degree Of Acceptance.


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The Reality

- ◆ Legal Proceedings are a Sham
 - Meretricious Testimony
 - Judge Complicity
 - Enabled by Attorney Abdication

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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.

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 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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Expert Witnesses Are Critical

"[A]n expert will probably be 'the single most valuable person to testify on behalf of a client in a contested commitment hearing.'"

Perlin, "You Have Discussed Lepers and Crooks: Sanism in Clinical Teaching," 9 Clinical L. Rev 683, 703 (2003)


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Gottstein Estimates:

- ◆ 10% of Commitments Legally Justified
- ◆ No Forced Drugging (or Electroshock) Legally Justified


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10% of Involuntary Commitments Legally Justified?

- ◆ Unreliability of Dangerousness Predictions
- ◆ Illegality (unconstitutionality) of Gravely Disabled Standard

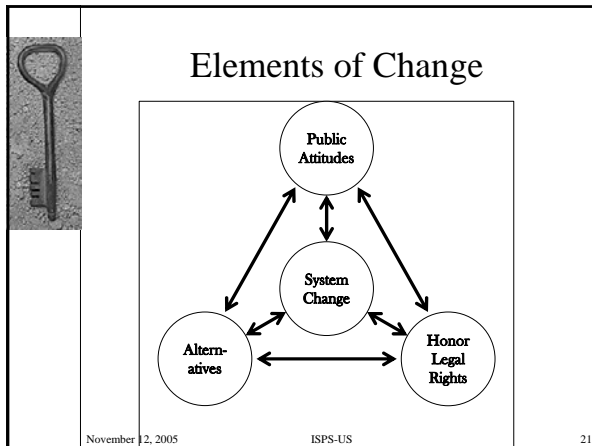
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No Forced Drugging Legally Justified?

- ◆ Best Interests
 - Can't meet evidentiary standard
 - Very Limited Effectiveness (terrible long term prospects).
 - Extreme Harm
- ◆ Least Restrictive Alternative

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ISPS Members Can Play Key Role in All Three Areas

- ◆ Public Attitudes
- ◆ Alternatives to Coercion and Drugs
- ◆ Expert Witnesses (Mainly MDs)

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PsychRights Efforts

- ◆ Organizing Strategic System Changing Litigation.
- ◆ Recruiting Lawyers and Psychiatrists for Cases

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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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