

The Illegality of Psychiatric Imprisonment, Forced Drugging and Forced Electroshock in the United States

PsychOUT

New York City, June 21, 2011

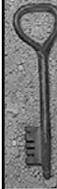
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Three Ways Psychiatric Imprisonment & Forced “Treatment” Are Illegal in Practice

- ◆ Violations of Procedural Due Process
- ◆ Violations of Substantive Due Process
- ◆ Violations of Right to Effective Counsel

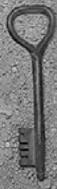
June 21, 2011 PsychOUT 2011, New York City 2



Substantive Due Process— Fundamental Rights

- ◆ To Justify Deprivation of Fundamental Rights, Substantive Due Process Requires the Action:
 - Furthers a Compelling State Interest
 - Is the Least Restrictive/Intrusive Alternative

June 21, 2011 PsychOUT 2011, New York City 5



Due Process Clause

Fifth Amendment, U.S. Constitution

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

June 21, 2011 PsychOUT 2011, New York City 3



Involuntary Commitment and Medication Are Deprivations of Fundamental Rights

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

June 21, 2011 PsychOUT 2011, New York City 6



Hallmarks of Procedural Due Process

- ◆ Meaningful Notice
- ◆ Meaningful Opportunity to Be Heard (Respond & Have Neutral Decision Maker)

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

June 21, 2011 PsychOUT 2011, New York City 4



Sources of Forced Drugging Authority

- ◆ Parens Patriae (We’re from the Government and Here to Help You)
- ◆ Police Power (Protection from Harm)

June 21, 2011 PsychOUT 2011, New York City 7



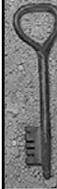
When Non-Emergency Forced Drugging Constitutionally Permissible

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).

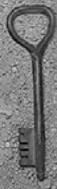
June 21, 2011 PsychOUT 2011, New York City 8



Illegality of Police Power Forced Drugging

- ◆ “Agitation” Insufficient Justification
- ◆ Yelling Insufficient Justification
- ◆ Usually Less Restrictive/Intrusive Alternative Could be Utilized
 - Couch program in Arizona
 - Query:
 - Is Seclusion Less Restrictive/Intrusive?
 - Restraint?

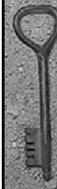
June 21, 2011 PsychOUT 2011, New York City 11



Forced Drugging Litigation Results in Alaska

- ◆ Statute (Non-Emergency) ◆ *Bigley* (2009)
 - If Found Incompetent to Decline, Hospital Gets To Do What it Wants.
 - If Alternative to Drugging Feasible, Must Be Provided or Person Let Go
- ◆ *Myers* (2006)–To be Constitutional, State Must Prove:
 - In Person’s Best Interests
 - No Less Intrusive Alternative Available
 - Failure to Provide Evidence Sufficiently in Advance is Due Process Violation
 - Petition Must Include Detailed Best Interests Allegations

June 21, 2011 PsychOUT 2011, New York City 9



When Involuntary Commitment Constitutionally Permissible

- ◆ Confinement takes place pursuant to proper procedures and evidentiary standards,
- ◆ Finding of "dangerousness either to one's self or to others," and
- ◆ 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 is a form of harm to self.

Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 1383 (1996)

June 21, 2011 PsychOUT 2011, New York City 12



Illegality of *Parens Patriae* Forced Drugging & Electroshock

- ◆ Can Never In Truth Prove in Best Interests
- ◆ Less Intrusive Alternative Almost Always Feasible

June 21, 2011 PsychOUT 2011, New York City 10



Ex Parté (without notice) Proceedings

- ◆ Often Used to Grab People & Haul Them To Hospital Without Notice or Opportunity to be Heard
- ◆ Violation of Procedural Due Process Unless Sufficient Excuse
- ◆ PsychRights Believes Routine Use of *ex parté* Proceedings Is Unconstitutional
- ◆ Can be Legally Justified Where True Emergency Exists & No Less Restrictive Alternative

June 21, 2011 PsychOUT 2011, New York City 13



Psychiatrists Predictions of Violence Unreliable

The voluminous literature as to the ability of psychiatrists (or other mental health professionals) to testify reliably as to an individual's dangerousness in the indeterminate future had been virtually unanimous: "psychiatrists have absolutely no expertise in predicting dangerous behavior—indeed, they may be less accurate predictors than laymen—and that they usually err by overpredicting violence."

Michael L. Perlin & Heather Ellis Cucolo, *Mental Disability Law: Civil And Criminal*, 2nd Ed. § 2.A-4.3c, at 109

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14



Right To Effective Representation

- ◆ Importance
- ◆ Constitutional Right?
- ◆ Professional Ethics Responsibilities

June 21, 2011

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17



Do Even 10% of Psychiatric Inmates Meet Commitment Criteria?

- ◆ Best, Instrument Based Predictions of Violence Only Achieve 50% reliability
 - See, James B. Gottstein Law Review Article for Authority (PsychRights.Org Homepage)
 - 50% Does Not Satisfy "Clear and Convincing" standard (or preponderance of evidence for that matter)
- ◆ Gravely Disabled or Similar Concept Legal Only if Person "Unable to Survive Safely in Freedom"

June 21, 2011

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15



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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18



"Gravely Disabled" *Wetherhorn v. API* (2007)

- Statute:
 - A Prong -- "Serious Accident, Illness, or Death Highly Probable"
 - B Prong -- "Substantial Deterioration of the Person's Previous Ability To Function Independently"
- *Wetherhorn*: B Prong Only Constitutional if it means the Person:
 - Is Unable To Survive Safely In Freedom
 - Is Unable To Live Safely Outside Of a Controlled Environment.
 - Cannot Exist Safely Outside an Institutional Framework

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16



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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19



Meretricious Testimony (Perjury)

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.

June 21, 2011 PsychOUT 2011, New York City 20



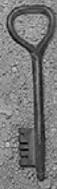
Wetherhorn (Alaska 2007)

– Didn't Allow Direct Appeal Challenge to Effectiveness of Counsel.

- Required Separate Proceeding to Challenge Lawyer's Failure to do Anything on Whetherhorn's Behalf
- Other States Allow Direct Challenge on Appeal
- No Real Appellate Remedy In Any Event,

But . . .

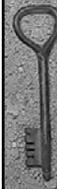
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Is Truly Effective Counsel Constitutionally Required?

Bad	Good
<ul style="list-style-type: none"> ◆ <i>Detention of T.A. H.-L</i> (Wash) – Adopted Criminal <i>Strickland</i> Standard – Presumption of Effectiveness <ul style="list-style-type: none"> • "Judicial scrutiny of counsel's performance must be highly deferential." – Must Show Reasonable Probability Results Would Have Been Different. 	<ul style="list-style-type: none"> ◆ KGF (Montana) – Rejects <i>Strickland</i> & Presumption of Effectiveness – Seek Client's Desire – Specialized Training – Thorough Investigation – Right to Be At Psych Evaluation – More ◆ Ignored In Practice

June 21, 2011 PsychOUT 2011, New York City 21



Violation of Ethical Responsibilities

- ◆ Lawyer Must Be Loyal to Client
 - Generally Must Try to Achieve Client's Wishes
- ◆ Lawyer Must Vigorously Advocate for Client's Desires
- ◆ PsychRights Looking at Filing Ethics Complaint Against the Alaska Public Defender Agency
 - Could Be Very Effective To Change Attorney Behavior
- ◆ Probably Need Attorney to File Such Complaints to be Taken Seriously

June 21, 2011 PsychOUT 2011, New York City 24



KGF

“ [R]easonable professional assistance’ cannot be presumed in a proceeding that routinely accepts--and even requires--an unreasonably low standard of legal assistance and generally disdains zealous, adversarial confrontation.”

Rejected by Other Courts in Favor of *Strickland* Deference (so far)

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Where To Go From Here

- ◆ Need To Mount Efforts in Other States
 - State Coordinators
 - Recruit Attorneys
 - Analyze Legal Setting
 - Obtain Expert Witness(es)
 - Pursue Cases

June 21, 2011 PsychOUT 2011, New York City 25