Myers, Wetherhorn & More:
Litigating for Consumer Driven Services

Mental Health Consumer and Family
Education & Leadership Conference
"Shaping the Dream:
Consumer Driven Services"
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Overview

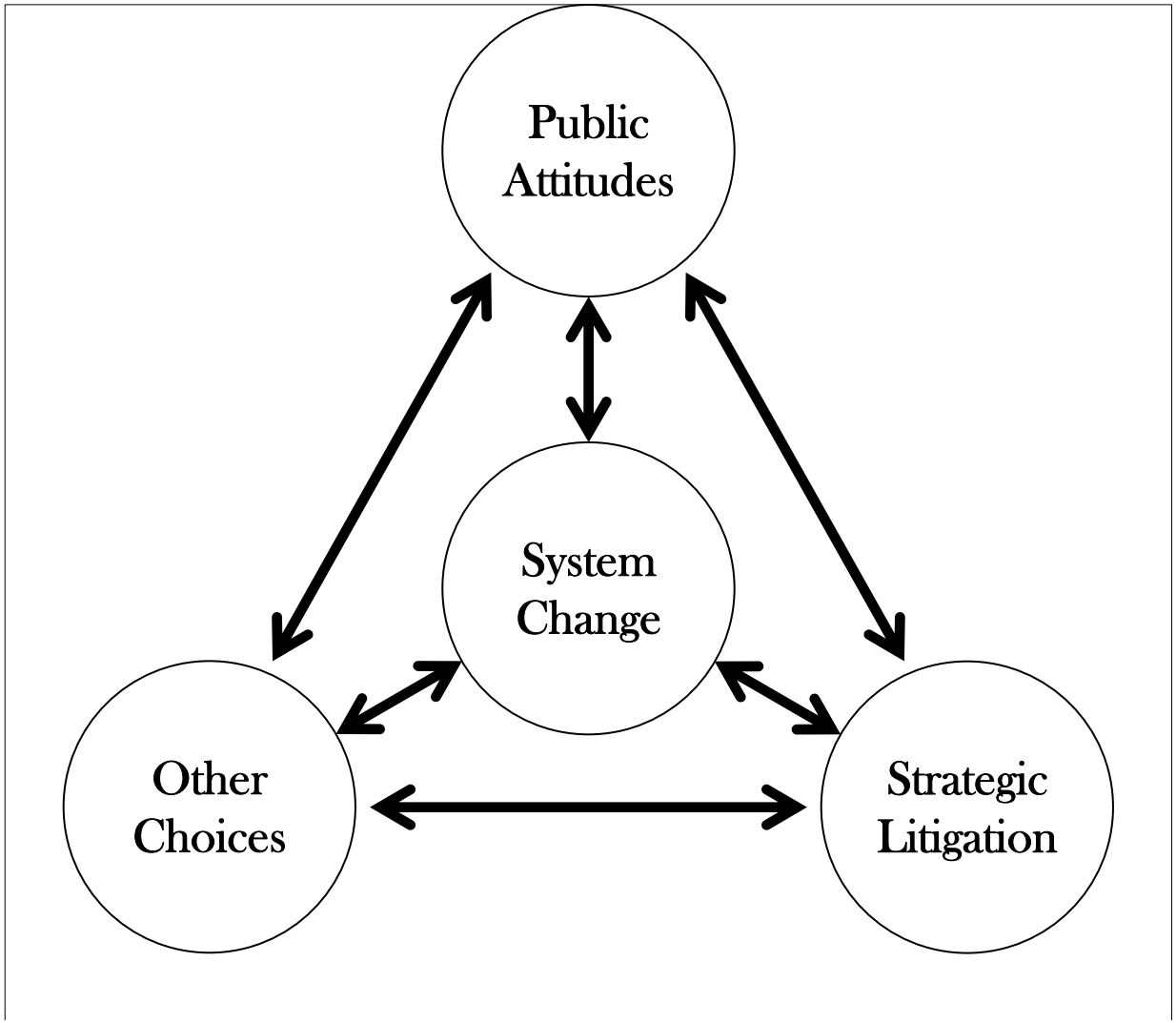
- Involuntary Commitment & Forced Drugging Complete Opposite of Consumer Driven Services
- Significant Number of People Can Fully Recover Without Psychiatric Drugs
- *Myers* Established Right to That Choice
- *Wetherhorn* substantially restricted commitment on the basis of being "gravely disabled."
- Legal Rights Ignored as A Matter of Course
- Non-Drug Choices Must Become Available
- Litigation is part of the answer

System Presents a False Choice:

Take Psych Drugs or Experience Intolerable Symptoms

There Are More Possible Choices than Taking Psych Drugs or Experiencing Intolerable Psychiatric Symptoms For Many People

Coordinated Strategy For Creating Non-Drug, Consumer Driven, Choices



Public Education:

- Mental Illness System's Insistence on Psych Drugs for Everyone, Forever, Prevents Many, Many People From Recovering
- At Least Doubling Chronicity
- People Diagnosed with Mental Illness not More Prone to Violence absent Drugs
- There are Much More Effective, Non-Harmful Alternatives for Very Many People

The Disabled Mentally Ill in the United States

Year	Rate of Disabled Mentally Ill Per 1,000 Population
1850	.2
1903	1.86
1955	3.38
1987	13.75
2003	19.69

Source: The disability rates for 1850 through 1955 are based on the number of hospitalized mentally ill, as cited by E. Fuller Torrey in *The Invisible Plague.* The disability rates for 1987 and 2003 are based on the number of mentally ill receiving SSI or SSDI payments, as was reported in 2004 by the Social Security Administration.

The Trial That Launched the Drug Era

Study

(1964) NIMH Trial. Nine hospitals, 344 schizophrenia patients. Three groups received antipsychotic drugs, and one group was treated with placebo.

Six-week results

- 75 percent of drug-treated patients much improved or very much improved after six weeks.
- 23 percent of placebo patients much improved or very much improved after six weeks.

Arch. Gen Psychiatry 1964 ; 10:246-61.

The Paradox

Study

One-year followup of patients in NIMH's nine-hospital trial of 344 schizophrenia patients.

Results

"Patients who received placebo treatment were less likely to be rehospitalized than those who received any of the three active phenothiazines."

Am. J. of Psychiatry 1967; 123:986-95.

Neuroleptics Increase Relapse Rates NIMH Withdrawal Studies

Study: Two drug-withdrawal studies over 24 weeks, 301 patients

Daily drug dosage at start of trial	Relapse Rate
Placebo	7 %
Less than 300 mg. of chlorpromazine	23%
300-500 mg.	54%
More than 500 mg.	65%

Conclusion: Relapse was found to be significantly related to the dose of the tranquilizing medication the patient was receiving before he was put on placebo—the higher the dose, the greater the probability of relapse.

Hosp. Community Psychiatry 1971; 22:20-3

Bockoven's Retrospective Study

Study

Comparison of five-year outcomes for psychotic patients treated from 1947 to 1952 without antipsychotic drugs with five-year outcomes for psychotic patients treated from 1967-1972 with antipsychotic drugs.

Results

1947-1952 group

45% of patients treated without drugs did not relapse in followup period, and 76% were successfully living in the community at the end of the followup period.

1967-1972 group

31% of patients treated with drugs did not relapse in followup period. The drug-treated group were also much more "socially dependent"—on welfare and needing other forms of support—than those in the 1947 cohort.

Am J Psychiatry 1975; 132:796-801.

Drug Treatment vs. Experimental Forms of Care in the 1970s

Study author	Follow-up Period	Relapse rate for medicated patients	Relapse rate for non-medicated patients
Carpenter (1977)	One year	45 %	35%
Rappaport (1978)	Three years	62%	27%

Am J Psychiatry 1977; 134: 14-20
Int Pharmacopsychiatry 1978; 13: 100-11

The Explanation: Drug-induced Supersensitivity Psychosis

"Neuroleptics can produce a dopamine supersensitivity that leads to both diskinetic and psychotic symptoms. An implication is that the tendency toward psychotic relapse in a patient who has developed such supersensitivity is determined by more than just the normal course of the illness . . . The need for continued neuroleptic treatment may itself be drug induced."

Chouinard and Jones, McGill University

Am.J Psychiatry 1978; 135: 1409-1410
Am J Psychiatry 1980; 137: 16-20.

Confirming Evidence: Harding's Long-Term Outcomes Study

Study

Courtenay Harding did 30-year follow-up study of schizophrenia patients that were on the back wards of a Vermont hospital in the 1950s.

Results

One-third of all patients were completely recovered. All of these receovered patients had stopped taking neuroleptics.

Harding's Conclusion

It is a "myth" that schizophrenia patients must me on medication all their lives.

In "reality it may be a small percentage who need medication indefinitely."

APA Monitor 2000; 31 (number 2).
Acta Psychiatr Scand 1993; 90 (Suppl 384):140-6.

The Soteria Project

Study

First-episode schizophrenia patients treated conventionally in a hospital setting with drugs versus treatment in the Soteria House, which was staffed by non-professionals and involved no immediate use of antipsychotic medications. Results are from 1971-1983 cohorts, with 97 patients treated conventionally and 82 patients treated in Soteria House .

Results

- At end of six weeks, psychopathology reduced comparably in both groups.
- At end of two years:
  - Soteria patients had better psychopathology scores
  - Soteria patients had fewer hospital readmissisions
  - Soteria patients had higher occupational levels
  - Soterial patients were more often living independently or with peers

Antipsychotic Use in Soteria Patients

76% did not use antipsychotic drugs during first six weeks

42% did not use any antipsychotic during two-year study

Only 19 % regularly maintained on drugs during follow-up period

J Nerv Ment Dis 1999; 187:142-149
J Nerv Ment Dis 2003; 191: 219-229

Confirming Evidence: World Health Organization Studies

	Developing Countries	Developed Countries
Drug use		
• On antipsychotic medication 76% to 100% of follow-up period	15.9%	61%
Best Possible Outcomes		
• Remitting course with full remission	62.7%	36.9%
• In complete remission 76% to 100% of follow-up period	38.3%	23.3%
•Unimpaired	42.9%	31.6%
Worse Possible Outcomes		
Continuous episodes without complete remission	21.6%	38.3%
In psychotic episodes for 76% to 100% of follow-up period	15.1%	20.2%
Impaired social functioning throughout follow-up period	15.7%	41.6%

WHO Conclusion: Living in a developed country is a "strong predictor" that a schizophrenia patient will never fully recover.

Psychol Med 1992; 22:131-45

Confirming Evidence: MRI Studies

1) Researchers report in 1990s that antipsychotics cause atrophy of the cerebral cortex and an enlargement of the basal ganglia.

2) Researchers at University of Pennsylvania report in 1998 that the drug-induced enlargement in the basal ganglia is "associated with greater severity of both negative and positive symptoms," which are the very symptoms the drugs are supposed to alleviate.

Arch Gen Psychiatry 1998; 55:145-52
Am J Psychiatry 1994; 151:1430-6.
The Lancet 1998; 352:784-5.
Am J Psychiatry 1998; 155: 1711-7.

Results from other experimental programs that have minimized use of neuroleptics

- **Soteria in Switzerland.** Ciompi reported in 1992 that first-episode patients treated with no or very low doses of antipsychotics "demonstrated significantly better results than patients treated conventionally."

- **Sweden.** Cullberg reported in 2002 that 55% of first-episode patients treated in an experimental program were off neuroleptics at end of three years, and the others were being maintained on extremely low doses of chlorpromazine. Patients treated in this manner spent fewer days in the hospital than conventionally treated patients in three-year follow-up period.

- **Finland.** Lehtinen and his colleagues developed a program that involves treating first-episode patients without neuroleptics for first three weeks, and then initiating drug treatment only when "absolutely necessary." At the end of five years, 37% of the experimental group had never been exposed to neuroleptics, and 88% had never been rehospitalized during the two-to-five-year follow-up period. (Reported in 2001).

- **Finland.** Seikkula reported in 2006 that after five years, 82% of psychotic patients treated with his "open dialogue" approach did not have any residual psychotic symptoms, and that 86% had returned to their studies or full-time jobs. Only 14% were on disability allowance. Seventy-one percent of patients never took any antipsychotic medication.

Br J Psychiatry 1992; 161 Suppl 18):145-53.
Med Arch 1999; 53:167-70.
Acta psychiatr Scand 2002;106:276-85.
Eur Psychiatry 2000;15:312-20.
Psychotherapy Research, 2006; 16(2):214-28.

Finland Open Dialogue Approach:
Five Year Study of Psychotic Patients

- 82% did not have any residual psychotic symptoms;
- 86% had returned to their studies or full-time jobs;
- only 14% were on disability; and
- 71% never took any antipsychotic medication.

Psychotherapy Research, 2006; 16(2):214-28.

Summary of Evidence on Neuroleptics

Psychotic Symptoms:

Neuroleptics increase likelihood that a person will become chronic

Other Negative Effects:

Neuroleptic malignant syndrome	Hyperglycemia
Parkinsonian symptoms	Cardiac problems
Tardive dyskinesia	Blindness
Akathisia	Speech impairment
Drug-induced suicide	Swollen breasts
Drug-induced violence	Leaking breasts
Emotional lethargy	Impotence
Memory deficits	Obesity
Cognitive impairment	Sexual Dysfunction
Shrinkage of frontal lobes	Blood disorders
Enlargement of basal ganglia	Skin rashes
Early death	Seizures
Diabetes	Heat stroke
Pancreatitis	Fatal blood clots

Latest Report Suggests Life Spans Now Decreased by Average of 25 Years.

Evidence-based Use of Neuroleptics

1. No immediate neuroleptisation of first-episode patients

2. Every patient on long-term neuroleptics should be given an opportunity to gradually withdraw from the drugs

Take Home Points on Neuroleptics

- People Should be Told the Truth About them
- People Should have Non-Drug Options
- Selective Use of Neuroleptics to Allow Those Who Can Recover Without Them Do So

Role of Litigation

- Force System to Honor People's Rights
- Change Path of Least Resistance
- Help Create Environment Supportive of Other Choices

Alaska Statutes

- Every reasonable opportunity to accept voluntary treatment before involvement with the judicial system. [????]

- "POA" – Police Officer Application
- *Ex Parte*
- 30 Day Commitment
- 90 Day Commitment
- 180 Day Commitments
- Involuntary Medication

AS 47.30.655 Purpose of major revision.

Balance Rights & State's Interests; Principles

1. Every reasonable opportunity to accept voluntary treatment before involvement with the judicial system;
2. Least restrictive alternative environment consistent with their treatment needs;
3. Treatment occur as promptly as possible as close to the individual's home as possible;
4. System of mental health community facilities and supports be available;
5. Patients be informed of their rights and be informed of and allowed to participate in their treatment program as much as possible;
6. Persons who are mentally ill but not dangerous to others be committed only if there is a reasonable expectation of improving their mental condition.

Hallmarks of Due Process

1. Meaningful Notice
2. Meaningful Opportunity to Respond.

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

AS 47.30.705 Emergency detention for evaluation ("POA" or "Police Officer Application")

- Police Officer, Physician, or Clinical Psychologist having probable cause to believe person is mentally ill and likely to cause serious harm to self or others of such immediate nature that no time for *ex parte* may cause person taken into custody and transported to nearest evaluation facility.

AS 47.30.700 (*Ex Parté)*

- Upon Petition of Any Adult, Judge to Conduct or Direct Screening Investigation--mentally ill and, as a result gravely disabled or present likelihood of serious harm to self or others.
- If so, without notice (ex parté), direct peace officer take into custody and deliver to nearest appropriate facility for emergency examination or treatment.
- No Exigency Requirement.

AS 47.30.710 Examination.

a) Examine Person Brought in under POA or Ex Parté within 24 hours.

b) If (1) mentally ill & gravely disabled or likelihood of serious harm to self or others and (2) in need of treatment, file for *Ex Parté*.

Query: What is exigency at this point justifying no notice?

30-Day Commitment
AS 47.30.725 – .735

- Mentally ill and as a result likely to cause harm to self or others or is gravely disabled
- Right to counsel
- Gravely Disabled Person's Mental Condition Could be Improved
- Right to Be Free of Medication for Trial (but exceptions)
- No Right to Jury Trial (there is for 90 & 180 Commitments)
- No Less Restrictive Alternative Has Accepted Patient.

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);.

Definition of Gravely Disabled (AS 47.30.915(7)

(7) "gravely disabled" means a condition in which a person as a result of mental illness

(A) is in danger of physical harm arising from such complete neglect of basic needs for food, clothing, shelter, or personal safety as to render serious accident, illness, or death highly probable if care by another is not taken; or

(B) will, if not treated, suffer or continue to suffer severe and abnormal mental, emotional, or physical distress, and this distress is associated with significant impairment of judgment, reason, or behavior causing a substantial deterioration of the person's previous ability to function independently* so substantial that the person is incapable of surviving safely in freedom;**

*** Unknown if still part of law.**

**** required to make constitutional in *Wetherhorn v. Alaska Psychiatric Institute*, Opinion No. S-11939, 2007 WL 1098416 (after rehearing), Alaska, April 13, 2007**

90-Day Commitment (AS 47.30.740 -- .755)

Same as 30-Day except:

- Can Demand Jury Trial
- Must Allege Serious Bodily Harm (but not find?) or continue Gravely Disabled
- 30 Day Findings of Fact May Not Be Rebutted, except for Newly Discovered Evidence
- Going Voluntary Same as Commitment
- Right to Independent Expert
- Civil Rules & Evidence?

180-Day Commitments (AS 47.30.770)

- Follows 90-Day
- Same rights as 90-Day
- Successive 180 Day Commitments
- 30, 90 & 180 Day Findings of Fact May Not be Rebutted Except for Newly Discovered Evidence

Wetherhorn v. API

"The definition of 'gravely disabled' in AS 47.30.915(7)(B) is constitutional if construed to require a level of incapacity so substantial that the respondent is incapable of surviving safely in freedom."

Constitutionality of Forced Drugging: the *Myers* Case

- Right to be Free of Unwanted Psychiatric Drugging is a "Fundamental" Constitutional Right.
- When No Emergency Exists, Right May be Overriden Only When
  - Necessary to Advance a Compelling State Interest, and
  - Only if No Less Intrusive Alternative Available.
- Compelling State Interest in non-emergency is "Best Interest" of a person found incompetent to make own decision.

Forced Drugging
(AS 47.30.836 -- .839)

- Must Be Competent to Give or Withhold Informed Consent (AS. 47.30.836)
- Hospital Must Follow Advance Directive Unless can Prove Incompetent When Made (AS 47.30.839).
  - API Not Equipped to Deal With This.
- Informed Consent Defined in AS 47.30.837
- If Not Competent, Hospital Gets to Do what it Wants – Held unconstitutional in *Myers*
- May Force In Emergency (AS 47.30.838) [called into question in *Myers*]

Myers v. API

"The Alaska Constitution's guarantees of liberty and privacy require an independent judicial determination of an incompetent mental patient's best interests before the superior court may authorize a facility like API to treat the patient with psychotropic drugs. * * * [A] court may not permit a treatment facility to administer psychotropic drugs unless the court makes findings that comply with all applicable statutory requirements and, in addition, expressly finds by clear and convincing evidence that the proposed treatment is in the patient's best interests and that no less intrusive alternative is available."

The Reality

- Rights Are ignored as a Matter of Course
  - **Assigned Lawyer: “If my client wasn’t crazy, She’d know this is good for her.”**
  - **Judges: “I won’t let pesky rights get in the way of doing to person what I know is right”**
- Legal Proceedings are a Sham
  - **Meretricious Testimony**
  - **Enabled by Attorney Abdication**
  - **No Actual Access to Independent Expert**

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.

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)

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

Legal Attack Points

- Least Restrictive/Intrusive Alternative
- Ineffective Representation
- Procedural and Evidentiary Irregularities (e.g. *WSB* Case)
- *Ex Parte* Applications
- Best Interests
- Federal Civil Rights Litigation (42 USC §1983)
- Informed Consent

Alaska Public Defender Agency

- No Meaningful Defense Put On.
- No Appeals Ever Taken.
- Unclear on Patients' Side.
  - Violation of Professional Ethics?
- Court Did Not Address Effective Representation Issue in *Wetherhorn* Decision

Queued Up Non-Drug Choices

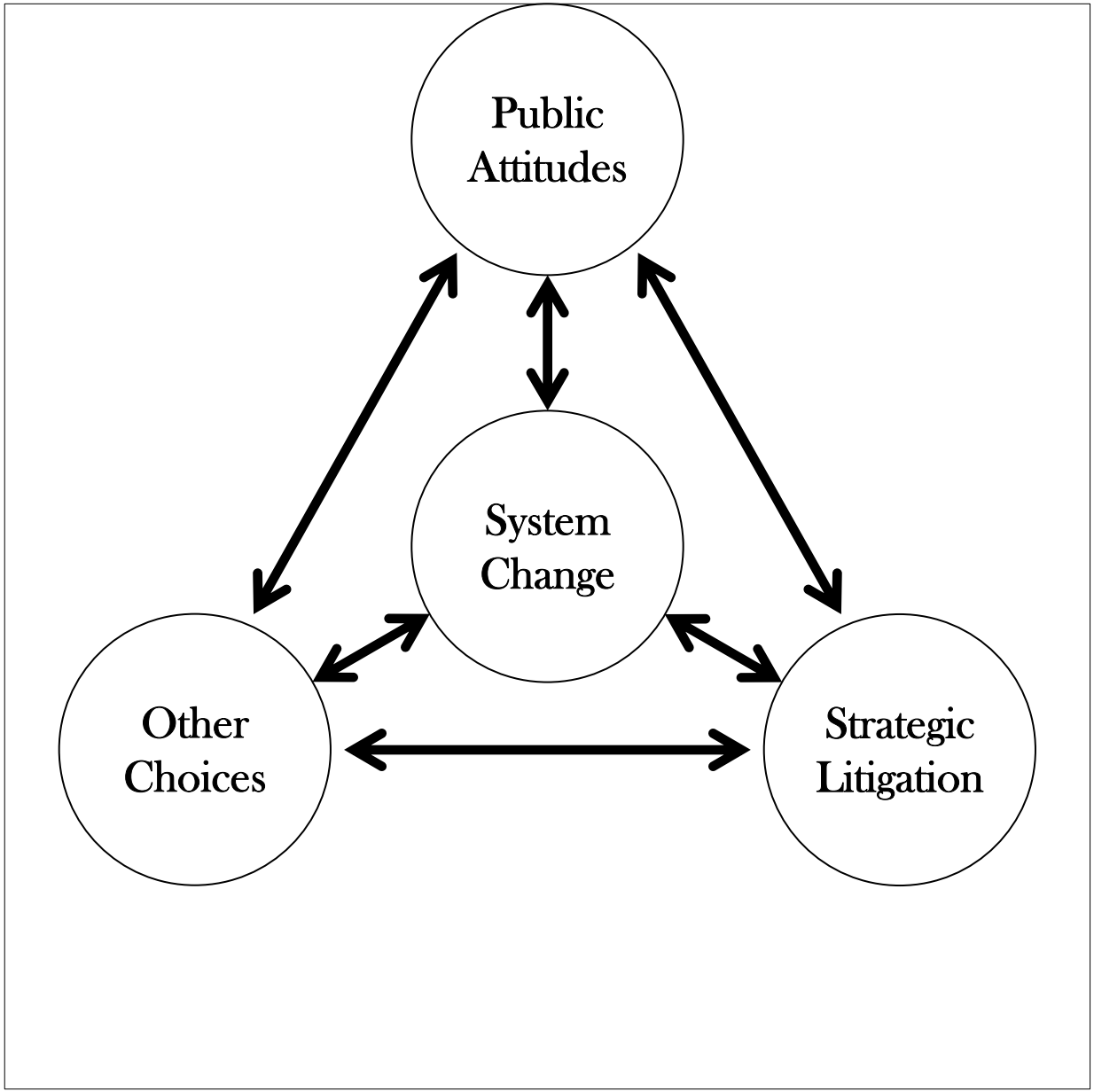
- Soteria-Alaska
- CHOICES, Inc.

Soteria-Alaska

- Non-coercive, Non-Drug option for Those Facing First or Second Hospitalization.
- Replicate Original Soteria-House
  - 6-8 People
  - Two staff at all times.
- Mental Health Board & Mental Health Trust Authority Support (and State to a lesser extent)
- Modest $220,000 GF/MH Trust Recommendation to Get Open Not Appropriated This Year.
- Reasonable Prospects for Next Session
- Trust May Even Fund Opening This Coming Year

C	onsumers
H	aving
O	wnership
I	n
C	reating
E	ffective
S	ervices

- "Consumer" Run
- Non-coercive, Non-drug (& drug) Choices In Community
- Trying to Get Open
- Very Difficult Bureaucratic Challenges
- Human Resources Challenges


Public
Attitudes
System
Change
Other
Choices
Strategic
Litigation

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 Voyce Hendrix with Deborah Fort (2004
- *Psychotherapy of Schizophrenia: The Treatment of Choice* (Jason Aronson, 1996), by Bertram P. Karon and Gary R. Vandenbos