



The Potential Role of Strategic Litigation in System Change

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Topics

- ◆ Due Process
- ◆ Constitutional Limits on Involuntary Commitment
- ◆ Constitutional Limits on Forced Drugging
- ◆ New Mexico Situation?

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Strategic Litigation

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

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Due Process

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

Fifth Amendment, U.S. Constitution

- ◆ Procedural Due Process
- ◆ Substantive Due Process

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Hallmarks of Procedural Due Process

Meaningful Notice and Meaningful Opportunity to Respond.

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

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Substantive Due Process

–To Justify Deprivation of Fundamental Rights

- Must Further Compelling State Interest
- Least Restrictive Alternative

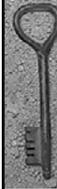
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Involuntary Commitment and Medication Are Deprivations of Fundamental Rights

- ◆ 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)? *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174 (2003)?

May 9, 2008 PSRANM 7



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).

May 9, 2008 PSRANM 9



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).

May 9, 2008 PSRANM 10



Coercion: Psychiatry Has Lost Its Way

- ◆ "Therapeutic Alliance" Most Important Thing.
- ◆ Involuntary Commitment and Forced Drugging Should be Exception and Hard to Obtain.

May 9, 2008 PSRANM 11



Meretricious Testimony

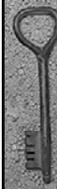
Courts accept . . . testimonial dishonesty, . . . specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." . . .

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 J.LHEALTH 15, 33-34.

May 9, 2008 PSRANM 12



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)

May 9, 2008 PSRANM 13

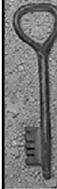


Attorney Abdication

“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

May 9, 2008PSRANM14



New Mexico?

- ◆ *Ex Parté* (no notice) Detention for evaluation?
 - Justification for no notice/opportunity to be heard?
- ◆ Standards/Procedures for Involuntary Commitment?
- ◆ Standards/Procedures for Forced Inpatient Drugging?

May 9, 2008PSRANM15



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, 2D. Ed* (2008) 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. Vandebos

May 9, 2008PSRANM16