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THE RIGHT TO REFUSE TREATMENT FOR MENTAL ILLNESS

Jennifer Colangelo[1]

In 2003, the Supreme Court upheld the right of the government to forcibly medicate mentally ill defendants in order to make them competent to stand trial,[2] and created a four-factor test to determine when the state interest in bringing a defendant to trial outweighs the defendant's right to privacy in his own body.[3] Previous cases had already established the government's right to forcibly treat mentally ill individuals – overriding an individual's right to refuse treatment – based on the state's interest in the health, welfare and safety of its citizens.[4] The most recent case, *Sell v. United States*, gave much

[1] Jennifer Colangelo, a graduate of the Rutgers School of Law - Camden (2007), is a public defender for the Enotah Judicial Circuit in Cleveland, GA.

[2] Sell v. United States, 539 U.S. 166 (2003).

[3] *Sell* held that "the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial," but only if: (1) there is an "important governmental interest" in bringing the defendant to trial; (2) involuntary medication will "significantly" further those interests; (3) involuntary medication is "necessary" to further those interest; and (4) the administration of the drugs must be "medically appropriate." *Id*. at 179-81.

[4] In *Washington v. Harper*, 494 U.S. 210 (1990), the Court held that the state law authorizing involuntary treatment of prison inmates was a constitutionally permissible "accommodation between an inmate's liberty interest in avoiding the forced administration of antipsychotic drugs and the State's interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others." *Id*. at 236. In *Riggins v. Nevada*, 504 U.S. 127 (1992), the Court held that an inmate's constitutionally protected liberty "interest in avoiding involuntary administration of antipsychotic drugs" could be overcome by an "essential" or "overriding" state interest. *Id*. at 134-35.

more specific guidance about how to balance an individual's rights with a state's interest.

These Supreme Court cases have based an individual's right to refuse medical treatment on the Due Process Clause of the Fourteenth Amendment, and the common law doctrine of informed consent. However, the various court circuits have cited other provisions in the Constitution in various cases such as the First, the Fifth, and the Sixth Amendments. This note will examine various types of cases involving forced medication: those involving pre-trial detainees, patients in nursing homes, prisoners, and parolees. This analysis will show that although many constitutional issues are addressed in these cases, the basic right to refuse medication in any situation is based on a liberty interest arising from the Due Process Clause.

This note will also look at the rules that have been created to protect patients' and prisoners' due process rights. Although the current case law provides detailed standards for how an individual's liberty interest in refusing unwanted medication should be balanced against the needs of the government, the courts have not provided sufficient guidance for ensuring that an individual's procedural due process rights are protected. The system may fail to protect the fundamental rights of the mentally ill without clear standards for the kind of procedure that must be followed when applying the various balancing tests.

1. TREATMENT OF MENTAL ILLNESS

The right of a patient to refuse medical treatment is well established. However, the refusal of treatment for mental illness presents a unique set of issues. The nature of a mental illness (compared to a purely physical illness) has several consequences. First, a patient's refusal of treatment may not be a rational or reasonable decision. Second, an untreated patient may pose a threat to society. Third, an untreated criminal defendant may not be able to participate in his own defense at trial. Additionally, the treatment of mental illness differs from the treatment of other illnesses in that it affects a patient's mental processes and thoughts,[5] which is considered to be a

[5] "[T]he effect of [psychotropic] drugs is to alter the chemical balance in the brain, the desired result being that the medication will assist the patient in organizing his or her thought processes and regaining a rational state of

greater intrusion to a patient's autonomy than other types of treatment.

Although there are many different types of treatments for mental illness, most legal challenges have involved only the issue of forcible medication. Medication is by far the most commonly used treatment[6] due to its cost and efficiency.[7] For example, in a prison setting, physically invasive treatments such as electronic stimulation of the brain[8] or electroconvulsive therapy[9] are impractical to administer, as well as being less

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mind." Washington v. Harper, 494 U.S. 210, 214 (1990).

[6] Dennis E. Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 LA. L. REV. 283, 285 (1992).

[7] Unfortunately, psychotropic medication is also sometimes administered for non-therapeutic reasons, as noted in one case:

> [T]he prevalent use of psychotropic drugs is countertherapeutic and can be justified only for reasons other than treatment-namely, for the convenience of the staff and for punishment . . . . Psychotropic drugs are not only overprescribed; they are also freely prescribed . . . . Both licensed and unlicensed physicians regularly prescribe drugs for any patient in the institution without regard to whether he is personally assigned to the patient or whether he has even seen the patient. It is not unusual for attendants to recommend a certain dosage or increased dosage . . . . Further, when dealing with an especially disturbed patient, attendants can obtain additional medication by submitting appropriate forms to the pharmacy when there is no physician available. Also, drugs are at times prescribed to be given PRN, or 'as necessary.' When this is done, an attendant may request medication without review by the authorizing physician.

Davis v. Hubbard, 506 F. Supp. 915, 926-27 (N.D. Ohio 1980).

[8] Electronic stimulation of the brain involves the placement of electrodes directly into the brain; the electrodes are stimulated to induce or inhibit certain behaviors or sensations. Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1, 66 (1989).

[9] In electroconvulsive therapy (ECT), an electrical current is passed directly through the brain, resulting in mental confusion and loss of memory in virtually all cases. *Id.* at 66-67. In *Lojuk v. Quandt*, 706 F.2d 1456 (7th Cir. 1983), the 7th Circuit held that the forcible administration of ECT

effective than medication in treating most mental illnesses.[10] In the case of parolees or prisoners, where the government will bear the cost of any treatment, individual counseling such as behavior therapy[11] or psychotherapy[12] is not cost-effective (although group counseling is frequently used). A second reason that most cases involve forced medication is that psychotherapy and other verbal techniques are considered less invasive than medication, and are therefore less likely to violate any fundamental constitutional rights.[13] Unlike medication, a patient can resist the effects of psychotherapy or counseling simply by withholding his full cooperation.[14] Although most cases involve the use of psychotropic medication, the same constitutional rights are implicated by any treatment that affects a person's mental functions, emotions, or thoughts.

Compared to mental health treatments such as psychotherapy and counseling, psychotropic drugs are unique in that even when the treatment succeeds in relieving the symptoms of mental illness, the adverse side effects of most drugs may have a debilitating effect on mental processes.[15] Side effects can include mood changes: a "flattening" of emotional

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implicated a patient's "First Amendment interests in being able to think and communicate freely," his "interest in bodily integrity, personal security and personal dignity," and his "interest in making certain kinds of personal decisions with potentially significant consequences." *Id.* at 1465.

[10] Cichon, *supra* note 6, at 285.

[11] Behavior therapy focuses on changing behavior, not mental processes. Winick, *supra* note 8, at 80.

[12] Psychotherapy and other verbal techniques focus on changing thought processes, emotions, and perceptions. *Id.*

[13] *See, e.g.,* Rutherford v. Hutto, 377 F. Supp. 268 (E.D. Ark. 1974) (forcing an illiterate prisoner to attend classes did not violate his constitutional rights; the State had a legitimate interest in rehabilitating prisoners); Jackson v. McLemore, 523 F.2d 838 (8th Cir. 1975) (finding although a prisoner may not be punished simply for failing to learn, punishing him for refusing to participate in a class did not violate his constitutional rights).

[14] Winick, *supra* note 8, at 83.

[15] *Id.* at 68-69.

affect, lethargy, or listlessness. Cognitive effects include difficulty concentrating, reading or talking. "Long-term drug treatment may impair memory, reasoning ability, mental speed, learning capacity, and efficiency of mental functioning in general."[16] Some courts have recognized that the side effects of psychotropic drugs, not just the beneficial effects, can have enough of an impact to implicate a patient's constitutional rights. For example, in *Bee v. Greaves*, the Tenth Circuit noted that the side effects of antipsychotic drugs "have the capacity to severely and even permanently affect an individual's ability to think and communicate."[17]

2. THE RIGHT TO REFUSE TREATMENT

Although the right of a patient to refuse medical treatment is considered a fundamental right, it is not absolute. Many situations allow a patient's decision to be overruled. For example, a mentally ill patient may be forcibly medicated if he is found to be a danger to himself or others. Also, defendants may be forcibly medicated to make them competent to stand trial, and prisoners can be forced to consent to medication as a condition of parole. In all of these situations the individual's liberty interest is balanced against the specific state interest in the case.

A. THE BASIC RIGHT TO REFUSE MEDICAL TREATMENT

The right of a patient to refuse medical treatment derives from the basic common law right to be free from unwarranted personal contact.[18] Tort law reflects this right in the concept of

[16] *Id.* at 72-73.

[17] 744 F.2d 1387, 1394 (10th Cir. 1984). *See also* Rogers v. Okin, 478 F. Supp. 1342, 1367 (D. Mass 1979) (concluding that since "psychotropic medication has the potential to affect and change a patient's mood, attitude and capacity to think," a patient has a right to refuse treatment); Scott v. Plante, 532 F.2d 939, 946 (3d Cir. 1976) (finding because of the side effects of the medication, "the involuntary administration of drugs which affect mental processes, . . . could amount . . . to an interference with Scott's rights under the first amendment.").

[18] *See, e.g.*, Davis v. Hubbard, 506 F. Supp. 915, 930 (N.D. Ohio 1980). ("In the history of the common law, there is perhaps no right which is older

consent. Non-emergency medical treatment that is given without a patient's informed consent is considered battery:[19]

> The very foundation of the doctrine of (informed consent) is every man's right to forego treatment or even cure if it entails what for him are intolerable consequences or risks, however warped or perverted his sense of values may be in the eyes of the medical profession, or even of the community, so long as any distortion falls short of what the law regards as incompetency. Individual freedom here is guaranteed only if people are given the right to make choices which would generally be regarded as foolish.[20]

This principle has been applied in a wide variety of cases, from assault and battery by a doctor,[21] to right-to-die[22] and assisted suicide[23] cases. Many cases quote Justice Cardozo: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a

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than a person's right to be free from unwarranted personal contact.").

[19] *Id.* at 931.

[20] *Davis*, 506 F. Supp. at 932 (quoting F. Harper & F. James, Jr., The Law of Torts 61 (Supp. 1968)).

[21] Mohr v. Williams, 104 N.W. 12 (Minn. 1905) (finding assault and battery based on lack of consent, where the patient consented to an operation on her right ear, but the surgeon operated on the left ear only). *See also* Wells v. Van Nort, 125 N.E. 910 (Ohio 1919) (finding assault and battery where the patient alleged that she had consented only to an operation for appendicitis, and that the surgeon removed both fallopian tubes without her knowledge or consent).

[22] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (denying parents' request to withdraw their vegetative daughter's feeding and hydration equipment; there was no clear and convincing evidence of the daughter's desire to have life-sustaining treatment withdrawn).

[23] Vacco v. Quill, 521 U.S. 793 (1997) (holding that New York's statute outlawing physician-assisted suicide was not unconstitutional because there was a rational basis for the distinction between assisting suicide and withdrawing life-sustaining treatment).

surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[24] This right applies even to mentally ill patients; courts have found that a patient who has been committed is not necessarily incompetent and incapable of giving informed consent to medical treatment, and that due process would require that some form of notice be given to a patient (or to someone standing *in loco parentis* to him) before the patient could be subjected to treatment.[25]

B. THE RIGHT TO REFUSE TREATMENT FOR MENTAL ILLNESS

Despite the fundamental right to refuse medical treatment courts have recognized that forced medication or other treatment may be necessary to protect a patient from harming himself or others:

> The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.[26]

The patient's liberty interests must be balanced against these State interests,[27] and the procedures for determining whether a particular patient can be treated involuntarily with psychotropic

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[24] Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914).

[25] Scott v. Plante, 532 F.2d 939, 946 (3d Cir. 1976) (holding that due process required some form of notice and opportunity to be heard before patient could be subjected to treatment).

[26] Addington v. Texas, 441 U.S. 418, 426 (1979) (addressing the issue of what standard of proof is required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital).

[27] Davis v. Hubbard, 506 F. Supp. 915, 935 (N.D. Ohio 1980).

drugs (or other treatment) must satisfy the procedural protections of Fourteenth Amendment due process.[28]

As the Supreme Court long ago stated in *Jacobson v. Massachusetts*:

> There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government . . . to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint . . . as the safety of the general public may demand . . . .
>
> . . . It is not, therefore, true that the power of the public to guard against itself imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities . . . for the purpose of protecting the public collectively against such danger.[29]

This principal has been applied more recently in *Addington v. Texas*,[30] where the Supreme Court considered the standard of proof required for a civil commitment. The Court balanced an individual's liberty interest in not being confined involuntarily with the state's duty to protect both the public and individuals who are unable to care for themselves, and settled on "a middle level of burden of proof that strikes a fair balance between the

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[28] *Id.* at 938.

[29] 197 U.S. 11, 29-30 (1905) (considering a challenge to a compulsory vaccination program on the basis that it was an unreasonable invasion of liberty, the Court held that the vaccination program was constitutional, and that the vaccination program had a real and substantial relation to the protection of the public health and safety).

[30] 441 U.S. 418, 426 (1979).

rights of the individual and the legitimate concerns of the state."[31]

C. THE RIGHT OF MENTALLY ILL PRISONERS TO REFUSE TREATMENT

The involuntary treatment of mentally ill prisoners is a special case of this issue. The balance between the State's interests and the prisoner's constitutional rights is different because of the State's additional interest in prison safety and security. In a variety of situations, the Supreme Court has held that "the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is reasonably related to legitimate penological interests."[32] This is true even when the constitutional right is one that would require a higher standard of review in different circumstances.[33]

Washington v. Harper and *Riggins v. Nevada* are the leading cases on the issue of involuntary medication of mentally ill prisoners. In 1990, the Supreme Court in *Harper* recognized that an individual has a significant constitutionally protected liberty interest in "avoiding the unwanted administration of antipsychotic drugs."[34] However, the state has a legitimate and important interest in providing appropriate medical treatment to reduce the danger that a mentally ill inmate may represent to himself or others; therefore the Due Process Clause permitted the state to treat a mentally ill prisoner against his will, if the inmate is dangerous to himself or others, and if the treatment is medically appropriate.[35] In 1992, in *Riggins*, the Court

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[31] *Id.* at 431.

[32] Washington v. Harper, 494 U.S. 210, 223 (1990) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)).

[33] *Id.* (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987)).

[34] *Id.* at 221.

[35] "There are few cases in which the State's interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, which, by definition, is made up of persons with a demonstrated proclivity for antisocial criminal, and often violent, conduct . . . . Where an inmate's mental disability is the root cause of the threat he poses

addressed a similar situation, and held that an inmate's constitutionally protected liberty interest in avoiding involuntary administration of antipsychotic drugs could be overcome only by an "essential" or "overriding" state interest.[36] The Court found that the state "would have satisfied due process if the prosecution had demonstrated . . . that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others."[37]

D. THE RIGHT OF MENTALLY ILL DEFENDANTS TO REFUSE TREATMENT

The Supreme Court's most recent case on the issue of involuntary medication, *Sell v. United States*,[38] addressed a slightly different issue – whether the government can forcibly administer antipsychotic drugs to a mentally ill defendant to render the defendant competent to stand trial. The patient's liberty interest is the same as in other situations, but the state's interest is different. Rather than an interest in protecting the safety of the patient or the public or in maintaining prison safety and security, the government has an interest in bringing a defendant to trial, making a timely prosecution, and assuring the defendant a fair trial.[39] The balancing test created in *Sell* requires that involuntary medication will "significantly further" those important governmental interests, by making it substantially likely that the defendant will be rendered competent to stand trial, but substantially unlikely to suffer side effects that interfere significantly with the right to a fair trial,

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to the inmate population, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness." *Id.* at 225-26 (citations omitted).

[36] 504 U.S. 127, 135 (1992).

[37] *Id.*

[38] 539 U.S. 166 (2003).

[39] *Id.* at 180.

and that involuntary medication is necessary to further the governmental interests.[40]

Subsequent cases have indicated that the requirement of an "important governmental interest" is not a trivial burden. In *United States v. Miller*, the court found that "[t]he Government has shown no likelihood that delay in accomplishing trial will prejudice the Government in its efforts to fairly enforce the law. There is no showing that the memories of witnesses are fading or that witnesses are, or are likely to become, unavailable for a trial when it is reached without forcibly medicating the Defendant."[41] One significant factor in assessing the importance of the governmental interest is the length of time that the defendant may remain involuntarily committed due to continuing mental illness. On one hand, if the trial is significantly delayed due to the defendant's refusal to accept treatment, evidence may become stale and the memory of witnesses may suffer. But on the other hand, the defendant may end up being confined to a hospital or treatment facility for nearly the same amount of time that he would have been incarcerated if convicted, which serves nearly the same purpose that incarceration would.[42]

Courts have also attempted to quantify the "substantially likely that the defendant will be rendered competent" requirement, finding that a 70 percent probability is sufficient, but that a ten percent probability is not.[43] Courts have also

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[40] *Id.* at 180-81.

[41] United States v. Miller, 292 F. Supp. 2d 163, 165 (D. Me. 2003) (holding that the four-part *Sell* standard was not met). *See also* United States v. Algere, 396 F. Supp. 2d 734 (E.D. La. 2005) (granting the government's motion for authorization to involuntarily medicate defendant with antipsychotic drugs to restore his competency to proceed to trial).

[42] United States v. McCray, 474 F. Supp. 2d 671, 677-78 (D.N.J. 2007) (denying a motion to permit the Bureau of Prisons to forcibly administer antipsychotic medication to defendant in order to restore his competency and allow him to stand trial).

[43] United States v. Gomes, 387 F.3d 157, 161-62 (2d Cir. 2004) (holding 70 percent sufficient); United States v. Morris, 2005 U.S. Dist. LEXIS 38785 at *13 (D. Del. Feb. 8, 2005) (holding 70 percent sufficient); United States v. Ghane, 392 F.3d 317, 320 (8th Cir. 2004) (holding five to ten percent chance of restored competence not a substantial likelihood).

noted that a finding that antipsychotic medication was the only possible way to treat a defendant's mental illness was not sufficient to prove that the medication is "substantially likely" to work.[44]

E. THE RIGHT OF PAROLEES TO REFUSE TREATMENT

The issue of requiring psychotropic medication as a condition for parole presents an interesting example of the balancing between an individual's liberty interest and the interest of the state in protecting its citizens. One important difference between the situation of a parolee and a mental patient is that the parolee is viewed as having a "choice" between taking the drugs and losing eligibility for parole.

In *United States v. Williams*,[45] a federal prisoner who had been granted supervised release (after being sentenced to time served) was required to

> [T]ake such psychotropic and other medications prescribed for him by physicians treating his mental illness. He does not have the option not to take medication if it is prescribed by a physician treating him during the period of his supervised release. If he refuses to take prescribed medication, the probation officer shall bring that refusal to the Court's attention, so that the Court may choose whether to have the defendant appear to show cause why his supervision should not be revoked, or whether a bench warrant ought to issue in lieu thereof.[46]

However, at the sentencing hearing, no medical evidence was introduced indicating that Williams was dangerous if

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[44] United States v. Lindauer, 448 F. Supp. 2d 558, 572 (S.D.N.Y. 2006) (denying government's motion to compel administration of psychotropic drugs to render defendant competent to stand trial, after she was found incompetent due to delusions of grandiosity and paranoia).

[45] 356 F.3d 1045 (9th Cir. 2004).

[46] *Id.* at 1047.

unmedicated, or linking his crimes to his failure to take psychotropic medication.[47]

The court acknowledged that a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment" existed here,[48] as it did for prisoners or for pre-trial detainees, and that the state had the burden of overcoming that interest:

> Where, as here, the liberty interest is one so weighty that even with respect to prisoners it can be overcome only with "a finding of overriding justification and a determination of medical appropriateness," the statutory standard cannot be met unless the district judge makes an explicit, specific finding under § 3583(d)(2) . . . . We also conclude that the unique nature of involuntary antipsychotic medication and the attendant liberty interest require that imposition of such a condition occur only on a medically-informed record.[49]

Title 18 U.S.C. § 3583 governs the district court's supervised release conditions. It provides several factors to be considered in determining the length of the term and the conditions of supervised release.[50] The court concluded that if the state's

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[47] *Id.* at 1048-50. Williams had earlier been found incompetent to stand trial; he was also found to be a danger to himself or others, and was forcibly medicated for that reason and for the purpose of rendering him competent to stand trial. He then continued to take medication voluntarily, and his condition apparently improved. *Id.*

[48] *Id.* at 1053 (citing Washington v. Harper, 494 U.S. 210, 221-22(1990)).

[49] *Id.* at 1056.

[50] The court found that the first four factors were most relevant in this case: "the nature and circumstances of the offense and the history and characteristics of the defendant," "affording adequate deterrence to criminal conduct," "protecting the public from further crimes of the defendant," and "providing the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *Id.* at 1052 (citing 18 U.S.C. §§ 3353(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D)). The statute also allows the court to order any other condition it feels appropriate, as long as it "involves no greater deprivation of liberty than is

conditions of supervised parole met the requirements of the statute then due process requirements were satisfied.

A paroled prisoner is in a slightly different situation than someone on supervised release (like Williams) because a parolee has not completed his prison sentence, and has no constitutional right to be released on parole before his sentence is complete.[51] However, "a state may create a liberty interest in parole by using mandatory language (e.g., "shall") to create a presumption that parole will be granted when objective criteria are met."[52] In *Felce v. Fiedler*, Wisconsin's mandatory release statute created such an interest.[53]

Felce's release from prison was conditioned on monthly injections of Prolixin, an antipsychotic drug.[54] The court found that the state could make parole conditional on the involuntary use of antipsychotic drugs; but the court held that Wisconsin's parole procedure was "insufficiently neutral and independent" because the parole plan was not subject to independent medical evaluation.[55]

3. THE CONSTITUTIONAL BASIS FOR THE RIGHT TO REFUSE TREATMENT

Most Supreme Court cases have based an individual's right to refuse medical treatment on the Due Process Clause of the Fourteenth Amendment, and the common law doctrine of informed consent. However, other courts have cited other provisions in the Constitution in various cases such as the First,

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reasonably necessary for the purposes set forth in sections 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D)." 18 U.S.C § 3583(d)(2) (2006).

[51] Felce v. Fiedler, 974 F.2d 1484, 1490 (7th Cir. 1992).

[52] *Id.* at 1491 (holding that Wisconsin statute section 302.11 created a liberty interest by granting mandatory parole to all inmates who had completed two-thirds of their sentences (citing WIS. STAT. ANN. § 302.11 (2005))).

[53] *Id.*

[54] *Id.* at 1485.

[55] *Id.* at 1498.

the Fifth, and the Sixth Amendments. Although these various constitutional issues are addressed in these cases, the majority of cases dealing with involuntary treatment of mentally ill individuals rely on an analysis of the procedural and substantive due process rights provided by the Fifth and Fourteenth Amendments.

A. THE FIRST AMENDMENT

The connection between the First Amendment right to free speech and the right to refuse medical treatment is clear in the context of mental illness where treatment will, by definition, affect the emotional states and thought processes that the First Amendment protects. The protection of "free speech" includes more than just the spoken or written word.[56] The Supreme Court has said:

> The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."[57]

The other rights that flow from the protection of speech include freedom of belief, freedom of association, freedom to contribute money to a political organization, and freedom of thought.[58] In *Stanley v. Georgia*, the Court noted that "our

[56] Texas v. Johnson, 491 U.S. 397 (1989) (upholding a right to burn the American flag as an expression of political protest).

[57] *Id.* at 404 (citations omitted).

[58] Winick, *supra* note 8, at 14-16. *See also* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach.").

whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[59]

Freedom of mind, freedom of belief, and freedom of thought are all particularly relevant in the context of involuntary mental health treatment. Most mental health treatments, particularly psychotropic drugs, affect both thought and behavior; they are designed to modify a patient's mental processes, "to affect attitudes, emotions, thoughts, and beliefs."[60] There is a difference between treatment methods that patients are able to resist, like counseling, and more intrusive methods, such as drug treatment, which unwilling patients cannot resist. As the Supreme Court noted: "intrusive mental health treatments . . . that effect massive changes in the individual's personality, mental processes, and emotional responsiveness which the individual is unable to resist, clearly constitute a direct and serious invasion of 'individual freedom of mind.'"[61]

In practice, the fundamental right of freedom of thought is weakened by the fact that the government does have a right to regulate conduct. The First Amendment "embraces two concepts – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[62] Therefore, in situations where a mentally ill person's

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[59] 394 U.S. 557, 565 (1969) (holding that a Georgia statute that made mere private possession of obscene matter a crime was unconstitutional under the First and Fourteenth Amendments). *See also* Rodney J.S. Deaton, *Neuroscience and the In Corpore-Ted First Amendment*, 4 FIRST AMEND. L. REV. 181, 190 (2006) ("[I]f the State cannot, without compelling reasons, control the content of what you say . . . then the State cannot, without similarly compelling reasons, control what information you have with which to formulate the content of what you say.").

[60] Winick, *supra* note 8, at 21.

[61] *Id.* at 26 (citing Wooley v. Maynard, 430 U.S. 705, 714 (1977)). *See also* Bee v. Greaves, 744 F.2d 1387, 1393-94 (10th Cir. 1984) ("The First Amendment protects the communication of ideas, which itself implies protection of the capacity to produce ideas . . . . Antipsychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate.").

[62] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (holding that a state statute prohibiting any person from soliciting money for any religious, charitable or philanthropic cause, from one other than a member of the

conduct risks his own safety or the safety of others, or implicates an important state interest, psychotropic drugs can be used to control the patient's conduct, despite the infringement on freedom of thought.

Another problem with basing a constitutional right to refuse psychiatric medications on the First Amendment is that courts have been skeptical of giving protection to "insane or disordered thought."[63] Well-established First Amendment case law puts certain types of speech outside of constitutional protection: "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[64] Although the exact boundaries of "lewd and obscene" and other types of unprotected speech have changed over time with the changing moral standards of society,[65] the basic concept remains that these types of speech are not protected because they are not an "essential part of any expositions of ideas."[66]

The delusions or irrational thoughts experienced by a person suffering from psychosis or schizophrenia are usually considered to be symptoms of disease, which actually impair the sufferer's freedom of thought or expression.[67] Therefore, medication (or other treatment) would have the beneficial effect of "improv[ing] thinking and thereby confer[ring] greater

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soliciting organization, without approval by the secretary of the public welfare council, violates the freedom of speech and of religion guaranteed by the Fourteenth Amendment).

[63] *See* Rennie v. Klein, 462 F. Supp. 1131, 1144 (D.N.J. 1978) ("The court need not reach the problem of whether insane or disordered thought is within the scope of first amendment protection.").

[64] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding that a statute prohibiting the use of offensive words towards another in a public place, on its face and as applied, did not contravene the Fourteenth Amendment, since it did no more than prohibit words that were plainly likely to cause a breach of the peace).

[65] *See* Winick, *supra* note 8, at 42-43.

[66] *Id.*

[67] Douglass Mossman, *Unbuckling the "Chemical Straightjacket": The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033, 1130 (2002).

freedom of expression on their recipients."[68] Treating hallucinations or delusions as "protected thought," suppressed by drugs, puts them on equal footing with unpopular political or moral viewpoints or other types of expression that the First Amendment is intended to protect. But psychotropic medications do not censor particular thoughts, or impose particular viewpoints.[69]

The potential adverse side effects of psychotropic medications provide a stronger argument that forced medication violates First Amendment rights. Psychotropic medications are considered to be an effective treatment for mental illness, but some patients suffer side effects that impair mental processes. Although these side effects are usually considered to be less of an impairment than the actual symptoms of disease, they may include impairment of memory or of judgment.[70] The Court in *Bee v. Greaves* noted that "[a]ntipsychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate."[71] This aspect of psychotropic drugs supports patients' claims for a liberty interest in avoiding forcible medication.[72]

A final problem with using the First Amendment as a basis for a patient's right to refuse psychotropic medication is the different standard of analysis applied to situations involving a prisoner's First Amendment rights, as opposed to the standards

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[68] *Id.*

[69] *Id.* at 1131. Further, Winick notes that although psychotropic drugs are "mind-altering," they are not "mind-controlling," and are considered to be incapable of creating "thoughts, views, ideas or opinions de novo." Winick, *supra* note 8, at 73.

[70] Winick, *supra* note 8, at 70.

[71] Bee v. Greaves, 744 F.2d 1387, 1394 (10th Cir. 1984). In *Davis v. Hubbard*, 506 F. Supp. 915, 928 (N.D. Ohio 1980) (citations omited), the Court noted that "all antipsychotic drugs can cause side effects which are 'as varied and serious as any pharmaceuticals approved for clinical use in the United States.' . . . Indeed, the drug may even exacerbate the symptoms of the disorder for which they are given." *See also* Rennie v. Klein, 476 F. Supp. 1294, 1299 (1979) ("the drugs inhibit a patient's ability to learn social skills needed to fully recover from psychosis").

[72] *Bee*, 744 F.2d at 1394.

for a due process analysis. In *Harper v. State* (the Washington Supreme Court case that was appealed in *Harper v. Washington*) the cases cited by the State included *Turner v. Safley*, which held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[73] The Washington Supreme Court rejected the First Amendment arguments, stating that "[t]he uniquely intrusive nature of antipsychotic drug treatment is distinguishable from the First Amendment interests involved in the cases cited by the State."[74] However, the court held that due process required that "a judicial hearing must be held to determine whether the State can treat a prisoner with antipsychotic drugs against his will" and the State must prove "(1) a compelling state interest to administer antipsychotic drugs, and (2) the administration of the drugs is both necessary and effective for furthering that interest."[75] This due process requirement gives mentally ill prisoners greater protection than the "reasonable relation" test used in other prison cases involving First Amendment rights.

Recent Supreme Court cases dealing with the issue of forcible medication have not relied on First Amendment arguments. In the most recent major case, *Sell v. United States*, the Supreme Court "chose to ignore, and by implication rejected, the argument contained in the Petitioner's Brief that forcible medication encroaches upon an individual's First Amendment right to freedom of speech."[76]

B. THE FOURTH AMENDMENT

Most Fourth Amendment objections to forcible medication are based on the premise that forcible administration of

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[73] 482 U.S. 78, 89 (1987). *See also* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding that work rules that prevented prisoners from attending weekly religious services did not violate First Amendment's free exercise of religion clause.).

[74] Harper v. State, 759 P.2d 358, 364 (Wash. 1988).

[75] *Id.*

[76] Megan Quinlan, *Forcible Medication and Personal Autonomy: The Case of Charles Thomas Sell*, 84 B.U. L. REV. 275, 291 (2004).

medication can be considered a Fourth Amendment "search" or "seizure." The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[77] A considerable amount of jurisprudence is dedicated to defining the meaning of a "search" under the Fourth Amendment, but one established principle is that a search is defined by the degree of its intrusion, which is based on a person's "reasonable expectation of privacy."[78] In the leading case of *Schmerber v. California*, the Supreme Court held that the compulsory administration of a blood test was a search and seizure under the Fourth Amendment. [79] However, this "search and seizure" was allowable because it was "reasonable" – there was a risk that evidence would be lost if the test was not done, the medical procedure was routine and low risk, and was done by a doctor in a reasonable manner.[80] One situation where a medical procedure was not considered an allowable "search" was *Winston v. Lee*, where the Court held that surgery to remove a bullet from a suspect's chest was a violation of his Fourth Amendment rights.[81] Compared to *Schmerber*, the intrusion on the patient's privacy interest and bodily integrity was much greater, and the risk of the procedure was greater as well.[82]

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[77] U.S. CONST. amend. IV.

[78] Katz v. United States, 389 U.S. 347, 361 (1967) (addressing the privacy rights of a defendant whose telephone conversations in a public phone booth had been recorded by listening devices outside the booth, without a warrant).

[79] 384 U.S. 757 (1966) (holding that the privilege against self-incrimination protected an accused only from being compelled to testify against himself, or to otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis was not self-incrimination).

[80] *Id.* at 770-73.

[81] 470 U.S. 753 (1985) (holding that the reasonableness of surgical intrusions beneath the skin depended on a case-by-case approach, in which the individual's interests in privacy and security were weighed against society's interests in conducting the procedure).

[82] *Id.* at 760-63.

The forcible administration of medication can be considered a Fourth Amendment "search" or "seizure." "A person being forcibly medicated, by definition, is not free to walk away during the procedure."[83] The reasonable person would consider forcible medication to be an intrusion on their expectation of privacy. However, the parallel between the *Schmerber* rule and the issue of forcible medication is weaker when the reasonableness of the government action is considered. Although the use of psychotropic drugs can be nearly as risky as surgery, and the effect on a patient's mental processes are much more of a bodily intrusion than a blood test, the facts in many situations will support an argument that the medication is done in a reasonable manner and is essential to important state interests.

Many forcible medication cases involve patients who are a danger to themselves or others, or who are imprisoned. In both situations, the state's obligation to protect its citizens, and its interest in maintaining a safe prison system, are strong enough to override an individual's rights in most situations, as long as reasonable due process safeguards are applied. For example, in *Washington v. Harper*, the Supreme Court held that prisoners could be involuntarily medicated after being given a hearing that comported with the procedural due process requirements of the Fourteenth Amendment, despite the prisoner's liberty interest in avoiding the unwanted administration of antipsychotic drugs.[84] The Fourth Amendment does not support a stronger interest for the patient than the First Amendment or the Fourteenth Amendment; therefore, the outcome would most likely be the same.

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[83] Rebekah W. Page, Comment, *Forcible Medication and the Fourth Amendment: A New Framework for Protecting Nondangerous Mentally Ill Pretrial Detainees Against Unreasonable Governmental Intrusions Into the Body*, 79 TUL. L. REV. 1065, 1077 (2005).

[84] 494 U.S. 210, 222-23 (1990).

C. THE SIXTH AMENDMENT

A mentally ill individual's Sixth Amendment rights are usually only implicated in a situation where he is being forcibly medicated to make him fit to stand trial.[85]

> The issue of forced medication can become more complicated because of the strong effects that anti-psychotic drugs produce. While these drugs often relieve the positive symptoms of some major mental illnesses, such as hallucinations and delusions, they also impose significant side effects that can infringe upon a defendant's ability to receive a fair trial. Many practicing trial lawyers have noted that defendants who are on such drugs as Melaril, Elavil and Valium may appear to be "out of it." I have had several clients who were restless, pacing back and forth, not motivated, forgetful, constantly rocking back and forth, anxious, falling asleep, and seemingly unaware of the events happening around them, even in the courtroom.
>
> This behavior can significantly interfere with the defendant's ability to exercise procedural rights. Such clients often are not able to meaningfully discuss the case or evidence with counsel, to make suggestions or comments on the evidence or testimony, or to decide whether to testify. Additionally, a defendant's affect, demeanor, and responsiveness are so compromised by some of these drugs that jurors and judges may ascribe negative connotations to the behavior that they observe in the courtroom. This works to

[85] In *Pate v. Robinson*, 383 U.S. 375 (1966), the Supreme Court held that the conviction of a legally incompetent defendant violates his due process right to a fair trial.

> compromise the defendant's credibility and presumption of innocence at trial.[86]

However, as is the situation with the Fourth Amendment, the protection of the Sixth Amendment is not as broad as that protection given by the Due Process Clause. In *Riggins v. Nevada*, Justice Kennedy's concurrence addresses the issue of side effects from psychotropic medication. He discusses at length the side effects of medication, including the two main conflicts with the Sixth Amendment: that they affect a defendant's ability to assist in his own defense, and that they "[alter] his demeanor in a manner that will prejudice his reactions and presentation in the courtroom."[87] He concludes that "elementary protections against state intrusion require the State in every case to make a showing that there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel."[88]

The problem with this requirement is that it leads to the conclusion that if medication will not impair a defendant's capacity or willingness to participate in his trial, then the involuntary administration of medication will be allowed. This is less protection than that provided the fundamental "liberty" guaranteed by the Due Process Clause; a patient's liberty interest allows him to refuse medication based on his fundamental right to self-determination, regardless of the harmful or beneficial effects.

D. THE EIGHTH AMENDMENT

In some cases, an argument can be made that the side effects of psychotropic drugs are severe enough to implicate the Eighth Amendment's prohibition against cruel and unusual

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[86] Tamar M. Meekins, *This is Your Mind on Drugs: In* Sell v. United States*, The Justices Made It Hard To Force Meds On Mentally Ill Defendants. Or Did They?*, 173 NEW JERSEY L. J. 328 (2003).

[87] 504 U.S. 127, 142 (1992).

[88] *Id.* at 140-41.

punishment.[89] However, this argument has not had much success in court. In *Bell v. Wolfish*, the Supreme Court noted that the fact that harm is inflicted by the government does not make it "punishment;" the reasons for the harm may not be punitive.[90] Therefore, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'"[91] This reduces the analysis to essentially the same one that is used when determining if there has been a due process violation; little is gained by basing an argument on Eighth Amendment grounds, and the argument is rarely made.

E. THE FIFTH AND FOURTEENTH AMENDMENTS

The majority of cases dealing with involuntary treatment of mentally ill individuals rely on an analysis of the due process rights provided by the Fifth[92] and Fourteenth[93] Amendments. As noted above, all patients have a fundamental right to refuse medical treatment, and due process allows the state to override those rights only when it is able to show that its interests in doing so are strong enough, and its procedures for making that decision have protected the patient's rights.

In most recent cases, courts have based a general right to refuse treatment either solely on the common law right to

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[89] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[90] 441 U.S. 520, 539 (1979). In this case, the Court also held that when considering the claims of punishment by pretrial detainees, reliance should be placed on the due process clause of the Fifth Amendment, rather than on the Eighth Amendment. Therefore, the Eight Amendment analysis in this case would not apply to the situation of mentally prisoners who have been found incompetent to stand trial.

[91] *Id.*

[92] The Due Process Clause of the Fifth Amendment states: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[93] The Due Process Clause of the Fourteenth Amendment states: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

informed consent, or on both that common law right and a constitutional privacy right.[94] Courts seem to feel that the right of informed consent provides a stronger argument. For example, the court in *Davis v. Hubbard*,[95] when addressing a patient's right to refuse psychotropic medication, stated its intent to take a different approach than "some of the courts which have derived the right to refuse treatment from the First Amendment, the Eighth Amendment, as well as the 'penumbras' and 'shadows' of these and the Third, Fourth, and Fifth Amendments."[96] The court referred to the approach taken in *Griswold v. Connecticut*[97] (and subsequent cases) when analyzing the right to privacy. The court stated that "the source of the right can best be understood as substantive due process, or phrased differently, as an aspect of 'liberty' guaranteed by the [D]ue [P]rocess [C]lause of the Fourteenth Amendment."[98] In *Cruzan v. Director, Missouri Dep't of Health*, the Supreme Court stated that "[a]lthough many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We

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[94] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (denying parents' request to withdraw their vegetative daughter's feeding and hydration equipment; there was no clear and convincing evidence of the daughter's desire to have life-sustaining treatment withdrawn).

[95] 506 F. Supp. 915, 931-32 (N.D. Ohio 1980).

[96] *Id.* at 929.

[97] 381 U.S. 479 (1965). The controversial analysis in *Griswold* is based on the premise that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *id.* at 487, and that the right to privacy is found in the Constitution because "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," and these "guarantees create zones of privacy." *Id.* at 482-83.

[98] *Davis*, 506 F. Supp. at 929. However, the court then found that "a respect for bodily integrity . . . underlies the specific constitutional guarantees of the Fourth . . . [and] Eighth Amendment[s], as well as due process clauses of the Fifth and Fourteenth Amendments," – an analysis very similar to the one in *Griswold*. *Id.* at 931.

believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest."[99]

Once the existence of a liberty interest protected by the Fourteenth Amendment has been established, the next step is to determine whether an individual's constitutional rights have been violated "by balancing his liberty interests against the relevant state interests."[100] This analysis is the basis of the Supreme Court's recent decisions regarding the right to refuse treatment for mental illness. In these cases the existence of a mental illness adds an aspect that is not present in other medical decision cases (such as the right to receive blood transfusions). The result is that the state interest in these cases is usually much stronger and is much more likely to outweigh the patient's right to refuse.

In the case of mentally ill prison inmates, the balancing analysis found that the state law authorizing involuntary treatment of prison inmates was a constitutionally permissible "accommodation between an inmate's liberty interest in avoiding the forced administration of antipsychotic drugs and the State's interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others."[101]

In the case of mentally ill defendants, *Sell v. United States* established that in the balance between individual and state interests, the state's interest in restoring a defendant's competency for trial only outweighed the individual's rights when "the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests."[102]

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[99] 497 U.S. at 279, n.7 (1990) (holding that the Due Process Clause of the Fourteenth Amendment did not forbid a state from requiring that evidence of an incompetent individual's wishes regarding the withdrawal of life sustaining treatment be proved by clear and convincing evidence).

[100] *Id.* at 279.

[101] Washington v. Harper, 494 U.S. 210, 236 (1990).

[102] 539 U.S. 166, 179 (2003).

F. PROCEDURAL DUE PROCESS

In addition to the protections of substantive due process, in each situation the determination of whether to forcibly medicate an individual must be made in a way that comports with the requirements of procedural due process.[103] Specifically, the determination of whether the treatment is necessary and medically appropriate must comply with procedural due process requirements.[104] In most cases, a state (or federal) statute provides a mandatory procedure, and the court evaluates challenges to that procedure by an analysis of the applicable statutory procedure.

The courts have not defined a clear standard or a simple test for determining whether a particular procedure is constitutionally acceptable, but the existing cases provide a broad outline of acceptable procedure. In *Washington v. Harper*, the Supreme Court addressed the issue of "whether a judicial hearing is required before the State may treat a mentally

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[103] *Washington v. Harper* described the difference between substantive and procedural due process: "Restated in the terms of this case, the substantive issue is what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will; the procedural issue is whether the State's nonjudicial mechanisms used to determine the facts in a particular case are sufficient." 494 U.S. at 220.

[104] *See, e.g.*, Mills v. Rogers, 457 U.S. 291 (1982). The Supreme Court said:

> The principal question on which we granted certiorari is whether an involuntarily committed mental patient has a constitutional right to refuse treatment with antipsychotic drugs. This question has both substantive and procedural aspects. The parties agree that the Constitution recognizes a liberty interest in avoiding the unwanted administration of antipsychotic drugs. Assuming that they are correct in this respect, the substantive issue involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance.

Id. at 298-99.

ill prisoner with antipsychotic drugs against his will,"[105] and held that a judicial hearing was not required.[106] The procedural process at issue in *Harper* was described as follows:

> [T]he regulation provided the inmate with a variety of procedural safeguards before, during, and after the hearing. In particular, the inmate had the right to 24-hour notice of intent to convene the hearing, during which time he could not be forcibly medicated. He had the right to attend the hearing, to present evidence, and to cross-examine adverse witnesses. He also had the right "to the assistance of a lay advisor who [had] not been involved in his case and who [understood] the psychiatric issues involved." If the committee rendered an adverse decision, the inmate had the right to submit an appeal within 24 hours to the superintendent of the institution, who was then obliged to decide the appeal within 24 hours of receipt. The inmate could then seek judicial review of an adverse decision by way of "a personal restraint petition or an extraordinary writ." Lastly, after the initial hearing, the inmate could be forcibly medicated only with periodic review.[107]

In holding that this procedure comported with the requirements of due process, the Court determined that an inmate's interests "[were] adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge."[108] The Court also

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[105] 494 U.S. at 213.

[106] *Id.* at 228.

[107] U.S. v. Morgan, 193 F.3d 252, 261 (4th Cir. 1999) (citations omitted) (relying on *Harper* to find that although the procedures described by the statute satisfied the due process requirements, the administrative proceeding that the defendant actually received may not have been conducted in compliance with regulations).

[108] *Harper*, 494 U.S. at 231. The Court explained further: "The risks associated with antipsychotic drugs are for the most part medical ones, best

found that due process did not require an attorney to represent Harper: "Given the nature of the decision to be made, the provision of an independent lay advisor who understands the psychiatric issues involved is sufficient protection."[109]

In *U.S. v. Charters*, the Fourth Circuit also found that the determination of whether to forcibly medicate a pre-trial detainee rests upon the professional judgment of institutional medical personnel (not a judge), subject only to judicial review for arbitrariness.[110] In this particular case, due process was satisfied by placing the responsibility for making the decision to medicate with the appropriate medical personnel of the institution, with judicial review available to prevent an arbitrary result.[111]

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assessed by medical professionals. A State may conclude with good reason that a judicial hearing will not be as effective, as continuous, or as probing as administrative review using medical decisionmakers. We hold that due process requires no more." *Id.* at 233.

[109] *Id.* at 236.

[110] 863 F.2d 302 (4th Cir. 1988).

[111] *Chambers*, 863 F.2d at 313. The court said:

> We observe that under the regime we have approved there is no requirement that, as a matter of due process, every medication decision by responsible medical professionals be submitted by the government for prior judicial approval before proceeding to carry it out. Such prior approval may of course be sought if desired, but under the approved regime such a decision is of a piece with other pre-deprivation governmental decisions such as those leading to job or social benefit terminations, prison transfers, disciplinary sanctions, and the like. Those decisions are of course routinely acted upon without prior judicial approval. Though their implementation is always subject to challenge by the aggrieved party, hence to the risk of liability if illegally or unconstitutionally made, we assume that medical professionals, now aware of the standard to which they are held, may be as willing to proceed without prior judicial approval as are other governmental officials such as those on prison disciplinary committee, civil service boards and the like.

Id.

U.S. v. Morgan[112] applied the holdings of *Charters* and *Harper* to a federal prisoner, hospitalized after being incompetent to stand trial, who was forcibly medicated after an administrative proceeding conducted pursuant to a federal statute.[113] The general rule that the Fourth Circuit developed was simply to verify that the administrative procedure required by statute contained "administrative safeguards" and "the availability of judicial review for arbitrariness."[114] The adequacy of the administrative process was determined by comparing it to the one in *Harper*.[115]

The Ninth Circuit addressed, in slightly more depth than the Fourth Circuit, the requirements that must be met by the administrative proceeding. In *U.S. v. Rivera-Guerrero*,[116] Rivera-Guerrero was found incompetent to stand trial, and a hearing was held that determined that he could be forcibly medicated. However, at the conclusion of that hearing, Rivera-Guerrero's attorney asked the judge for a continuance so she could obtain an independent expert medical opinion regarding the effectiveness and medical appropriateness of the suggested course of treatment. The request for a continuance was denied.[117] In holding that the lower court should have granted a

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[112] 193 F.3d 252 (4th Cir. 1999). Although the court found that the administrative procedure used to decide to forcibly medicate was generally valid, the state may have failed to comply with all the requirements of that procedure; specifically, Morgan may not have received the assistance of a qualified staff representative, and therefore the case was remanded for further factual findings. *Id.* at 265.

[113] 28 C.F.R. § 549.43 (1995). Section 549.43 authorizes forcible treatment with antipsychotic medication when institutional medical personnel find that such treatment "is necessary in order to attempt to make the inmate competent for trial or is necessary because the inmate is dangerous to self or others, is gravely disabled, or is unable to function in the open population." *Id.* at § 549.43(a)(5). The statute also provides a list of procedural safeguards, including a right to a hearing, advance notice, and the right to appeal, among other procedures. *Id.* at § 549.43(a)(1)-(8).

[114] *Morgan*, 193 F.3d at 263.

[115] *Id.*

[116] 426 F.3d 1130 (9th Cir. 2005).

[117] *Id.* at 1134-35.

continuance, the circuit court discussed several relevant factors. One was that the government did not provide Rivera-Guerrero, in advance of the hearing, adequate notice about the treatment proposal its experts would testify about. In addition, the district court should have allowed Rivera-Guerrero the opportunity to provide rebuttal evidence.[118] Third, the court held that the district court's denial of Rivera-Guerrero's request for a continuance made it impossible for the court to develop a medically informed record in the proceeding, which was required to avoid prejudice.[119]

In summary, the determination whether the procedures used to determine whether to forcibly medicate an individual is done on a case-by-case basis. Although courts have established some grounds rules – such as the fact that the decision does not need to be made by a judge, and that the individual should be provided with assistance and allowed to present evidence – no court has created a bright-line test or enumerated a list of factors that it could apply to a variety of situations.

4. THE EFFECT OF STATE STATUTES ON AN INDIVIDUAL'S RIGHT TO REFUSE

In some situations, an individual's right to refuse medical treatment does not arise only from the federal Constitution, but from state or federal statutes as well. In these cases, the individual's rights will be greater than those provided under the Due Process Clause; but the exact scope of the right depends on the content of the statute. Two cases involving the constitutional right of involuntarily committed mentally ill patients to refuse the forcible administration of antipsychotic

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[118] *Id.* at 1139-42.

[119] *Id.* at 1142-43. The Ninth Circuit previously held, in *United States v. Williams*, 356 F.3d 1045, 1056 (9th Cir. 2004), that a "medically-informed record" be developed whenever the state seeks to forcibly medicate a pre-trial detainee. The record must include an independent and timely evaluation of the defendant by a medical professional, information about the type of drugs proposed, the dosage, the expected duration of the drug treatment, and an opportunity for the defendant to challenge the evaluation and offer his or her own medical evidence in response.

drugs[120] illustrate the difference in the analysis when a statute is involved.

For a long time, two of the leading cases in the area of involuntarily committed mentally ill patients were *Rennie v. Klein*[121] and *Rogers v. Okin.*[122] In *Rennie*, the court held that antipsychotic drugs could be administered to an involuntarily committed mentally ill patient "whenever, in the exercise of professional judgment, such an action is deemed necessary to prevent the patient from endangering himself or others. Once that determination is made, professional judgment must also be exercised in the resulting decision to administer medication."[123] As in other cases, the court's analysis found that the patient's rights were based on a Fourteenth Amendment liberty interest.[124]

In *Rogers v. Okin*, the First Circuit considered the rights of involuntarily committed mentally ill patients in Massachusetts to refuse antipsychotic drugs.[125] This case was different from *Rennie* in that in previous proceedings, the Supreme Court held that state law gave patients a stronger liberty interest than the federal constitutional minimum. The procedural rules required by state law created a liberty interest under the federal Due Process Clause.[126] The balancing of the interests of the state with the rights of the patient, therefore, follows the same analysis used when only federal rights are at stake because the state rules must provide at least the minimum due process protections required by the federal Constitution with the additional procedural protections required by state law. The result in Massachusetts is that forcible medication requires a

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[120] Voluntarily committed mentally ill patients have an unqualified right to refuse. Rennie v. Klein, 476 F. Supp. 1294, 1307 (D. N.J. 1979).

[121] 720 F.2d 266 (3d Cir. 1983).

[122] 738 F.2d 1 (1st Cir. 1984).

[123] Rennie v. Klein, 720 F.2d at 269-70.

[124] *Id.* at 268.

[125] Rogers v. Okin, 738 F.2d at 2.

[126] *Id.* at 7.

judicial process to determine "whether an involuntarily committed mentally ill patient is incompetent to make his own treatment decision. State law also requires judicial process for making the substituted judgment treatment decision."[127]

Rogers v. Okin is not the only case to find that state law gives patients broader rights than the federal Constitution. In *Rivers v. Katz*,[128] the Court of Appeals of New York held that:

> [T]here must be a judicial determination of whether the patient has the capacity to make a reasoned decision with respect to proposed treatment before the drugs may be administered pursuant to the State's parens patriae power. The determination should be made at a hearing following exhaustion of the administrative review procedures . . . . The hearing should be de novo, and the patient should be afforded representation by counsel. The State would bear the burden of demonstrating by clear and convincing evidence the patient's incapacity to make a treatment decision.[129]

The rights of the patients in this case were based on the basic due process rights of patients and on protections in the New York state constitution.[130] New York law requires a judicial determination, which the Supreme Court held was not required by the Due Process Clause alone.[131]

The case of *United States v. Williams*,[132] discussed previously, also illustrates the effect a statute may have on an individual's rights – in this case, a federal statute governing the

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[127] *Id.* at 8.

[128] 495 N.E.2d 337 (N.Y. 1986).

[129] *Id.* at 344.

[130] *Id.*

[131] *See, e.g.*, Mills v. Rogers, 457 U.S. 291 (1982).

[132] 356 F.3d 1045 (9th Cir. 2004).

conditions of supervised release.[133] As in *Rivers v. Katz,* the statute created a requirement that a judge should determine if there is an "overriding justification and a determination of medical appropriateness."[134]

5. CONCLUSION

Sell v. United States and related cases have defined the standards for determining how to balance an individual's fundamental right to refuse mental health treatment with the state's interest in compelling such treatment to protect the health, welfare and safety of its citizens. This balancing is required by the substantive due process protections of the Fourteenth Amendment. However, the process used to decide whether to medicate an individual must meet the requirements of procedural due process. Courts have not been able to create consistent standards that define the basic requirements that a procedure must meet in to protect an individual's rights. In many states, the procedures are defined by a statute, and are therefore unique to each state. For example, some states require a decision to be made by a judge; some states do not. Courts evaluate these procedures on a case-by-case basis, with different factors considered in each case. The result is that although the factors to be considered when weighing an individual's rights against state interests are clearly defined, the procedures for ensuring that those standards are applied fairly are not clear or consistent. The result is a system that fails to protect the fundamental rights of the mentally ill.

[133] 18 U.S.C. § 3583 (2006).

[134] 356 F.3d at 1056.