ORIGINS OF THE RIGHT TO INFORMED CONSENT AND THE RIGHT TO REFUSE ANTIPSYCHOTIC MEDICATIONS

Prepared For: 1987 Annual Patient's Rights Advocates Conference

Workshop Topic: Medications - Their Usage and The Laws That Concern Them

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INTRODUCTION

Although constitutional and other legal bases form the primary foundation for the right to informed consent or the right to refuse antipsychotic medications, recognition of the right has been generated largely by nonlegal concerns. The right has emerged during a period of growing awareness of the competence, the capabilities, and the human dignity of people identified as mentally ill. In calling for increased client control over treatment decisions, proponents of the right to refuse emphasize a plethora of deficiencies in both the psychiatric profession and the state of the art of psychiatry, including, but not limited to: the inaccuracy of diagnoses and treatment choices; the dangers, adverse effects, and questionable efficacy of antipsychotic medications; the intrusiveness of forced treatment whether medically beneficial or not; and the ineffectiveness of "one-sided therapy." See, e.g., The Constitutional Right to Refuse Anti-Psychotic Mediations, 8 Bull. Am. Acad. Psychiatry and L. 179, 182-92 (1980). To assess the opposite side of the controversy, see Applebaum and Gutheil, "Rotting with Their Rights On": Constitutional Theory and Clinical Reality in Drug Refusal by Psychiatric Patients 7 Bull. Am. Acad. Psychiatry and L. 306 (1977).

1. COMMON LAW BASES

The right to autonomy over one's body which includes the right to refuse treatment can be traced back to English common law that predates our own constitution. A recent federal court decision traces the right to the year 1215, to what most authorities agree was the world's first constitution, the Magna Carta. See Davis v. Hubbard, 506 F.Supp. 915, 935-37 (N.D.Ohio 1980). These early sources of law established a right of personal security and freedom from nonconsensual invasions of bodily integrity. United States courts have recognized nonconsensual medical treatment as such an impermissible invasion for more than 100 years. See, e.g., Munn v. Illinois, 94 U.S. 113, 142 (1876) (Field, J., dissenting) and Union Pacific Railroad Co. v. Botsford, 141 U.S. 250, 251 (1891).

Nonconsensual bodily touchings may leave the violator liable for criminal battery and for civil suit to recover damages in tort for personal injury. In general, the individual's right to refuse medical or surgical treatment has been protected by this common law right. However, the sacred common law right of personal and bodily security under federal law has proven inadequate to protect one's right to refuse the forced administration of antipsychotic medications. But recently numerous state courts have extended this great common law right of informed consent to persons identified as mentally ill. To illustrate, in People v. Medina, 705 P.2d 961 (Colo. 1985), the Colorado Supreme Court declared:

> The common law over the centuries has always protected individuals from unwanted intentional contacts with their person. It has been observed that "there is perhaps no right which is older than a person's right to be free from unwarranted personal contact." The common law action of battery developed out of the law's recognition of an individual's interest in personal autonomy and bodily integrity -- that is, the right of a person to participate in and make decisions about his own body. The law of informed consent emerged from the law of battery, which was applied to unauthorized touchings by a physician.

705 P.2d at 968 (emphasis added).

2. STATUTORY BASES AND CALIFORNIA LAW

Common law presumptions can be changed by statute or out-weighed by other common law principles. Thus, if the state chooses to authorize the involuntary treatment of a certain class of individuals, whether they be diagnosed as having tuberculosis or identified as mentally ill, common law objections fall. This partially explains why historically the states permitted treatment of individuals identified as mentally ill without their consent as a matter of public policy. In states where statutes did not explicitly authorize such involuntary psychiatric treatment, the practice nonetheless proceeded. It was assumed that the state inherently possessed the power to act in parens patriae to "care"

for individuals labeled "insane" in whatever manner the state deemed necessary. This assumption is no longer legally permissible. All states now have statutory schemes defining under what circumstances the state may lawfully act in parens patriae to involuntarily detain or treat persons identified as mentally ill. See, e.g., Welf. & Inst. Code § 5150 et seq.

In California both voluntary and involuntary patients have the right to refuse or consent to electroconvulsive treatment and psychosurgery. See Welf. & Inst. Code §§ 5325(f), (g). Additionally, voluntarily committed adults possess the right to informed consent and the right to refuse antipsychotic medications. See Cal. Admin. Code, Title 9, § 850 et seq. Such right to refuse can only be overriden in the presence of an emergency, as defined under California law. Under Section 853, "[a]n emergency exists when there is a sudden marked change in the patient's condition so that action is immediately necessary for the preservation of the life or the prevention of serious bodily harm to the patient or others, and it is impracticable to first obtain consent. If antipsychotic medication is administered during an emergency, such medication shall be only that which is required to treat the emergency condition and shall be provided in ways that are least restrictive of the personal liberty of the patient." Further, under Section 854 "[a] voluntary patient may withdraw consent to the administration of antipsychotic medications at any time by stating such intention to any member of the treatment staff." Finally, Section 855 specifies that "[t]he consequence of refusal to consent to the administration of antipsychotic medications shall not in itself constitute grounds for initiating an involuntary commitment."

The accepted definition of informed consent is comprised of three elements: (1) knowledge -- the adequacy of information conveyed to the prospective treatment subject and his or her comprehension of this information; (2) volition -- the circumstances allowing for freedom of choice; and, (3) competency -- the capacity

to make rational or intelligent judgments. 38 Cal.Jur.2d, Physicians, §66, p.671. With respect to the capacity or competency element, persons receiving mental health treatment, whether voluntarily or involuntarily, are presumed competent. Welf. & Inst. Code §§ 5326.5(d), 5331; Aden v. Younger, 57 Cal.App.3d 662 (1976).

California's highest state court has determined what knowledge must be conveyed before a patient can make an informed decision regarding treatment. The California Supreme Court has adopted the "full disclosure" standard with respect to rights of informed consent to treatments which may be termed "complicated." Cobbs v. Grant, 8 Cal.3d 229 (1972). In Cobbs, the Court indicated that different standards apply depending on the type of procedure. For example, if a proposed treatment is "simple," the doctor does not have to describe remote risks. Id. at 244. On the other hand, if the procedure is "complicated," the physician is obligated to describe all possible risks, regardless of how remote. Id.

Under the LPS Act, detailed procedures regarding informed consent to ECT have been established. See §§ 5326.2 et seq.; Cal. Admin. Code, Title 9, §§ 840-841. Section 5326.5(c) defines incapacity to give consent as being unable to understand, or knowingly and intelligently act upon, the information in Section 5326.2. Section 5326.2 contains the type of detailed information which would satisfy the "full disclosure" standard required by Cobbs v. Grant. Like ECT and psychosurgery, antipsychotic medications are also a "complicated" form of treatment given the significant side effects associated with their use, including, but not limited to, tardive dyskinesia. As a result, full disclosure to the subject regarding proposed treatment with antipsychotic medications would appear to be required for informed consent under Cobbs v. Grant. At a minimum, the disclosure must include the information currently contained in Title 9, California Administrative Code, Section 851, which governs informed consent to antipsychotic medications for

voluntary patients. Section 851 states:

> A voluntary patient shall be treated with antipsychotic medications only after such person has been informed of his or her right to accept or refuse such medications and has consented to the administration of such medications. In order to make an informed decision, the patient must be provided with sufficient information by the physician prescribing such medications (in the patient's native language, if possible) which shall include the following:
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> (a) The nature of the patient's medical condition;
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> (b) The reasons for taking such medication, including the likelihood of improving or not improving without such medication, and that consent, once given, may be withdrawn at any time by stating such intention to any member of the treating staff;
>
> (c) The reasonable alternative treatments available, if any;
>
> (d) The type, range of frequency and amount (including use of PRN orders), method (oral or injection), and duration of taking the medications;
>
> (e) The probable side effects of these drugs known to commonly occur, and any particular side effects likely to occur with the particular patient; and,
>
> (f) The possible additional side effects which may occur to patients taking such medication beyond three months. The patient shall be advised that such side effects may include persistent involuntary movement of the face or mouth and might at times include similar movement of the hands and feet, and that these symptoms of tardive dyskinesia are potentially irreversible and may appear after medications have been discontinued.

Additionally, California statute now requires that written and oral information on the effects of antipsychotic medications be given the persons detained for evaluation and treatment. Welf. & Inst. Code § 5152. Section 5152 further specifies that the following information be given orally to the detained patient:

> (1) The nature of the mental illness, or behavior, that is the reason the medication is being given or recommended.
>
> (2) The likelihood of improving or not improving without the medications.
>
> (3) Reasonable alternative treatments available.
>
> (4) The name and type, frequency, amount, and method of dispensing the medications, and the probable length of time that the medications will be taken.

A substantial minority trend in state court decisions throughout the country regarding the forced administration of antipsychotic medications is represented by the recent decision in Keyhea v. Rushen, 178 Cal.App.3d. 526 (1986). In Keyhea, the California Court of Appeal for the First District unanimously determined that state prisoners identified as mentally ill have a statutory right to refuse treatment with antipsychotic medications absent a judicial determination that they are incompetent to do so. The court based its decision in part on the statutory rights of mentally ill conservatees concluding: "LPS conservatees have a right to refuse involuntary long-term medication absent a judicial determination of their incompetency to do so." Id. at 537. See also Welf. & Inst. Code §§ 5357, 5358, 5358.2.

The Keyhea court also cited with approval a 1977 Attorney General Opinion which concluded that, under LPS,

> the conservatee is not divested of the right to make his or her own medical decisions absent a specific determination by the court that the conservatee cannot make those decisions (emphasis supplied by court). In view of the fundamental nature of the right affected, the court should not make such a determination unless it finds that the conservatee lacks the mental capacity to rationally understand the nature of the medical problem, the proposed treatment and the attendant risks. 60 Ops.Cal.Atty.Gen. 375, 377 (1977).

178 Cal.App.3d at 535 (emphasis added; citation omitted). After reviewing the present statutory definition of grave disability, the court concluded that "by affording a qualified right to refuse treatment related to being gravely disabled, LPS affords a right to refuse psychiatric treatment for the mental disorder causing the grave disability, absent a court order. Id. at 536 (emphasis added).

The Keyhea court did not examine the question of whether a judicial determination of incompetence is required before involuntarily medicating individuals committed under the authority

of Section 5150 (72-hour hold), Section 5250 (14-day certification) or Section 5300 (post-certification procedures for imminently dangerous persons). However, under the LPS Act persons receiving mental health treatment cannot be deprived of any legal right unless specifically provided by law. The Legislature has declared:

> Persons with mental illness have the same legal rights and responsibilities guaranteed all other persons by the federal Constitution and laws and the Constitution and laws of the State of California unless specifically limited by federal or state law or regulations.

§ 5325.1 (emphasis added); see also § 5327. Moreover, the statutory presumption that persons identified as mentally ill are competent and free to exercise their fundamental personal rights unless explicitly denied them by law remains unchanged despite the imposition of involuntary hospitalization and despite their status as detainees:

> Unless specifically stated, a person complained against in any petition or proceeding initiated by virtue of the provisions of this part shall not forfeit any legal right or suffer legal disability by reason of the provision of this part.

§ 5005 (emphasis added). Further, in enacting the LPS Act, the Legislature specifically declared their intent to "eliminate legal disabilities," § 5001(a), and "[t]o safeguard individual rights through judicial review," § 5001(d) (emphasis added).

As previously indicated, the Keyhea court based its decision in part on the right of LPS conservatees to refuse treatment absent a judicial determination of their incapacity to do so. 178 Cal.App.3d at 536, 542. The issue of whether there is constitutional, common law or statutory right to a judicial determination of incompetency before persons involuntarily committed can be treated against their wills with antipsychotic drugs is currently pending before the First District Court of Appeal in Riese v. St. Mary's Hospital and Medical Center, Civil No. A034048.

3. CONSTITUTIONAL BASES

Since the mid-1960's, mental health rights activists have argued that the right to refuse psychiatric treatment, including the forced administration of antipsychotic medications, is protected by various provisions of the United States Constitution.

FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH AND FREEDOM OF THOUGHT

Courts throughout the country have found that antipsychotic medications are mind-altering, affect and change a person's mood, attitudes, and capacity to think. See, e.g., Rogers v. Okin, ("Rogers I"), 478 F.Supp. 1342, 1366 (D.Mass. 1979); Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1974). Therefore, antipsychotic medications possess the potential to control the individual's mind by interfering in the private realm of individual thought and decision in violation of First Amendment guarantees. See, e.g., Abrams v. U.S., 250 U.S. 616, 630 (1919).

In Rogers v. Okin, the court explained:

> The First Amendment protects the communication of ideas. That protected right of communication presupposes a capacity to produce ideas. As a practical matter, therefore, the power to produce ideas is fundamental to our cherished right to communication and is entitled to comparable constitutional protection. Whatever powers the Constitution has granted our government, involuntary mind control is not one of them, absent extraordinary circumstance. The fact that mind control takes place in a mental institution in the form of medically sound treatment of mental disease is not, itself, an extraordinary circumstance warranting an unsanctioned intrusion on the integrity of a human being.

478 F.Supp. at 1367.

FOURTH AMENDMENT RIGHTS TO FREEDOM FROM ILLEGAL SEARCH AND SEIZURE

Forced, intrusive administration of antipsychotic medications may be analogized to violations of the sanctity of the individual that characterize unjustified searches of the person. This argument actually rests on the individual's expectation of privacy which derives from the Fourth Amendment's protection of the individual's right to be free from unreasonable searches and seizures.

EIGHTH AMENDMENT RIGHT TO PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

The significant deprivation of liberty inherent in forced treatment with antipsychotic medications convinces some right to refuse proponents that such deprivation of liberty should not be distinguished from penal incarceration. These right to refuse theorists contend that forced drugging violates the Eighth Amendment because it constitutes punishment of a cruel and unusual kind, motivated solely because an individual is considered deviant, i.e. identified as mentally ill. Courts have traditionally been reluctant to characterize forced psychiatric treatment as punishment. But at least one court has intimated that under certain circumstances forced drugging may be cruel and unusual punishment. See Sounder v. McGuire, 423 F. Supp. 830 (M.D.Pa. 1976) where the court describes the forced administration of antipsychotic drugs as "painful and frightening."

FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

The Due Process Clause of the Fourteenth Amendment appears to support the strongest legal argument for the right to refuse. The Due Process Clause incorporates the common law guarantees of privacy, bodily integrity, and personal security.

Since the nonconsensual administration of antipsychotic medications to an involuntary patient results in a significant deprivation of liberty, it follows that the state cannot administer the medications without providing an opportunity for the patient to argue the merits of the treatment decision before an impartial decision-maker. Opponents of the right to refuse contend that a treating physician exercising sound professional judgment constitutes an impartial decision-maker, thereby satisfying patients' interests in avoiding forced drugging. See Youngberg v. Romeo, 457 U.S. 307 (1982).

Reliance on the recommended federal standard of sound professional judgment appears misplaced. First, Youngberg was not a case involving the individual liberty interests at stake in the forced administration of antipsychotic medications. Second, Youngberg and its companion case, Mills v. Rogers, 457 U.S. 291 (1982), recognize that state law may require considerably more than the minimal due process requirements suggested by Youngberg. In Mills, the United States Supreme Court determined that:

> For purposes of determining actual rights and obligations, however, questions of state law cannot be avoided. Without our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution. [Citations.] If so, the broader state protections would define the actual substantive rights possessed by a person living within that State.
>
> Where a State creates liberty interests broader than those protected directly by the Federal Constitution, the procedures mandated to protect the federal substantive interests also might fail to determine the actual procedural rights and duties of persons within the State. Because state-created liberty interests are entitled to the protection of the federal Due Process Clause [citations], the full scope of a patient's due process rights may depend in part on the substantive liberty interests created by state as well as federal law. Moreover, a State may confer procedural protections of liberty interests that extend beyond those minimally required by the Constitution of the United States. If a State does so, the minimal requirements of the Federal Constitution would not be controlling, and would not need to be identified in order to determine the legal rights and duties of persons within that State.

457 U.S. at 300. Numerous state courts have therefore determined that greater protection of the liberty interests asserted by patients in avoiding the forced administration of antipsychotic medications is required under their constitutions, their statutes or their common law. Indeed, no state court has followed the bare minimum of Youngberg in the context of antipsychotic medications.

Moreover, the federal standard defining what constitutes the exercise of sound professional judgment may change in light of the American Psychiatric Association's recent declaration regarding the importance of informed consent. The unusual July 1985 statement sent by the Association to each of its members in part declares:

> The overall lifetime risk for developing [tardive dyskinesia] is unknown. Although prevalence estimates vary widely from population to population, the previous task force estimated that at least 10% to 20% of patients in mental hospitals and at least 40% of elderly, chronically institutionalized or outpatients exhibit more than minimal signs of probable tardive dyskinesia attributable to or associated with neuroleptic drug treatment (Task Force Report #18, p. 44). Although the majority of cases are mild and not progressive, severe, persistent, and disabling forms of the disorder do occur in both adults and children.
>
> Our concern as physicians is increased because neuroleptic drugs are sometimes used in clinical situations where other drugs or non-pharmacological treatments would be primarily indicated. We are further concerned about the apparent increase in litigation over tardive dyskinesia. In this context we would emphasize the importance of adequately documented informed consent.

But despite the future trend in the federal courts, it is clear that the present trend in the state courts, as discussed above, is to provide greater protection of the common law guarantees incorporated by the Due Process Clause. It must be remembered that the states remain free to provide greater constitutional protection than that minimally required by federal law to individuals identified as mentally ill. See, e.g., Rogers v. Commissioner of the Department of Mental Health, 390 Mass. 489 (Mass.Sup.Jud.Ct., December 2, 1983). California law also appears to provide a much stronger basis than does federal law for a more unqualified right to refuse the forced administration of antipsychotic drugs.

FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION

Equal protection does not require that all persons be dealt with identically. However, equal protection does require that a distinction drawn bear some rational relationship to the purpose for which the classification is made. See Baxtrom v. Herald, 383 U.S. 107, 111 (1966).

Routinely denying involuntarily detained patients the right to refuse antipsychotic medications may violate equal protection guarantees because it relies on an arguably irrational distinction between psychiatric patients and medical patients. The only legally-based rational distinction that should be drawn between a psychiatric patient and a medical patient is incompetence to act. Therefore, equal protection proponents contend that absent an adjudication of incompetence to make a treatment decision, involuntarily detained psychiatric patients should possess, as any other medical patient, the right to refuse treatment. See, e.g., Colyar v. Third Jud. Dist. Ct. for Salt Lake County, 469 F.Supp. 424 (D.Utah 1979).

RIGHT TO PRIVACY

The fundamental right to privacy exists in the penumbra of rights specifically enumerated in the Bill of Rights. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965). Insofar as the right to privacy encompasses the right to bodily autonomy, it is abridged by involuntary treatment, including the forced administration of antipsychotic medications. The United States Supreme Court has to date chosen to limit this right to privacy primarily to decision-making areas concerning procreation and the family.

However, California has established a much broader and protective right of privacy. The California Constitution explicitly provides that "all people ... have inalienable rights ... among

these (inalienable rights) are enjoying ... privacy." Cal. Const. art. I, § 1. A recent series of California decisions protecting the right to refuse medical treatment under the constitutional privacy concept has concerned the termination of life-sustaining treatment. See Bouvia v. Superior Court, 179 Cal.App.3d 1127 (1986); In re Bartling 163 Cal.App.3d 186, 209 Cal.Rptr. 220 (1984); Barber v. Superior Court 147 Cal.App.3d 1006 (1983).

In Bouvia, the court explained why the right to refuse treatment is an inextricable part of the right to privacy, saying:

> The right to refuse medical treatment is basic and fundamental. It is recognized as a part of the right of privacy protected by both the state and federal constitutions. (Cal. Const., Art. I, Sec. 1; Griswold v. Connecticut (1965) 381 U.S. 479, 484 [14 L.Ed.2d 510, 514-515, 85 S.Ct. 1678]; Bartling v. Superior Court, supra, 163 Cal.App.3d 186.) Its exercise requires no one's approval. It is not merely one vote subject to being overridden by medical opinion. (emphasis supplied).

179 Cal.App.3d at 1139.

CONCLUSION

The right to refuse forced treatment with antipsychotic medications is only one of a number of issues presently compelling the courts to decide how persons identified as mentally ill shall exercise their fundamental rights of citizenship. To what extent persons identified as mentally ill should possess the right to make their own treatment decisions remains one of the most controversial issues in mental health law today, generating intense feelings in all professional disciplines involved. But for persons asserting their rights to informed consent to treatment with antipsychotic medications, the issue is viewed as part of a common history that has seen them subjected to discrimination primarily because of their status as citizens identified as mentally ill.