Involuntary Civil Commitment: Fourteenth Amendment Due Process Protections

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SUMMARY

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Involuntary Civil Commitment: Fourteenth Amendment Due Process Protections

Involuntary civil commitment refers to the forced hospitalization of persons with serious mental illness (SMI). While this process is generally governed by state law, it also implicates constitutional concerns and constraints under the Fourteenth Amendment Due Process Clause of the U.S. Constitution, specifically with regard to the liberty interests of the confined patients.

The law concerning involuntary commitment for persons with SMI has evolved over time. Certain federal statutes address civil commitment, such as laws concerning federal prisoners with SMI and requirements for certain health care facilities that treat patients with SMI. In addition, the District of Columbia Hospitalization of the Mentally Ill Act governs inpatient hospitalization in the District.

The Fourteenth Amendment's Due Process Clause is interpreted by courts to provide both procedural and substantive due process protections for persons who are subject to involuntary civil commitment. Courts have recognized and applied due process rights when such persons face deprivations of liberty and property due to their mental health status, particularly in the context of involuntary hospitalization.

As to procedural due process rights for the civilly committed, there are well-established, constitutionally protected rights of notice of the confinement and a hearing. The Supreme Court has also established a minimum burden of proof for purposes of involuntary civil commitment, although some states have higher standards. Whether and to what extent an indigent person facing civil commitment has a right to counsel, a right to an independent expert to testify on his or her behalf, or a right to a jury trial are all unsettled areas of law. While many states protect these rights, the Supreme Court has never ruled that the Fourteenth Amendment guarantees any of these protections.

With respect to substantive due process protections, there are two types of constitutionally protected substantive due process rights that have been recognized for persons subject to involuntary hospitalization. The first is the liberty interest of all persons to be free from confinement; the second is related to the rights of confined persons to safe conditions. Other substantive due process rights of individuals with SMI include requisite standards of dangerousness before a state may involuntarily commit a person, as well as a committed person's rights to safe conditions, freedom of movement, and basic training. Legal issues related to a committed individual's right to receive or to refuse medical treatment during confinement also appear throughout the relevant case law.

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Introduction

Involuntary civil commitment, or the forced hospitalization of persons with serious mental illness (SMI),[1] is a type of mental health treatment that presents tension between an individual's liberty interests and the state's interests in protecting citizens from danger. According to the Substance Abuse and Mental Health Services Administration (SAMHSA),[2] a division of the U.S. Department of Health and Human Services (HHS), civil commitment is a legal intervention wherein a judge or jury may order a person with a mental illness who meets certain criteria to be confined to a psychiatric hospital, or to receive supervised outpatient treatment.[3]

While civil commitment is generally a matter of state law,[4] federal constitutional concerns and constraints can arise, especially with regard to the confined patient's liberty interests. These constitutional constraints limit state civil commitment laws in at least three ways. First, constitutional constraints affect how states may initially detain an individual suspected of experiencing SMI and transport that individual to a treatment facility.[5] Second, constitutional constraints affect how states may seek to commit such individuals to mental health facilities on a longer-term basis.[6] Third, they affect how states must treat civilly confined individuals and protect their rights during confinement.[7] Over the last 50 years, the U.S. Supreme Court has addressed these three areas in various civil commitment cases.

In recent years, involuntary civil commitment has garnered attention from stakeholders, as many states grapple with the use of involuntary civil commitment for vulnerable populations, including children and unhoused individuals.[8] With respect to the latter, changes in mental hygiene laws in states with large populations of unhoused persons, including New York, California, and Hawaii, have sparked debates about the rights of unhoused individuals with SMI and the most effective ways to assist them.[9] For example, in November 2022, New York City announced a new policy

[1] SAMHSA defines adults with SMI as "persons age 18 and over, who currently or at any time during the past year, have had a diagnosable mental, behavioral, or emotional disorder of sufficient duration to meet diagnostic criteria . . . that has resulted in functional impairment which substantially interferes with or limits one or more major life activities." 58 Fed. Reg. 29422 (May 20, 1993).

[2] For more information on SAMHSA, see CRS Report R46426, *Substance Abuse and Mental Health Services Administration (SAMHSA): Overview of the Agency and Major Programs*, by Johnathan H. Duff.

[3] SUBSTANCE ABUSE & MENTAL HEALTH ADMIN., OFF. OF THE CHIEF MEDICAL OFFICER, CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM; HISTORICAL TRENDS AND PRINCIPLES FOR LAW AND PRACTICE 1 (2019) [hereinafter CIVIL COMMITMENT REPORT], https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf.

As explained in a recent report from the Treatment and Advocacy Center, there are different types of involuntary treatment for the mentally ill, including emergency psychiatric evaluation, inpatient civil commitment, and assisted outpatient treatment. States have different laws and procedures for each of the three types of treatment. For more information, see TREATMENT ADVOC. CTR., GRADING THE STATES: AN ANALYSIS OF U.S. PSYCHIATRIC TREATMENT LAWS (2020), https://www.treatmentadvocacycenter.org/storage/documents/grading-the-states.pdf. For purposes of this report, "involuntary civil commitment" generally refers to long term, in-patient commitment, unless otherwise stated.

[4] CIVIL COMMITMENT REPORT, *supra* note 3, at 1.

[5] *See, e.g.*, *Ex parte* Bashinsky, 319 So. 3d 1240 (Ala. 2020).

[6] *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975); Vitek v. Jones, 445 U.S. 480 (1980).

[7] *See, e.g.*, Mills v. Rogers, 457 U.S. 291 (1982), Youngberg v. Romeo, 457 U.S. 307 (1982).

[8] *See, e.g.*, Donna St. George, *In Florida, Showing Mental Health Struggles Could Get a Child Detained*, WASH. POST., Mar. 16, 2023, https://www.washingtonpost.com/education/2023/03/16/florida-law-child-mental-health/?utm_campaign=ext_rweb&utm_medium=referral&utm_source=extension.

[9] *See* Teresa Wiltz, *'Gravely Disabled' Homeless Forced into Mental Health Care in More States*, PEW TRUSTS, Sept. 11, 2019, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/09/11/gravely-disabled-homeless-forced-into-mental-health-care-in-more-states; Brittany Lyte, *Homeless Advocates Test Hawaii's New Forced-*
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under Section 9.39 of its Mental Hygiene Law[10] that allows state authorities, including firefighters and police officers, to involuntarily commit unhoused individuals who are suspected of being a harm to themselves. The policy sparked controversy from stakeholder and advocacy groups over concerns that it could deprive unhoused persons of their liberty and further deter individuals with SMI from seeking mental health treatment.[11]

This report addresses how the Constitution's Due Process Clause of the Fourteenth Amendment protects the interests of persons with SMI who are subject to involuntary civil commitment. Where relevant, this report references other constitutional provisions implicated by involuntary civil commitment, such as the Seventh Amendment right to jury trial.[12] First, the report considers the history of involuntary commitment for persons with mental illness and discusses how the law has evolved around this issue over time. Next, the report highlights select federal laws and regulations related to civil commitment. Third, the report covers both procedural and substantive due process protections under the Fourteenth Amendment's Due Process Clause for persons who are subject to involuntary civil commitment.[13]

While the report does not cover every possible procedural due process protection available to persons with SMI, it discusses the procedural protections of notice, hearing, burden of proof, right to counsel, right to an expert witness, and the right to a jury trial. With respect to substantive due process protections, it addresses the requisite standard of dangerousness that a state must prove to involuntarily commit a person, as well as the committed patient's rights to safe conditions, freedom of movement, and basic training. The report concludes with a discussion of the rights of civilly committed patients both to receive and reject medical treatment during their confinement.

Treatment Law, HONOLULU CIVIL BEAT, Sept. 4, 2019, https://www.civilbeat.org/2019/09/homeless-advocates-test-hawaiis-new-forced-treatment-law/.

[10] N.Y. MENT. HYG. LAW § 9.39 (2022) (governing emergency involuntary hospitalization admissions of mentally ill patients for observation, examination, care, and treatment).

[11] *NYCLU on Mayor Adams' Expansion of Forcible Detentions and Hospitalizations for Mental Illness*, NYCLU, Nov. 29, 2022, https://www.nyclu.org/en/press-releases/nyclu-mayor-adamss-expansion-forcible-detentions-and-hospitalizations-mental-illness; Talal Ansari, New York City Plan to Involuntarily Hospitalize Some Mentally Ill Homeless Faces Legal Challenge, Wall Street Journal, (Dec. 8, 2022), https://www.wsj.com/articles/new-york-city-plan-to-involuntarily-hospitalize-some-mentally-ill-homeless-faces-legal-challenge.

[12] This report focuses on the constitutional protections stemming from the Fourteenth Amendment for involuntarily committed patients with SMI. Involuntary civil commitment and the processes leading up to it (e.g., detention by an officer) potentially implicate other constitutional protections. For example, the Second Circuit has suggested that the Fourth Amendment's prohibition on unreasonable searches and seizures was implicated when officers arrested a suspected individual with SMI pursuant to the New York Mental Hygiene law. *See* Kerman v. City of New York, 261 F.3d 229, 237 (2d Cir. 2001).

[13] This report focuses on Fourteenth Amendment protections for individuals with SMI who face any type of involuntary civil commitment; no distinction is drawn between an initial civil commitment and a long-term civil commitment. Moreover, the differences in state laws, which reflect varying ways of committing individuals, concerning these two types of civil commitment are generally omitted. Differences in the law include whether the proposed commitment is an emergency commitment or long-term commitment, who is authorized to initiate the commitment proceedings, how the need must be demonstrated, when the proposed patient can request a hearing, and what the standard is for the commitment itself. As an example, *compare* ARIZ. REV. STAT. § 36-520A (stating that "any responsible individual may apply for a court-ordered evaluation of a person . . . alleged to be, as a result of a mental disorder, a danger to self or to others"), *with* CONN. GEN. STAT. § 17a-498, which does not specify who can file a commitment application.

History of U.S. Laws Regarding Involuntary Civil Commitment

English laws concerning mental illness began as early as the 13th century, and in the United States, formalized care in mental hospitals appeared in the late 18th and early 19th centuries.[14] There are two generally accepted legal bases under which a state may justify involuntary confinement of persons with SMI: *parens patriae* and state police power.[15] Under the *parens patriae* theory, the state is obligated to care for citizens who are unable to care for themselves; this theory assumes that such persons are unable to make informed decisions about their need for treatment, justifying state intervention.[16] The *parens patriae* power was primarily used to justify civil confinement until the mid-1970s, after which police power became more commonly used.[17] Under the police power theory, the state has a responsibility to maintain public order and safety and thus may confine people on the basis that they pose a threat to themselves or others.[18]

Until reforms began in the mid-1800s, Americans could be involuntarily confined to mental hospitals under questionable circumstances, and these hospitalizations were not necessarily for the benefit of the person suffering from mental illness. For example, in 1860, Ms. Elizabeth Parsons Ware Packard was committed to a state mental hospital under an Illinois law that allowed married women to be civilly committed at the behest of their husbands, without actual evidence of a mental health issue.[19] After her release, Ms. Packard led a reform movement to create judicial procedures that would prevent wrongful involuntary hospitalization, successfully changing state laws in Illinois, Iowa, Maine, and Massachusetts.[20] Ms. Packard also fought for patient's rights, including the right to untampered mail and better living conditions.[21] During this time, many states developed "semi-formal" procedures for the emergency detention and observation of patients with SMI, generally at the request of a family member, doctor, or the police.[22]

The late 1960s saw the beginnings of the "Patient Rights Movement," which brought changes in admission procedures and generally aimed to prevent unnecessary, rather than simply unjust, involuntary civil commitments.[23] The movement came about as the result of both lawyers and mental health clinicians calling attention to problematic aspects of involuntary confinement, including overcrowded hospitals, patient neglect and mistreatment, lack of available treatment in both inpatient and community-based settings, and unnecessary commitments.[24]

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[14] CIVIL COMMITMENT REPORT, *supra* note 3, at 2. For a brief history of institutional care in the United States, *see* CRS In Focus IF10870, *Psychiatric Institutionalization and Deinstitutionalization*, by Johnathan H. Duff.

[15] Karl Menninger, Wrongful Confinement to a Mental Health or Developmental Disabilities Facility, 44 AM. JUR. PROOF OF FACTS 3d 217, 230 (1997).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 225. For more information about Elizabeth Packard and the specific reforms that she championed, see Mariana Brandman, *Elizabeth Packard, National Women's History Museum*, https://www.womenshistory.org/education-resources/biographies/elizabeth-packard (last accessed Feb. 27, 2023).

[20] Menninger, *supra* note 15, at 225.

[21] Brandman, *supra* note 19.

[22] Menninger, *supra* note 15, at 225.

[23] *Id.* For more comprehensive information on civil commitment reforms, see PAUL APPELBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE (1994).

[24] Menninger, *supra* note 15, at 225. The lack of community-based (i.e., non-inpatient) facilities offering mental health (continued...)

In 1975, the U.S. Supreme Court recognized the constitutionally protected liberty interests of the involuntarily hospitalized, barring states from committing mentally ill patients who were not a danger to themselves or others.[25] Under the changing legal landscape during this time, many states shifted from a *parens patriae* justification for civil confinement to a police power view, which more closely aligns with the idea that dangerous persons with SMI can appropriately be involuntarily confined.[26] A few years later, in 1979, the Court established that the threshold burden of proof for civil commitment hearings was more than a mere civil preponderance standard, holding that the state must demonstrate its case for involuntary hospitalization with clear and convincing evidence.[27] During this time, actions from both Congress[28] and the Supreme Court led to many states updating and revising their civil commitment laws.[29]

Select Federal Laws Related to Involuntary Civil Commitment

Standards under which individuals can be civilly committed are not widely defined by federal law or regulation and have generally been left to states, with each state having different procedures and processes.[30] There are some federal statutes that address involuntary commitment, a sampling of which are discussed in this section, including laws governing federal prisoners and patients' rights, and the D.C. Code.[31]

Many of the federal statutes that directly address civil commitment focus on commitment proceedings for federal prisoners.[32] In the 1980s, Congress began discussing prison reform, and

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treatment was also an issue being discussed in the 1960s. *See, e.g.*, Lake v. Cameron, 267 F.Supp. 155 (Dist. Ct. D.C. 1967), wherein the D.C. District Court addressed the necessity of civil confinement in Saint Elizabeths Hospital for an unhoused patient. When assessing whether there were alternatives to inpatient care, the court noted that the patient required constant supervision for her safety. The court found that the hospital was the only facility that could provide the patient with the type of care she required, because there were insufficient public funds to place her in a nursing home, and no other community-based facilities were available. *Id.* at 158.

[25] O'Connor v. Donaldson, 422 U.S. 563 (1975).

[26] Menninger, *supra* note 15, at 230.

[27] Addington v. Texas, 441 U.S. 418 (1979).

[28] *See* discussion of the District of Columbia Hospitalization of the Mentally Ill Act, *infra* "Select Federal Laws Related to Involuntary Civil Commitment."

[29] Megan Testa & Sara West, *Civil Commitment in the United States*, 7 PSYCHIATRY 30, 33 (2010).

[30] *See also supra* "History of U.S. Laws Regarding Involuntary Civil Commitment."

[31] The D.C. Code is included in this section, because Congress, in conjunction with the D.C. Council, controls D.C. law. Congress's control of D.C. stems from the U.S. Constitution, which grants Congress the power to "exercise exclusive legislation" over a federal district, not to exceed 10 square miles, to "become the Seat of the Government in the United States." U.S. CONST., art. I, § 8, cl. 17. While civil commitment also arises in the context of agency regulations governing federal health care programs, the focus of this section is limited to federal statutes. It should be noted that other federal laws address the circumstances under which certain costs related to civil commitment may be covered by federal health programs. The Social Security Act, which authorizes the Medicare and Medicaid programs, excludes inpatient mental health care for patients under age 65 (commonly referred to as the "institutions for mental disease" or "IMD" exclusion).[31] 42 U.S.C. § 1396d(a)(B). *See also* CRS In Focus IF10222, *Medicaid's Institutions for Mental Disease (IMD) Exclusion*, by Alison Mitchell. States currently have a few options when seeking to use Medicaid funds to cover IMD services, including Section 1115 waivers. For more information about Section 1115 waivers and how they are used in the Medicaid IMD context, see MaryBeth Musumeci et al., *State Options for Medicaid Coverage of Inpatient Behavioral Health Services*, KAISER FAMILY FOUND., Nov. 9, 2019, https://www.kff.org/medicaid/report/state-options-for-medicaid-coverage-of-inpatient-behavioral-health-services/.

[32] In addition to those mentioned here, other federal statutes concern civil commitment of prisoners. *See, e.g.*, 34 U.S.C.
(continued...)

as part of the FY1985 appropriations bill, Congress passed the Insanity Defense Reform Act of 1984 to provide the affirmative defense of insanity in federal criminal proceedings.[33] The Act was codified in 18 U.S.C §§ 4241–4247 and outlines requirements related to the treatment of federal prisoners with SMI.[34] Other places in the criminal code also prohibit persons who have "been adjudicated as mental[ly] defective or who [have] been committed to a mental institution" from possessing firearms.[35]

Federal law also addresses standards and other requirements related to the civil commitment in regulations governing certain health care and other community-based settings. In 2000, Congress passed the Children's Health Act (CHA), which broadly limits the use of restraints and seclusion in hospitals, nursing facilities, and other health care and non-health care settings for individuals with SMI.[36] The CHA authorized SAMHSA to create and enforce federal protections for individuals subject to civil commitment, including ensuring that civilly committed patients are free from harsh conditions, physical and chemical restraints, abuse, seclusion, and other punishments.[37] The CHA further authorized SAMHSA to create and enforce similar protections for children and youth who are held in community-based, nonmedical facilities.[38] Other provisions of the CHA required SAMHSA to promulgate regulations to ensure that inpatient health care facilities[39] as well as community-based settings offering services for children with SMI[40] that receive federal funding follow data-reporting requirements and have treating staff who are appropriately trained in the use of restraints, both physical and chemical. The CHA states that facilities that do not follow these requirements will be ineligible to receive federal funding.[41]

§ 20971 (authorizing the Attorney General to make grants to states to support civil commitment programs for sexually dangerous persons); 18 U.S.C. § 4248 (outlining procedures for the civil commitment of a sexually devious prisoner). Additionally, Title 20 prohibits a Federal Pell Grant from being awarded to anyone subject to an involuntary civil commitment upon the completion of incarceration for a sexual offense. 20 U.S.C. § 1070a(b)(6).

[33] Joint Resolution making Continuing Appropriations for the Fiscal Year 1985, ch. IV, Pub. L. No. 98-473, 98 Stat. 1837, 2057 (1984) (codified as amended at 18 U.S.C. § 4241). Around the time of the Supreme Court's decision in *Vitek v. Jones*, which is discussed *infra* and deals with a prisoner who was subject to an involuntary transfer to a mental health facility, Congress began discussing prison reform. *See infra* "Right to Counsel."

[34] *See generally* 42 U.S.C. §§ 4243–4246. Notably, § 4243 discusses the involuntary hospitalization of persons found not guilty by reason of insanity, and § 4244 and § 4245 discuss the conditions under which prisoners can be subject to involuntary civil commitment. Section 4245 gives federal inmates who are subject to involuntary civil confinement the right to a hearing on their present mental condition and allows the court to order psychiatric and psychological examinations of prisoners. Section 4246 outlines the process to which a prisoner due for release is entitled prior to being subject to involuntary hospitalization upon release.

[35] 18 U.S.C. § 922(g)(4).

[36] Children's Health Act of 2000, Pub. L. No. 106-310; 114 Stat. 1101 (codified at 42 U.S.C. § 290ii). In addition to this discussion of the Children's Health Act of 2000, see also Protection and Advocacy for Individuals with Mental Illness Act of 1986, Pub. L. No. 99-319, 100 Stat. 478 (codified at 42 U.S.C. §§ 10801–10851).

[37] *See generally* 42 U.S.C. § 290ii (requirements for residents of inpatient facilities).

[38] *See generally id.* § 290jj (requirements for nonresidential, community-based facilities for children and youth).

[39] *Id.* §§ 290ii-1, -2(a)–(b).

[40] *Id.* §§ 290jj-1, -2(a)–(b). SAMHSA refers to children with SMI as children with "serious emotional disturbance" (SED). *See* 58 F.R. 29422 (May 20, 1993).

[41] *Id.* §§ 290ii-2(c), 290jj-2(c). *See also* 42 C.F.R. §§ 483.350–483.376, 66 Fed. Reg. 7161 (2001). HHS creates Conditions of Participation (often called CoPs) that health care providers must meet to receive funding from federal health programs like Medicare and Medicaid. For more information about CoPs, see *Conditions for Coverage & Conditions of Participation*, CTRS. FOR MEDICARE & MEDICAID SERVS., Dec. 1, 2021, https://www.cms.gov/Regulations-and-Guidance/Legislation/CFCsAndCoPs.

Congress also chose to directly regulate involuntary hospitalizations in D.C. through the District of Columbia Hospitalization of the Mentally Ill Act,[42] also known as the Ervin Act. In the context of involuntary confinement, the law requires proof of a mental illness as well as a showing that the proposed patient was at risk of harm to self or others, and it gave confined patients the rights to "medical and psychiatric care and treatment."[43] After its passage, the Ervin Act served as a model for other states to reform their civil commitment laws.[44] A statement by Senator Samuel J. Ervin, one of the primary drafters and proponents of the bill, suggested that he intended for the bill to resolve "a problem of serious national scope."[45] He stated: "Our concern has been to assure that when an individual is deprived of his liberty because he is mentally ill, he will receive appropriate attention and the treatment necessary to restore him to his place in society."[46] D.C. courts subsequently interpreting the bill and its provisions recognized the legislation's overall purpose as furthering civil and constitutionally protected rights to persons subject to involuntary confinement.[47]

The Fourteenth Amendment's Due Process Clause: Protections for People with Serious Mental Illness

The Fourteenth Amendment's Due Process Clause[48] provides certain protections against laws that restrict an individual's life, liberty, or property.[49] While states can legislate as to the circumstances under which an individual with SMI may be deprived of life, liberty, or property, Due Process concerns often arise in these contexts, as patients' liberty is at stake when they are forcibly hospitalized. The deprivation of rights for patients with SMI can generally occur in a variety of ways, including involuntary civil commitment, forced outpatient mental health treatment, and in judicial proceedings challenging competency.[50]

The Fourteenth Amendment has been interpreted to extend to both procedural and substantive due process protections to individuals with SMI in a variety of ways, including how states may

[42] Congress later passed the District of Columbia Home Rule Act of 1973, which created the D.C. Council and gave D.C. residents more control over local government affairs. Prior to the passage of the Home Rule Act, Congress directly legislated for D.C. and enacted statutes, such as the Hospitalization of the Mentally Ill Act, which governed local affairs. For more information about the Home Rule Act and the D.C. government, see *D.C. Home Rule,* COUNCIL OF THE DIST. OF COLUMBIA, https://dccouncil.gov/dc-home-rule/ (last accessed Mar. 20, 2023).

[43] Hospitalization of the Mentally Ill Act, Pub. L. No. 88-597, 78 Stat. 944 (1964) (codified as amended in scattered sections of D.C. CODE §§ 21-, 32-).

[44] John L. Bohman, *Procedural Safeguards for the Involuntary Commitment of the Mentally Ill in the District of Columbia*, 28 CATH. U. L. REV. 855, 859 (1979).

[45] 110 CONG. REC. 21346 (1964).

[46] *Id.*

[47] *See, e.g.*, *In re* Ballay, 482 F.2d 648, 660 (D.C. Cir. 1973).

[48] For more information on the Fourteenth Amendment's Due Process Clause, see Cong. Rsch. Serv., *Overview of Due Process in Civil Cases*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-5-4-1/ALDE_00013750/ (last accessed Mar. 7, 2023).

[49] Cong. Rsch. Serv., *Liberty Deprivations and Due Process*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-5-1/ALDE_00013747/ (last accessed Mar. 3, 2023).

[50] A patient who is involuntarily civilly committed is not necessarily deemed to be incompetent and in need of a guardian. The reforms of inpatient hospitalization in the 1960s emphasized patient autonomy in consenting to medical treatment, and some states require a judicial declaration of incompetence and the appointment of a guardian prior to forced treatment. A few states, such as Alabama, require incompetency for civil commitment, meaning persons who are able to make informed medical choices do not qualify for civil commitment. For more information, see CIVIL COMMITMENT REPORT, *supra* note 3, at 15.

initially detain a person suspected of experiencing SMI; how such a person may be civilly committed; and how the state must treat committed patients and patient rights during confinement.

The Due Process Clause provides that no state may "deprive any person of life, liberty, or property, without due process of law."[51] The concept of due process prevents states from making laws that unfairly deprive citizens of life, liberty, or property, and it allows a person to contest the basis upon which the state is seeking to curtail individual rights.[52] As the Supreme Court has explained: "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."[53]

When questions concerning the specific procedures needed to satisfy due process arise, the answer depends on the underlying facts and circumstances of each case. The Supreme Court prescribed a three-factor balancing test in *Mathews v. Eldridge* to evaluate the sufficiency of the government's procedures for purposes of compliance with due process in the context of civil cases.[54] The first factor looks at the private interest affected by the government's proposed action; the second weighs the likelihood that a deprivation of life, liberty, or property will occur if the government's procedure is used and the probable value of additional procedural safeguards.[55] The third factor evaluates the government's interest, including any fiscal or administrative burden in providing additional procedural safeguards.[56] Courts have applied these factors in a wide range of civil cases to balance the interests of the government against those of individuals. The *Mathews v. Eldridge* factors have also been used to evaluate the sufficiency of procedural due process protections in the context of individuals with SMI who are challenging an involuntary civil confinement.[57]

Procedural Due Process Requirements for Civil Commitment

This section discusses the procedural due process rights of individuals with SMI and how courts have applied those rights when such persons face deprivations of liberty and property due to their mental health status, mainly in the context of involuntary hospitalization. The discussion first covers the well-established constitutional rights of notice of confinement and a hearing, highlighting how courts have recognized the right to these procedural protections for persons subject to involuntary commitment as well as incompetency proceedings. The state's requisite burden of proof for purposes of involuntary civil commitment is covered next, followed by a discussion of when and to what extent an indigent person facing civil commitment has a right to counsel and an independent expert to testify on his or her behalf. Finally, the section concludes with a discussion of whether the Due Process Clause affords an individual subject to involuntary confinement the right to a jury trial.

Notice and Hearing

The hallmark protections afforded by the Due Process Clause are (1) an individual's right to notice of any action on the government's part to restrict his or her right to life, liberty, or property,

[51] U.S. CONST. amend. XIV, § 1.

[52] Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

[53] Carey v. Piphus, 435 U.S. 247, 259 (1978).

[54] 424 U.S. 319, 335 (1976).

[55] *Id.*

[56] *Id.*

[57] *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979).

and (2) the right to a hearing. The Supreme Court has explained that notice is "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality," and that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of action and afford them an opportunity to present their objections."[58] Much of how notice and hearing requirements are generally understood today was elaborated by the Supreme Court in the 1960s and 1970s. The Court has recognized that in order to comport with the Due Process Clause's requirements, notice must be structured in such a way that the person to whom it is directed receives it,[59] and it must clearly identify to the recipient what action is being proposed and what he or she may do to prevent it.[60]

In the context of involuntary confinement and incompetency proceedings, the Supreme Court first recognized the importance of notice and hearing requirements, as well as their limitations, in the 1901 case *Simon v. Craft*, where the Court found that due process required only actual notice.[61] The case concerned a "lunacy petition" for Ms. Simon, a widow.[62] Although a sheriff served a notice to Ms. Simon alerting her of the petition, her physician determined that her presence in the courtroom would be detrimental to her health, and she did not appear in court.[63] A jury found Ms. Simon of unsound mind, and the probate court appointed a guardian, who later sold her home.[64] Ms. Simon later challenged this action, arguing that the probate court's proceedings deprived her of liberty and property without due process of law.[65] The Court recognized the principle that "[t]he essential elements of due process of law are notice and opportunity to defend."[66] The Court held, however, that due process was satisfied because Ms. Simon was served with actual notice and "if she had chosen to do so, she was at liberty to make such defense as she deemed advisable."[67]

In 1980, the Supreme Court again took up the issue of the Due Process Clause's requirements of notice and hearing for persons facing involuntary civil commitment, applying those protections not only to situations involving ordinary citizens but also to prisoners.[68] In *Vitek v. Jones*, the Court confronted the question of whether the Fourteenth Amendment's Due Process Clause afforded any protection to a prisoner with SMI before he was involuntarily transferred to a mental hospital without his notice or consent.[69] The petitioner challenged the constitutionality of the transfer, arguing the prison violated his due process rights by declining to afford him notice and a hearing prior to his civil commitment.[70] The Court agreed with the prisoner that the state statute

[58] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

[59] Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

[60] Goldberg v. Kelly, 397 U.S. 254, 267 (1970), *superseded by statute,* Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. § 601 (1996), *as recognized in* Hudson v. Bowling, 752 S.E.2d 313 (W. Va. 2013).

[61] 182 U.S. 427 (1901). This case does not discuss involuntary confinement specifically, but rather concerns the due process requirements of adequate notice and hearing in the context of "lunacy petitions," which could sometimes lead to involuntary civil commitment. As was the case with Ms. Simon, when a court found a person to be of "unsound mind," state law allowed the appointment of a guardian over the subject and his/her personal property.

[62] *Id.*

[63] *Id.* at 429.

[64] *Id.* at 430.

[65] *Id.* at 437.

[66] *Id.* at 434.

[67] *Id.* at 436.

[68] Vitek v. Jones, 445 U.S. 480 (1980).

[69] *Id.* at 480. Under a state statute, prisoners who suffered from mental diseases for which they could not be treated while incarcerated could be transferred to a state mental hospital for treatment.

[70] *Id.* at 487.

created a liberty interest that entitled him to due process protections, and that even though the prisoner was already confined in prison, he was still "entitled to the benefit of procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital."[71]

The *Vitek* Court observed that because a liberty interest existed under the Due Process Clause, the state was required to provide the inmate with "effective and timely" written notice of his transfer, as well as afford him an opportunity for an adversarial hearing, where the state could present its evidence in favor of civil commitment and the prisoner could cross-examine the state's witnesses and call witnesses of his own.[72] The Court reasoned that the notice requirement was "essential to afford the prisoner an opportunity to challenge the contemplated action and to understanding the nature of what is happening to him."[73]

In the years following the Court's decision in *Vitek*, Congress also considered the procedural rights of involuntarily hospitalized federal inmates as part of a greater conversation about prison reform.[74] A 1983 Senate Judiciary Committee report about the Comprehensive Crime Control Act discusses the need for reform after the Court's holding in *Vitek*, clarifying that federal inmates were entitled to court hearings before being transferred to mental hospitals.[75] The Committee notes that the protective procedures outlined in what would eventually become 18 U.S.C. § 4245 were created "to insure that Federal prisoners continue to receive fair and just treatment."[76] In expressing its approval for such a measure, the Committee noted that involuntary hospitalization of federal inmates required more than mere administrative process and that judicial proceedings would better safeguard a prisoner's rights in a situation in which the prisoner did not wish to be transferred.[77]

Since *Vitek* was decided, other federal courts have elaborated on the sufficiency of the notice requirement in the context of civil commitment cases for ordinary citizens with SMI who are not federal prisoners. For example, in *Clark v. Cohen*, the Third Circuit held that the resident of a mental hospital was deprived of her liberty without due process when she was never given a hearing to challenge her commitment and was not released into a community living arrangement, as recommended by her health providers.[78] The court observed the petitioner had protested her detention for more than 28 years but was never given a hearing, despite her many requests for

[71] *Id.* at 488, 493. The state attempted to argue that the transfer of a prisoner to a mental hospital was within the scope of his prison sentence, but the Court disagreed. The Court stated: "None of our decisions hold[] that conviction for a crime entitles a State note only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences accessed on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of a crime." *Id.* at 493. The Court also observed that if the case had involved an "ordinary citizen," rather than a convicted felon serving a prison sentence, "it is undeniable that protected liberty interests would be unconstitutionally infringed absent compliance with the procedures required by the Due Process Clause." *Id.* at 492.

[72] *Id.* at 495. The district court also found that due process entitled a prisoner facing an involuntary civil commitment to legal representation, but the Supreme Court's holding did not extend this far. *Id.* at 496. Further discussion of the right to counsel in civil commitment hearings is provided, *infra* "Right to Counsel."

[73] *Vitek*, 445 U.S. at 496 (citing Wolff v. McDonnell, 418 U.S. 539 (1974)).

[74] *See generally* JOHN CONYERS, JR., INSANITY DEFENSE AND RELATED CRIMINAL PROCEDURE MATTERS (TO ACCOMPANY H.R. 3336), H.R. REP. NO. 98-577; COMM. ON THE JUDICIARY, COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. REP. NO. 98-225 (1983).

[75] COMM. ON THE JUDICIARY, COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. REP. NO. 98-225 at 40 (1983).

[76] *Id.*

[77] *Id.*

[78] Clark v. Cohen, 794 F.2d 79 (3d Cir. 1986).

one.[79] Moreover, the state never reviewed her case, even after the commitment law under which she was originally confined was found to be unconstitutionally vague.[80] The court held that the petitioner was entitled to periodic review of her commitment and that her due process rights had been violated because for "more than twenty-eight years she was never afforded a hearing before *any* decisionmaker with authority to resolve her dispute with those who were confining her."[81]

Burden of Proof

In addition to the due process protections of notice and hearing, the Supreme Court has found that the Fourteenth Amendment also requires the state to show a higher burden of proof prior to the long-term civil commitment of a patient with SMI.[82] Generally, the greater the individual liberty that is being challenged in court, the higher the burden of proof. In most civil litigation, a litigant must prove his or her case by preponderant evidence, meaning that he or she must prove a fact is more likely than not true. In criminal cases, the state must present evidence proving the defendant's guilt beyond a reasonable doubt.[83]

In general, state legislatures have the authority to determine the applicable burden of proof in civil litigation.[84] However, the Supreme Court found in *Addington v. Texas* that to meet due process demands in a proceeding for involuntary civil commitment, the state must prove its case for commitment by clear and convincing evidence.[85] The Court reasoned: "The function of a standard of proof, as that concept is embodied in the Due Process Clause and the realm of fact-finding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[86] In other words, a higher burden of proof is warranted for civil commitment proceedings to ensure that the confinement is justified.

At the time *Addington* was decided, Texas was the only state in which a court had found that a preponderance of the evidence standard was sufficient to meet constitutional due process obligations.[87] Twenty other states already used a "clear and convincing evidence" standard, two used a "clear, cogent, and convincing evidence" standard, and two required "clear, unequivocal and convincing evidence."[88] The Court found that "unequivocal" evidence is not constitutionally required prior to a civil commitment, but that a state could require it if it so desired.[89]

In its reasoning for a heightened standard for involuntary civil commitment, the Court cited its prior holding in *Mathews v. Eldridge*, noting the state's interest in treating individuals with SMI, the individual's liberty interest, and the need to minimize unnecessary confinement.[90] The Court assessed the preponderance standard, finding that because it "creates the risk of increasing the number of individuals erroneously committed," the state's interests would not necessarily be

[79] *Id.*

[80] *Id.* (citing Goldy v. Beal, 429 F. Supp. 640 (M.D. Pa. 1976)).

[81] *Id.* at 86 (emphasis in original).

[82] Addington v. Texas, 441 U.S. 418 (1979).

[83] For a discussion of the various burdens of proof used in civil and criminal litigation, see *id.* at 423–24.

[84] *See* Hawkins v. Bleakly, 243 U.S. 210, 214 (1917).

[85] *Addington*, 441 U.S. at 418.

[86] *Id.* at 423.

[87] *Id.* at 426.

[88] *Id.* at 431–32.

[89] *Id.* at 432.

[90] *Id.* at 425.

furthered through its use in commitment proceedings.[91] Distinguishing involuntary civil commitment from prison, the Court disagreed with petitioner's assertion that evidence beyond a reasonable doubt was required for civil commitment.[92] The Court noted that the many layers of review of a patient's condition, as well as the care of friends and family, "provide continuous opportunities for an erroneous commitment to be corrected."[93] Moreover, the Court was concerned that, given the evolving understanding of mental illness, the state would be unable to ever prove a patient mentally ill beyond a reasonable doubt.[94]

Right to Counsel

The Supreme Court has never directly addressed whether the Due Process Clause guarantees a noncriminal, civilly committed patient the right to counsel when challenging an involuntary civil commitment, but the Court has elaborated in other types of civil cases the circumstances under which the Due Process Clause guarantees a right to counsel. While representation by counsel is not an absolute right in all civil proceedings,[95] the Supreme Court established a presumption that the Due Process Clause gives an indigent litigant the right to appointed counsel when his or her physical liberty is being threatened.[96] However, in *Turner v. Rogers*, the Court clarified: "[T]he Due Process Clause does not *always* require the provision of counsel in civil proceedings where incarceration is threatened."[97]

The Supreme Court came close to recognizing an indigent, civilly committed person's right to counsel in *Vitek v. Jones*, which concerned a criminal defendant challenging his transfer from a state prison to a mental hospital.[98] Under state law, if a prison facility could not adequately treat a mentally ill prisoner, the state could transfer the prisoner to a mental hospital.[99] The prisoner challenged the state law under the Fourteenth Amendment's Due Process Clause, arguing his transfer was unconstitutional because he was not given notice, a hearing, or the opportunity to be represented by counsel.[100] On the subject of the Due Process Clause's requirement of counsel, the plurality noted it had not previously found an absolute right to counsel for an indigent prisoner facing "other deprivations of liberty," but that illiterate or uneducated prisoners "have a greater need for assistance in exercising their rights."[101] Four Justices observed that under those circumstances, "it is appropriate that counsel be provided to indigent prisoners whom the State

[91] *Id*. at 426.

[92] *Id*. at 427.

[93] *Id*. at 429.

[94] *Id.* The Supreme Court did not specify whether the clear-and-convincing standard, as set forth in *Addington*, was to be applied retroactively. In 1987, almost 10 years after *Addington* was decided, the D.C. District Court observed that many patients civilly committed under the lower "preponderance" standard were not given a hearing to determine whether their confinement was justified by "clear and convincing evidence." Streicher v. Prescott, 663 F. Supp. 335 (D.D.C. 1987). The court held that the patients were constitutionally "entitled to a review of their commitment according to constitutional standards." *Id.* at 342–43. The court reasoned that that although many of the patients in the class action had been confined in St. Elizabeths Hospital in D.C. for more than 20 years, they still had a constitutionally recognized liberty interest. *Id.* at 339. Many other lower courts have reached the same conclusion. *See, e.g.*, Clark v. Cohen, 613 F. Supp. 684 (E.D. Pa. 1985), *aff'd*, 794 F.2d 79 (3d Cir. 1986).

[95] Goldberg v. Kelly, 397 U.S. 254 (1970), *superseded by statute*, Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. § 601 (1996), *as recognized in* Hudson v. Bowling, 752 S.E.2d 313 (W. Va. 2013).

[96] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981).

[97] Turner v. Rogers, 564 U.S. 431 (2011) (emphasis added).

[98] Vitek v. Jones, 445 U.S. 480 (1980).

[99] *Id*. at 480.

[100] *Id.* at 485.

[101] *Id*. at 496 (citing Gagnon v. Scarpelli, 411 U.S. 778 (1973)).

seeks to treat as mentally ill," but Justice Lewis Powell expressly disagreed, arguing that the prisoner was entitled only to "competent help" at the hearing, rather than counsel.[102]

Thirty years after the Court decided *Vitek*, the Justices were again confronted with the question of the circumstances under which an indigent individual is entitled to counsel in a civil hearing where a deprivation of liberty is at stake. In *Turner*, a parent who failed to pay child support was held in willful civil contempt and sentenced to 12 months in prison under state law.[103] In the proceeding which resulted in the defendant's eventual incarceration, neither parent was represented by counsel.[104] The defendant appealed the incarceration, arguing that he was entitled to representation by counsel under the Due Process Clause because the proceeding resulted in the deprivation of his liberty.[105] Applying the *Mathews v. Eldridge* balancing test, the Court found that even though the defendant was subject to incarceration, the Due Process Clause did not entitle him to counsel at the child support hearing.[106] In reaching this conclusion, the Court found it significant that neither party in the proceeding was represented by counsel, reasoning that if all defendants held in contempt for failure to pay child support were entitled to counsel, this could create "asymmetry of representation" if the opposing parent seeking the support were not also represented.[107] The Court also pointed out that "substitute procedural safeguards" could be put in place to "reduce the risk of an erroneous deprivation of liberty . . . without incurring some of the drawbacks inherent in recognizing an automatic right to counsel."[108]

Lower federal courts have also considered the circumstances under which civilly committed patients are entitled to representation by counsel. For example, the Tenth Circuit held in *Heryford v. Parker* that the Due Process Clause extends the right to counsel to a person challenging an involuntary civil commitment.[109] The case concerned a petitioner who was civilly committed as a child under Wyoming state law.[110] After being reconfined as an adult, the patient's family brought a habeas petition, alleging the patient had been denied his rights to counsel and confrontation at his initial commitment hearing.[111] Persuaded by the Supreme Court's reasoning in *In re Gault*, which concerned delinquency proceedings resulting in civil commitment, the Eighth Circuit found that the Due Process Clause entitled the petitioner to representation by counsel.[112] The court stated: "It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be instability or juvenile delinquency. It is the likelihood of involuntary incarceration . . . [which] commands observance of the constitutional safeguards of due

[102] *Id*. at 497 (Powell, J., dissenting).

[103] Turner v. Rogers, 564 U.S. 431, 437 (2011).

[104] *Id*.

[105] *Id*. at 438.

[106] *Id*. at 446. *But see infra* note 108 (noting that the Court reversed on other grounds).

[107] *Id*. at 447.

[108] *Id*. Although the Supreme Court found the Due Process Clause did not guarantee the right to counsel, it did overturn the state supreme court's ruling on the basis that the state did not satisfy due process requirements because it failed to provide the defendant with "alternative procedures," such as notice signaling the significance of the situation and "fair opportunity to present, and to dispute, relevant information, and court findings." *Id.* at 448–49. Four Justices dissented, arguing that the beginning and end of the case rested on the premise that "the Due Process Clause of the Fourteenth Amendment does not provide a right to appointed counsel for indigent defendants facing incarceration in civil contempt proceedings." *Id.* at 450 (Thomas, J., dissenting).

[109] 396 F.2d 393 (10th Cir. 1968).

[110] *Id*. at 394.

[111] *Id*. at 395.

[112] *Id*. at 395–97 (discussing 387 U.S. 1 (1967)).

process."[113] The court found that when the state exercises its *parens patriae* power to deprive someone of their liberty, it is obligated to ensure due process, which "necessarily includes the duty to see that a subject of an involuntary commitment proceeding[] is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf."[114]

Many state courts have also considered whether patients challenging civil commitment are entitled to representation by counsel, and many have found that counsel is generally needed to ensure due process.[115] For example, the Alabama Supreme Court recently set aside a probate court's order appointing a temporary guardian for an allegedly incompetent widow with dementia because of a fundamental lack of due process.[116] The petitioner's business associates filed an emergency petition seeking a guardian and conservator for her estate.[117] During the initial hearing, the judge dismissed the petitioner's attorneys after finding they had a conflict of interest in the case and denied petitioner's motion for a continuance.[118] The court appointed a guardian without allowing petitioner an opportunity to question the testifying witnesses or call any of her own witnesses.[119]

Petitioner appealed to the Alabama Supreme Court, arguing that the probate court deprived her of procedural due process by dismissing her counsel and proceeding with the hearing without allowing her time to find new representation.[120] The Alabama Supreme Court agreed, holding that procedural due process under the Fourteenth Amendment "contemplates the rudimentary requirements of fair play," and that petitioner's procedural due process rights were violated when her counsel was dismissed and she was not granted a continuance to find new counsel.[121] The Alabama Supreme Court called the probate court's denial of a continuance "unfathomable," noting that the five-month delay between the hearings for the emergency and permanent petitions suggested that a true emergency did not exist.[122]

Other state courts have held that patients with mental illnesses are not constitutionally entitled to counsel. For example, the Minnesota Court of Appeals held that the Due Process Clause does not confer a right to counsel for an individual challenging a civil commitment proceeding in *Beaulieu v. Minnesota Department of Human Services.*[123] The case concerned a civilly committed prisoner claiming ineffective assistance of counsel after his attorney did not timely appeal his commitment order.[124] The court of appeals stated: "We naturally are disinclined to recognize a federal

[113] *Id.* at 396.

[114] *Id*.

[115] *See generally Ex parte* Bashinsky, 319 So. 3d 1240 (Ala. 2020); Jenkins v. Dir. of the Va. Ctr. for Behav. Rehab., 624 S.E.2d 453 (Va. 2006); *In re* Hop, 171 Cal. Rptr. 721, 623 P.2d 282 (1981); *In re* Fisher, 313 N.E.2d 851 (Ohio 1974); *In re* Beverly, 342 So. 2d. 481 (Fla. 1977), *superseded by statute*, FLA. STAT. § 394.467(1)(a)2.b (1999), *as recognized in* Craig v. State, 804 So. 2d 532, 534 (Fla. Dist. Ct. App. 2002). *But see* Beaulieu v. Dep't of Hum. Servs., 798 N.W.2d 542 (Minn. Ct. App. 2011) (declining to apply *Heryford*, 396 F.2d 393, to recognize a federal constitutional right to counsel under the Fourteenth Amendment Due Process Clause for a person challenging an involuntary civil commitment).

[116] *Bashinsky*, 319 So. 3d 1240.

[117] *Id*. at 1247.

[118] *Id*. at 1251.

[119] *Id*.

[120] *Id*. at 1254.

[121] *Id*. at 1263 (quoting *Ex parte* Weeks, 611 So. 2d 259, 261 (Ala. 1992).

[122] *Bashinsky*, 319 So. 3d at 1261.

[123] 798 N.W.2d 542 (Minn. Ct. App. 2011).

[124] *Id.* at 545.

constitutional right that has never been recognized by the United States Supreme Court, has not been recognized in 10 of the 11 regional federal circuits, and has not been adopted by the supreme courts of 48 of the 50 states."[125]

Right to an Expert Witness at Trial

Because states require proof of mental illness and evidence that the patient is dangerous to himself or others prior to involuntary civil commitment,[126] expert testimony from a mental health provider is often introduced at trial. The Supreme Court has found that a state must provide indigent criminal defendants with a psychiatrist when the state challenges the defendant's sanity at the time of the offense in question, but the Court has never directly addressed the issue of whether an indigent individual subject to civil confinement has the right to a psychiatric expert.[127] Other federal courts have considered this issue, finding that due process concerns could arise under certain circumstances.

In *Goetz v. Crosson*, the Second Circuit addressed the requisite psychiatric expert assistance that a state must provide to an indigent patient subject to involuntary confinement.[128] In the case, an involuntarily confined patient brought a class action challenging confinement, in part on the basis that the state violated the committed patients' due process rights by failing to guarantee them a psychiatrist.[129] Under New York law, a patient subject to involuntary confinement had the right to counsel in all proceedings related to confinement; the court could also appoint two independent psychiatrists to assess the patient, but was not required to do so.[130] The petitioner argued that due process guaranteed indigent patients a right to both a consulting and independent psychiatrist, and the court addressed each in turn.[131]

The court first noted the difference in "consulting" and "independent" psychiatrists, namely that a consulting psychiatrist would assist a patient's counsel in preparation for and during a commitment hearing and could testify, while an independent psychiatrist, unassociated with the state, would offer testimony to ensure accuracy.[132] In finding that due process did not require appointment of a consulting psychiatrist in every situation, the court reasoned that the purpose of the psychiatrist would be to provide testimony favorable to noncommitment of the patient and to assist the patient's counsel in preparing the case.[133] However, the court observed that the functions of a consulting psychiatrist "are not of sufficient import to implicate due process in every proceeding."[134] The Second Circuit further distinguished civil and criminal confinement, citing the Supreme Court's comment in *Addington* that "a civil commitment proceeding can in no sense be equated to a criminal prosecution."[135] The court concluded that due process was not

[125] *Id.* at 549. The court of appeals recognized the 10th Circuit's ruling in *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968), as well as the Supreme Court's plurality opinion in *Vitek v. Jones*, 445 U.S. 480 (1980). *Beaulieu*, 798 N.W.2d at 549.

[126] *See* discussion of O'Connor v. Donaldson, 422 U.S. 563 (1975), *infra* "Showing of Requisite Conduct—"Dangerousness"

[127] Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

[128] Goetz v. Crosson, 967 F.2d 29 (2d Cir. 1992).

[129] *Id*. at 30–31.

[130] *Id*. at 32 (citing N.Y. JUD. LAW §§ 35(1)(a), 35(4)).

[131] *Goetz*, 967 F.2d at 33.

[132] *Id*. at 31, 36.

[133] *Id.*

[134] *Id*. at 34.

[135] *Id*. at 33 (quoting Addington v. Texas, 441 U.S. 418, 428 (1979)).

focused on decreasing the number of civil confinements in general, which could happen were every patient guaranteed an expert psychiatrist, but only erroneous civil confinements.[136] The court also observed that there was no basis for the assumption that a psychiatrist testifying on behalf of the state would be biased toward confinement.[137]

On the question of whether the Due Process Clause required the appointment of an independent psychiatrist for an indigent patient, the Second Circuit found that if a judge were to find that the testimony of an independent psychiatrist was needed, a due process concern could arise were such a psychiatrist not appointed.[138] The Second Circuit noted that in cases where judges request independent expert testimony, "the individual's interests in both freedom and self-protection are directly affected, and the failure to provide such testimony may implicate due process concerns."[139] The court further observed that "when the presiding judge determines that such testimony is necessary to a reliable assessment of a patient, an indigent individual should have the right to obtain the testimony of an independent psychiatrist."[140]

Many state courts have recognized the right of indigent patients with SMI to obtain a court-appointed expert witness when challenging their civil commitment. For example, a New Jersey state court found the Fourteenth Amendment guarantees the right to an "independent psychiatric examination" for indigent patients.[141] Pennsylvania has recognized a similar right.[142] Although many states allow indigent patients with SMI the right to a court-appointed expert, they do not entitle the patient to "shop around" for the most favorable expert.[143]

Right to a Jury Trial

Although states may create the right to a jury trial for individuals facing civil commitment, neither the Sixth,[144] Seventh,[145] or Fourteenth Amendments have been interpreted to guarantee

[136] *Id.* at 34.

[137] *Id*.

[138] *Id*. at 36.

[139] *Id*.

[140] *Id*. at 37. The Second Circuit remanded the case to the district court to determine whether New York's procedures may not provide access to independent psychiatrist testimony in some instances when a trial judge requests it. On remand, however, the parties agreed there was never a case in which a judge appointed an independent psychiatrist and the court was unable to provide one. Goetz v. Crosson, 838 F.Supp. 136, 140 (S.D.N.Y. 1993).

[141] *In re* Gannon, 301 A.2d 493 (N.J. Cnty. Ct. 1973). In *Gannon*, the court reasoned, "the presence of a lawyer at the commitment hearing is not a sufficient safeguard for the patient's rights. No matter how brilliant the lawyer may be, he is no position to effectively contest the commitment proceedings because he has no way to rebut the testimony of the psychiatrist from the institution who has already certified to the patient's insanity." *Id*. at 494.

[142] *Accord* Dixon v. Att'y Gen. of Pa., 325 F. Supp. 966 (M.D. Pa. 1971).

[143] *See, e.g.*, Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962). In ruling on a motion for the government to pay the cost of a psychiatrist appointed by an indigent, mentally ill criminal defendant, the court stated it would not "permit any defendant, at Government expense, to employ a psychiatrist of his own choosing, which means that a defendant can shop around for a favorable expert witness, and then have the Government pay for it. I don't consider that good administration of justice." *Id.* at 623. *Accord* Proctor v. Harris, 413 F.2d 383 (D.C. Cir. 1969).

[144] The Sixth Amendment guarantees a federal criminal defendant the right to a jury trial, and both state and federal courts have made clear that it applies only to criminal prosecutions, declining to extend it to civil commitment cases. U.S. CONST. amend. VI. *See, e.g.*, White v. White, 196 S.W. 508 (Tex. 1917); United States v. Sahhar, 917 F.2d 1197, 1205–07 (9th Cir. 1990); *accord* Hernandez-Carrera v. Carlson, 547 F.3d 1237 (10th Cir. 2008).

[145] The Seventh Amendment guarantees the right to a jury trial in federal civil cases "at common law" seeking monetary damages in excess of $20. U.S. CONST. amend. VII. For more information about the Seventh Amendment right to a jury trial, see CRS Legal Sidebar LSB10883, *The Right to a Jury Trial in Civil Cases Part 1: Introduction and Historical Background*, by Wen W. Shen. The Supreme Court has never ruled on whether the Seventh Amendment (continued...)

such a right. The Supreme Court has never explicitly held that the Fourteenth Amendment's Due Process Clause extends the right to a jury trial to a person facing an involuntary civil commitment. The Court has historically interpreted the Fourteenth Amendment to provide states with significant discretion to decide whether to provide for jury trials in civil cases.[146] For example, in *Simon v. Craft*, the Court held that the Due Process Clause does not require a state court to provide a specific type of proceeding to an individual challenging a competency proceeding, as long as the state gives the affected person notice and the right to defend.[147] In *McKeiver v. Pennsylvania*, the Court declined to extend the Fourteenth Amendment's Due Process Clause protections to jury trials for delinquent juveniles.[148]

If an individual challenged involuntary civil commitment on the basis that the patient was not provided a jury trial, the reasoning of *McKiever* could be applied to decline the recognition of such a right. Indeed, the Supreme Court has observed that the question of whether a person is mentally ill and poses a threat of harm to themselves or others can be a complex question of fact and generally rests on the testimony of experts.[149]

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guarantees the right to a jury trial for involuntary commitment proceedings, but federal circuit courts considering the question have not recognized such a right. *See, e.g.*, Poole v. Goodno, 335 F.3d 705, 710–11 (8th Cir. 2003), *accord* United States v. Carta, 592 F.3d 34 (1st Cir. 2010); Aruanno v. Hayman, 384 Fed. App'x 144 (3d Cir. 2010).

The Supreme Court has held that the Seventh Amendment preserves the right to a jury trial when the right existed under English common law at the time of the Amendment's adoption. Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). However, many courts have held that the Seventh Amendment does not apply in incompetency proceedings because there is no "value" in controversy at issue. Ward v. Booth, 197 F.2d 963 (9th Cir. 1952). For example, the Ninth Circuit reasoned in an incompetency proceeding: "The matter in controversy is the question of the competence [or] incompetence of the person named, and while the result of such a determination may affect extensive property holdings, it cannot be said that the issue to be tried is one where there is any value in controversy." *Id.* at 967 (internal quotations omitted). The Ninth Circuit's reasoning can also be applied to civil commitment cases, such that there is no "value in controversy" at issue, and therefore no right to a jury trial under the Seventh Amendment.

[146] *See, e.g.*, N.Y. Central R.R. Co. v. White, 243 U.S. 188, 207–08 (1916); McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971), *superseded by statute*, Revised Kansas Juvenile Justice Code, KAN. STAT. ANN. §§ 38-2301–38-23100 (2006), *as recognized in In re* L.M., 186 P.3d 164 (Kan. 2008). For a general discussion of the states' powers to regulate procedures in the Fourteenth Amendment context, see Cong. Rsch. Serv., *Power of States to Regulate Procedures*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-5-4-7/ALDE_00013756/ (last accessed Apr. 10, 2023).

[147] 182 U.S. 427, 437 (1901). In a case where a widowed plaintiff challenged a state probate court's order declaring her incompetent on Due Process Clause grounds, the Supreme Court held: "[T]he Due Process Clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it." *Id.* (quoting Louisville & N. R. Co. v. Schmidt, 177 U.S. 230, 236 (1900)).

[148] *McKeiver*, 403 U.S. at 528. Although *McKeiver* did not concern an involuntary civil commitment, juvenile delinquency proceedings are a type of civil proceeding wherein the finding of delinquency may result in involuntary confinement in a juvenile detention center. *Id.* In *McKeiver*, a group of juveniles facing delinquency charges challenged the proceedings on Fourteenth Amendment Due Process Clause grounds, arguing they should be entitled to a trial by jury. *Id.* The Court first noted that juvenile court proceedings have both civil and criminal elements, which can make them difficult to distinguish. *Id.* at 541. In other cases concerning juvenile proceedings before the Court, the applicable due process standards concerned fundamental fairness, which emphasized factfinding. *Id.* at 543. For other cases in which the Court considers due process requirements for juvenile proceedings, see *In re* Gault, 387 U.S. 1 (1967); *In re* Winship, 397 U.S. 358 (1970). The Court observed, however: "[O]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding," and thus that the Fourteenth Amendment did not give juveniles faced with delinquency adjudications the right to a jury trial. *McKeiver*, 403 U.S. at 543. The Court also recognized the potential for abuse that juvenile delinquency proceedings carry, but they declined to hold that any of the system's abuses had a "constitutional dimension." *Id.* at 547–48.

[149] *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979). The Court noted: "Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists." *Id.* at 429.

Even if the Fourteenth Amendment does not guarantee the right to a jury trial before an involuntary civil confinement, at least 17 states offer jury trials to individuals facing long-term civil confinement, although the right can be waived or otherwise limited to specific circumstances.[150] For example, New York state law allows for patients challenging an involuntary civil commitment to a jury trial when requested, but patients can waive this right if they do not raise it in a timely manner.[151]

Substantive Due Process Protections for Individuals Subject to Involuntary Civil Confinement

This section discusses two types of constitutionally protected substantive due process rights that courts have recognized. The first is the liberty interest of all persons to be free from confinement; the second is related to the rights of confined persons to safe conditions. As discussed above, the Fourteenth Amendment protects individuals from the encroachment of state laws that restrict their "life, liberty, or property, without due process of law."[152] Traditionally, "liberty" means freedom from physical restraint or confinement, but the Supreme Court has also interpreted the Due Process Clause's liberty interests to include the rights of a person to enjoy life and live freely.[153] The Court has also recognized that the Due Process Clause protects certain fundamental constitutional rights (e.g., the rights to marry and use contraceptives) from state interference, even when the state provides sufficient procedures, although some Supreme Court Justices have expressed disagreement with this interpretation.[154] Nevertheless, the Court has recognized that the

[150] *E.g.*, ALASKA STAT. ANN. § 47.30.735(e); CAL. WELF. & INST. CODE § 5302; COLO. REV. STAT. § 27-65-113(1); D.C. CODE § 21-544; 405 ILL. COMP. STAT. § 5/3-802; KAN. STAT. ANN. § 59-2960(a)(1); KY. REV. STAT. ANN. § 202a.076(2); MICH. COMP. LAWS ANN. § 330.1453(2); MO. REV. STAT. § 632.350(1), (3); MONT. CODE ANN. § 53-21-125; N.M. STAT. ANN. § 43-1-13(D); N.Y. MENT. HYG. LAW § 9.35; OKLA. STAT. tit. 43a, § 5-411(3); TEX. HEALTH & SAFETY CODE §§ 574.032(a)–(b), (d); VA. CODE ANN. § 37.2-821(F); WASH. REV. CODE § 71.05.300(2); WIS. STAT. ANN. §§ 51.20(2)(B), (11); WYO. STAT. ANN. § 25-10-110(g). These examples were identified from a review of the current state statutes (as retrieved from Westlaw's state statute databases) cited in Margaret J. Lederer, *Not So Civil Commitment: A Proposal for Statutory Reform Grounded in Procedural Justice*, 72 DUKE L.J. 903, 921 n.134 (2022) ("While many states leave the fact-finding to the presiding judge or officer, at least fourteen states allow respondents to elect a jury trial.") and Vicki Gordon Kaufman, *The Confinement of Mabel Jones: Is There a Right to Jury Trial in Civil Commitment Proceedings*, 6 FLA. ST. UNIV. L. REV. 103 (1978).

[151] N.Y. MENT. HYG. LAW § 9.35 (2022).

[152] U.S. CONST. amend XIV, § 1. Cong. Rsch. Serv., *Overview of Substantive Due Process*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-6-1/ALDE_00013814/ (last accessed Feb. 15, 2023).

[153] Cong. Rsch. Serv., *Liberty Deprivations and Due Process*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-5-2/ALDE_00013748/ (last accessed Mar. 3, 2023) (citing Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) ("The liberty mentioned in [the Fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or avocation . . . .")).

[154] Cong. Rsch. Serv., *Overview of Substantive Due Process*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-6-1/ALDE_00013814/ (last accessed Feb. 15, 2023). For more information on the Supreme Court's interpretation of the Fourteenth Amendment Due Process Clause in the context of substantive due process in general, see Cong. Rsch. Serv., *Overview of Noneconomic Substantive Due Process*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-6-3-1/ALDE_00013815/ (last accessed Apr. 10, 2023). *See also* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the Fourteenth Amendment Due Process Clause included constitutional protections for the rights to marriage, family, and procreation); Obergefell v. Hodges, 576 U.S. 644, 721 (2015) (holding that the Due Process Clause required states to recognize marriages between same sex couples) (Thomas, J. and Scalia, J., dissenting, calling the majority's interpretation of the Fourteenth Amendment as protective of substantive due process rights a "dangerous fiction" that "distorts the constitutional text" (internal citations omitted))).

Due Process Clause protects the liberty interests of patients with SMI who are subject to involuntary confinement,[155] and it has made clear that even when a person is subject to involuntary confinement, this does not strip him or her of all constitutionally protected liberty interests.[156]

This section discusses a few of the constitutional, substantive due process protections, including the dangerousness standard and a patient's right to safety and freedom from restraint. The section concludes with a discussion of the rights of involuntarily hospitalized patients to both receive and refuse medical treatment.

Showing of Requisite Conduct—"Dangerousness"

In 1964, Congress passed the Ervin Act, which governs the District's civil commitment process today.[157] The law provides threshold requirements for civil commitment, including proof of a mental illness and a showing of conduct that is likely to be injurious to self or others.[158] In other words, proof of a mental illness alone is insufficient to justify an involuntary civil commitment under the Act; one must also prove that the patient poses a threat to his or others' safety.[159] At the time of its enactment, the Ervin Act served as an example for other states that needed to update and modernize their civil commitment procedures, as it guaranteed certain civil rights for committed patients and established protective processes to prevent unnecessary or wrongful hospitalization.[160]

In *O'Connor v. Donaldson*, the Supreme Court directly acknowledged the liberty interest of individuals facing involuntary confinement and adopted a similar "dangerousness" requirement for an individual to be subject to civil commitment. The case involved a Florida citizen, involuntarily confined in a mental institution for nearly 15 years, who brought an action for damages under 42 U.S.C. § 1983 against the institution alleging a violation of his liberty under the Due Process Clause.[161] The patient argued that he was not mentally ill and his confinement resulted in an "intentional[] and malicious[]" deprivation of liberty.[162] At trial, the evidence showed that although the patient had been diagnosed with paranoid schizophrenia, he had never been a danger to others at any point in his life, he was not suicidal, and he had successfully held a job prior to his institutionalization.[163] The evidence further demonstrated that while confined, the patient received only "custodial care," rather than treatment for a mental illness.[164] The case presented the "relatively simple, but nonetheless important question," of whether the confinement violated the patient's liberty interest.[165]

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[155] O'Connor v. Donaldson, 422 U.S. 563 (1975); Vitek v. Jones, 445 U.S. 480 (1980).

[156] Youngberg v. Romeo, 457 U.S. 307 (1982).

[157] Hospitalization of the Mentally Ill Act, Pub. L. No. 88-597, 78 Stat. 944, 947 (1964) (codified as amended in scattered sections of D.C. CODE §§ 21-, 32-). *See also* D.C. CODE. ANN. §§ 21-501–21-592 (2002).

[158] Hospitalization of the Mentally Ill Act, 78 Stat. at 947.

[159] *Id. See also* Testa & West, *supra* note 29.

[160] Bohman, *supra* note44, at 856.

[161] O'Connor v. Donaldson, 422 U.S. 563 (1975).

[162] *Id*. at 564–65.

[163] *Id*. at 568.

[164] *Id*. at 569.

[165] *Id*. at 573. The Supreme Court granted certiorari in the case after the U.S. Court of Appeals for the Fifth Circuit issued a decision focused largely on whether the Fourteenth Amendment guarantees a right to medical treatment for persons who are involuntarily confined. The Court declined to decide whether persons subject to involuntary confinement have a right to treatment. *Id.*

The Supreme Court observed that even if mentally ill persons could be reasonably and accurately identified, which was a challenge under the currently evolving science, this alone was not a justification for institutionalization.[166] Neither is it acceptable for states to "fence in the harmless mentally ill . . . to avoid public unease," because the Court found that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[167] The Court stated: "A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. . . . [T]here is [ ] no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."[168] As discussed below, however, the Court did not address the degree of dangerousness that must be proven to justify an involuntary commitment; as a result, the issue has been largely left up to states.[169]

In 1992, the Supreme Court decided *Foucha v. Louisiana*, addressing the question of whether dangerousness alone, without evidence of mental illness, was sufficient to hold a person in civil confinement, and finding that it was not.[170] After being found not guilty for burglary by reason of insanity, the petitioner in *Foucha* was committed to a mental hospital.[171] Several years later, a court-appointed doctor found he had recovered from his mental illness, and the hospital superintendent recommended his release.[172] At a lower court hearing regarding his release, the same doctor testified that petitioner was not mentally ill, but had an "antisocial personality," which was untreatable, and the doctor would not "feel comfortable in certifying that [petitioner] would not be a danger to himself or to other people."[173] The trial court thus found that petitioner was dangerous and denied his release.[174]

Citing its earlier decision in *Addington v. Texas*, the Supreme Court stated that involuntary civil commitment required the state to prove, by clear and convincing evidence, "that the person sought to be committed is mentally ill *and* that he requires hospitalization for his own welfare and protection of others."[175] The Court also pointed to an earlier ruling in *Jones v. United States* for the assertion that to comply with due process, the "nature of commitment [must] bear some reasonable relation to the purpose for which the individual is committed."[176] The *Foucha* Court was unconvinced by the state's argument that the patient should remain committed on the basis of his antisocial personality, finding if the patient was no longer an "insanity acquittee," then he was entitled to constitutionally adequate procedures, including a hearing, as to his current mental

[166] *Id*. at 575.

[167] *Id*.

[168] *Id*. Chief Justice Warren Burger wrote a separate, concurring opinion to clarify that there is "no basis for equating an involuntarily committed mental patient's unquestioned unconstitutional right not to be confined without due process of law with a constitutional right to treatment." *Id*. at 587–88 (Burger, J., concurring).

[169] *See, e.g.*, Evelyn Burton, *Treatment Before Tragedy; Reform Maryland Involuntary Commitment Law*, THE BALT. SUN, Dec. 13, 2021, https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-1214-involuntary-treatment-criteria-20211213-zxuknjmrszhxnckkgt5esghwwa-story.html.

[170] Foucha v. Louisiana, 504 U.S. 71 (1992).

[171] *Id*. at 73–74.

[172] *Id*. at 74–75.

[173] *Id*. at 75.

[174] *Id.*

[175] *Id.* (emphasis added) (quoting Addington v. Texas, 441 U.S. 418 (1979)).

[176] *Id.* at 79 (referencing Jones v. United States, 463 U.S. 354 (1990) (holding that the Constitution permits the federal government to confine a person found not guilty by reason of insanity to a mental institution "until such time as he has regained his sanity or is no longer a danger to himself or society," and that indefinite commitment of an inmate acquitted based only on proof of insanity by a preponderance of the evidence does not violate due process)).

state.[177] The Court further noted: "[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them."[178] Citing its decision in *O'Connor*, the Court held that the state could not constitutionally continue petitioner's hospitalization because he was no longer mentally ill.[179]

Given the Supreme Court's guidance that patients must be both mentally ill and a danger to themselves or others to justify involuntary hospitalization, states have leeway to craft their own civil commitment laws and procedures. According to a 2020 Treatment and Advocacy Center report, while most state laws recognize that a patient with SMI's inability to meet basic needs for food, shelter, and clothing make him a danger to himself for purposes of involuntary hospitalization, a wide variety of state standards on dangerousness exist.[180] For example, like almost all states, North Carolina's involuntary commitment law requires patients to be mentally ill and dangerous to self or others.[181] But, unlike some other states, the law specifically delineates ways in which an individual can be "dangerous to self," including being unable to "conduct . . . daily responsibilities and social relations, or to satisfy [the] need for nourishment, personal or medical care, shelter, or self-protection and safety."[182] North Carolina law also requires "a reasonable probability" that the person would suffer "serious physical debilitation within the near future unless adequate treatment is given."[183] By contrast, Maryland's civil commitment laws provide no specific criteria for dangerousness, stating only that a patient must present "a danger to the life or safety of the individual or of others" as a criteria for confinement.[184] The dangerousness standard for admission is not discussed or defined elsewhere in the statute or state regulations.

Both state and lower federal courts have also grappled with the requisite threshold of dangerousness for purposes of involuntary commitment. For example, in 2020, the Florida Court of Appeals reversed the civil commitment of a patient who failed to take his medication and who had "issues managing his hygiene," finding this was insufficient to present a threat of substantial harm to the patient for purposes of the dangerousness standard.[185] As discussed above, New York City has also wrestled with the appropriate interpretation of "dangerousness" for purposes of involuntarily hospitalizing unhoused individuals with SMI. In 1987, New York City Mayor Ed Koch instituted a controversial policy to civilly commit unhoused people who appeared incapable of self-care, which gained a great deal of media attention after the involuntary hospitalization of an unhoused woman named Joyce Brown, also known as Billie Boggs.[186] A similar policy to involuntarily hospitalize unhoused people with SMI was carried out by New York City Mayor

[177] *Id.*

[178] *Id.* at 80 (internal citations omitted).

[179] *Id.* at 78.

[180] *See* discussion of the concept of dangerousness in LISA DAILEY ET AL., TREATMENT ADVOC. CTR., GRADING THE STATES: AN ANALYSIS OF U.S. PSYCHIATRIC TREATMENT LAWS 13 (2020), https://www.treatmentadvocacycenter.org/storage/documents/grading-the-states.pdf.

[181] N.C. GEN. STAT. § 122C-268(j) (2021).

[182] N.C. GEN. STAT. § 122C-3.11(a)(1)(I) (2021).

[183] N.C. GEN. STAT. § 122C-3.11(a)(1)(II) (2021).

[184] MD. HEALTH GEN. § 10-617(a)(3) (2016). The Code of Maryland Regulations does not further delineate the dangerousness standard or provide a definition of what qualifies as dangerousness to self or others. *See* MD. CODE REGS. 10.21.01 (2022).

[185] J.B. v. Florida, 307 So. 3d 986, 988 (Fla. Dist. Ct. App. 2020)

[186] *See* Luis R. Marcos, *Taking the Mentally Ill Off the Streets: The Case of Joyce Brown*, 20 INT'L J. OF MENTAL HEALTH 7 (1991). *See also* Boggs v. N.Y.C. Health & Hosps. Corp., 132 A.D.2d 340, 361–62 (App. Div. 1987).

Bill de Blasio during his administration.[187] In a case challenging the de Blasio policy, the New York State Supreme Court ordered the release of an involuntarily hospitalized patient, finding his due process rights were violated because the hospital failed to establish he had a mental health disorder or was in need of further treatment.[188] New York City Mayor Eric Adams's recent policy pushing for the forced hospitalization of unhoused persons with mental illness has faced similar challenges.[189]

The Rights to Safety and Freedom from Confinement

The Supreme Court addressed other constitutionally protected liberty interests to which civilly committed patients are entitled under the Fourteenth Amendment's Due Process Clause in *Youngberg v. Romeo*.[190] The *Youngberg* case is different from many of the others discussed in this report, because rather than a challenge to the confinement itself, the case discusses the substantive due process rights of individuals once they are confined. The Court held that involuntarily committed patients have the rights to reasonably safe conditions, freedom from restraint, and minimally adequate training, and that when determining whether the state has adequately protected these liberty interests, the proper standard is whether professional judgment was exercised by a qualified professional.[191]

The petitioner in *Youngberg*, the resident of a mental health facility, suffered numerous injuries while involuntarily committed.[192] While receiving medical treatment at a hospital, he was physically restrained for parts of the day.[193] The patient's mother sued the health providers, arguing they failed to keep him safe from violence, both his own and that of other patients against him; that they unlawfully physically restrained him; and that they failed to provide him with "appropriate treatment or programs" for his condition.[194] The jury returned a verdict for the patient, finding the providers violated his Eighth Amendment rights.[195] An *en banc* Third Circuit reversed, holding that the Fourteenth Amendment, rather than the Eighth, provided the proper constitutional basis for relief.[196]

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[187] Mark S. Kaufman, *Crazy Until Proven Innocent? Civil Commitment of the Mentally Ill Homeless*, 19 COLUM. HUM. RTS. L. REV. 333 (1988); Press Release, Office of the Mayor, Mayor de Blasio Announces "NYC Safe," An Evidence-Driven Public Safety And Public Health Program That Will Help Prevent Violence (Aug. 6, 2015), https://www.nyc.gov/office-of-the-mayor/news/540-15/mayor-de-blasio-nyc-safe-evidence-driven-public-safety-public-health-program.

[188] MP v. Ramesar, 25 N.Y.S.3d 577 (Sup. Ct. 2016).

[189] *See, e.g.*, Baerga v. City of New York, No. 21-CV-05762 (PAC), 2023 WL 1107633 (S.D.N.Y. Jan. 30, 2023). As discussed in the court's opinion, the case began prior to the creation of Mayor Adams's policy to involuntarily hospitalize unhoused people in New York City. The plaintiffs filed an emergency temporary restraining order challenging the policy shortly after it was announced, but the court found the plaintiffs lacked standing to challenge it. As of the date of this writing, the policy stands. *Id.* at *2. It is likely that other cases challenging the policy will be filed in the future.

[190] 457 U.S. 307 (1982).

[191] *Id.*

[192] *Id.* at 310.

[193] *Id.*

[194] *Id.* at 311.

[195] The Eighth Amendment prohibits cruel and unusual punishment as well as excessive bail and fines. U.S. CONST. amend. VIII. The Third Circuit found that the Eighth Amendment was the improper constitutional basis for a civilly committed individual's rights, as the Eighth Amendment applies only to individuals who have committed a crime. *Youngberg*, 457 U.S. at 312.

[196] *Id.* at 312.

On review, the Supreme Court first observed that "[t]he mere fact that [petitioner] has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment."[197] With respect to the right to confinement under safe conditions, the Court emphasized that individuals who are lawfully confined still have a right to personal safety, reasoning that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."[198] The Court used similar reasoning to recognize the patient's right to freedom from bodily restraint, noting that even the criminally incarcerated have such a right.[199] With respect to the patient's third claim of the right to habilitation, the Court found he was entitled to "minimally adequate or reasonable training," so as to prevent violence and the need to use physical restraints in the future.[200] The Court also highlighted the need to balance the liberty interests of patients against states' interests in "organized society," and instructed courts to do so by evaluating whether providers used professional judgment when making care decisions.[201] Finally, the Court acknowledged that care decisions made by an "appropriate professional" are presumptively correct.[202]

The Rights to Receive or Refuse Treatment

As discussed, many states justify the involuntary hospitalization of their citizens through the well-established concept of *parens patriae*, or the idea that the state serves as a protector of citizens who are unable to care for themselves.[203] States also rely upon the police power rationale to protect citizens from dangerous persons.[204] Using these rationales of providing care and treatment to justify civil commitment, however, creates questions about the rights of confined individuals to receive treatment,[205] what kinds of treatment the state is obligated to provide, and whether a person can refuse treatment. For example, some advocates have used the *parens patriae* theory to argue that a right to treatment is recognized in the U.S. Constitution, arguing that to civilly commit a person who is dangerous and unable to care for his or her mental health needs necessarily requires the state to provide treatment.[206] Similarly, advocates have argued that when the state deprives a person of his or her liberty through involuntary confinement, due process

[197] *Id*. at 315.

[198] *Id*. at 315–16.

[199] *Id*. at 316.

[200] *Id*. at 319. Justices Blackmun, Brennan, and O'Connor concurred with the majority opinion but wrote separately to express that "minimally adequate training" should include "such training as is reasonable necessary to prevent a person's pre-existing self-care skills from *deteriorating* because of his commitment." *Id*. at 327. (Blackmun, J., concurring) (emphasis in original). The concurrence noted: "For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they will ever know." *Id*. On the other hand, Justice Burger, concurring only in the judgment, wrote separately to emphasize his view that "respondent has no constitutional right to training, or 'habilitation,' *per se*." *Id*. at 329 (Burger, J., concurring in the judgment). While Justice Burger agreed that some amount of self-care instruction could be necessary, "the Constitution does not otherwise place an affirmative duty on the State to provide any particularly kind of training or habilitation—even such as might be encompassed under the essentially standardless rubric . . . to which the Court refers." *Id.* at 330. *See also* discussion of habilitation at note 219.

[201] *Id*. at 320–21 (internal citations omitted).

[202] *Id*. at 324.

[203] *See supra* "History of U.S. Laws Regarding Involuntary Civil Commitment."

[204] *Id.*

[205] For purposes of this report, the term "treatment" is used to connote both medical treatment and training or other rehabilitative treatment.

[206] *See, e.g., Hearings before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary on a Bill to Protect the Constitutional Rights of the Mentally Ill*, 88th Cong. 12 (1963) (statement of Sen. Sam Ervin).

requires that the person be entitled to treatment.[207] This section summarizes the various actions of Congress, the Supreme Court, and other federal courts on the rights of civilly committed patients to receive and refuse treatment.

It should be noted that inpatient treatment in a mental health facility is but one type of mental health treatment that can encompass not only the administration of antipsychotic medications, but can also include other types of behavioral therapies, which may help patients cope with their illnesses, live more independently, and help them deal with the stresses of daily life.[208] For purposes of this report, "mental health treatment" is used generally to refer to all types of care and treatment that patients receive while hospitalized.

The Right to Treatment

Congress, via the Ervin Act, intended for involuntarily committed patients in D.C. to have access to medical and psychiatric care. Section 9(b) of the original Act stated: "Any person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment."[209] The Act also stated its purpose was "to protect the constitutional rights of certain individuals who are mentally ill, [and] to provide for their care, treatment and hospitalization."[210] At a Senate hearing in 1963, Senator Ervin emphasized that the right to treatment for the civilly committed was "most critical," stating that "[s]everal experts advanced the opinion that to deprive a person of liberty on the basis that he is in need of treatment, without supplying the needed treatment, is tantamount to a denial of due process."[211]

In *O'Connor v. Donaldson*, the Supreme Court chose not to address whether the Constitution affords involuntarily hospitalized patients the right to mental health treatment.[212] In that case, the petitioner suffered from paranoid schizophrenia and was involuntarily hospitalized for a number of years before bringing a lawsuit to challenge his confinement.[213] During his confinement, petitioner did not receive any medical treatment for his condition, and his requests for occupational training were denied.[214] The appellate court observed "that when . . . the rationale for confinement is that the patient is in need of treatment, the Constitution requires that minimally adequate treatment in fact be provided," holding that the Fourteenth Amendment guarantees a patient's right to treatment.[215] The Supreme Court declined to address the issue of the patient's right to treatment, stating that "there is no reason now to decide whether mentally ill persons dangerous to themselves or others have a right to treatment upon compulsory confinement."[216]

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[207] *See, e.g.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (holding the Constitution guarantees a right to treatment for the involuntarily hospitalized).

[208] *What is Mental Illness*, AM. PSYCHIATRIC ASS'N, Nov. 2022, https://www.psychiatry.org/patients-families/what-is-mental-illness. For more information on mental health treatments, see *Mental Health Treatments*, MENTAL HEALTH AM., https://mhanational.org/mental-health-treatments (last accessed Mar. 7, 2023).

[209] Hospitalization of the Mentally Ill Act, Pub. L. No. 88-597, 78 Stat. 944, 951 (1964) (codified as amended in scattered sections of D.C. CODE §§ 21-, 32-).

[210] *Id*. at 944.

[211] *Hearings before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary on a Bill to Protect the Const. Rts. of the Mentally Ill*, 88th Cong. 12 (1963) (statement of Sen. Sam Ervin).

[212] 422 U.S. 563 (1975).

[213] *Id*. at 565.

[214] *Id*. at 569.

[215] *Id*. at 572.

[216] *Id*. at 573.

Instead, the Court found that because petitioner was not a danger to himself or others, the state could not confine him solely on the basis that he suffered from a mental illness.[217]

Before *O'Connor v. Donaldson* was heard by the Supreme Court, the Fifth Circuit found, after consideration as a matter of first impression, that the Fourteenth Amendment guaranteed the civilly committed a right to treatment when the justification for the commitment was treatment.[218] The Fifth Circuit again reaffirmed this finding in *Wyatt v. Aderholdt*, where it rejected a *parens patriae* justification for commitment when the state argued that the "primary function of civil commitment is to relieve the burden imposed upon the families and friends of the mentally disabled."[219] However, after *O'Connor and Wyatt* were decided, other Fifth Circuit judges expressed doubt as to whether the U.S. Constitution guarantees a right to treatment for involuntarily hospitalized patients. For example, in *Morales v. Turman*, the Fifth Circuit argued: "The civil commitment of the mentally ill without treatment is not necessarily an impermissible exercise of governmental power," and that arguments in favor of recognition of the Constitution's right to treatment "raise serious problems."[220]

Other federal courts have considered and recognized the rights of involuntarily committed patients to medical treatment under state and federal statutes, rather than in the U.S. Constitution. For example, in *Rouse v. Cameron*, the D.C. Circuit interpreted the Ervin Act to address whether a criminal defendant subject to involuntary civil commitment by reason of insanity has a right to medical treatment.[221] In recognizing the patient's right to treatment, the court reasoned that "[t]he purpose of involuntary hospitalization is treatment, not punishment," and thus when the rationale for confinement rests upon the necessity of treatment, the petitioner is essentially being jailed without it.[222] In making this holding, however, the court did not interpret the Constitution as providing such a right, but rather noted that Congress sidestepped the constitutional question by prescribing the right via the Act.[223]

The Right to Training or Other Rehabilitative Services

In addition to medical treatment, involuntarily hospitalized patients have also argued they have a right to basic rehabilitation services to enable them to better undertake self-care, develop needed skills, and reduce unwanted behaviors, like violence or aggression.[224] The Supreme Court

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[217] *Id*. at 575.

[218] Donaldson v. O'Connor, 493 F.2d 507, 510 (5th Cir. 1974), *vacated by* Gumanis v. Donaldson, 422 U.S. 1052 (1975).

[219] Wyatt v. Aderholt, 503 F.2d 1305, 1312–13 (5th Cir. 1974) ("[W]e find it impossible to accept the Governor's underlying premise that the 'need to care' for the mentally ill—and to relieve their families, friends, or guardians of the burdens of doing so—can supply a constitutional justification for civil commitment . . . . Against the sweeping personal interests involved, Governor Wallace would have us weigh the state's interest, and the interests of the friends and families of the mentally handicapped in having private parties relieved of the 'burden' of caring for the mentally ill. The state interest thus asserted may be, strictly speaking, a 'rational' state interest. But we find it so trivial beside the major personal interests against which it is to be weighed that we cannot possibly accept it as a justification for the deprivations of liberty involved.")

[220] 562 F.2d 993, 998 (5th Cir. 1977). *See also* Morales v. Thurman, 383 F. Supp. 53 (E.D. Tex. 1974) (recognizing the right to treatment under the U.S. Constitution for patients subject to involuntary hospitalization), *rev'd*, 535 F.2d 864 (5th Cir. 1976).

[221] Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

[222] *Id*. at 452–53.

[223] *Id*.

[224] *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982); Brief of the Am. Psychiatric Ass'n as Amicus Curiae, *Youngberg*, 457 U.S. at 307, No. 80-1429, 1981 WL 389867. As explained in the brief, the terms "treatment" and (continued...)

discussed mentally ill patients' rights to such services in *Youngberg v. Romeo,* but the Justices reached different conclusions as to whether the Constitution protects such rights.[225] As discussed, the *Youngberg* Court found that an involuntarily committed patient had a constitutionally protected liberty interest under the Fourteenth Amendment that guaranteed him the right to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint."[226] In other words, the Court recognized the patient's right to "minimally adequate" training only insofar as such training is reasonably necessary to protect the patient's other rights to safety in confinement and freedom from restraint.[227] As part of its analysis, the Court recognized that while the state has a certain duty of care to institutionalized persons, it has "considerable discretion in determining the nature and scope of its responsibilities."[228] The Court's decision attempts to balance the state's interests against those of the involuntarily committed, stating that in determining what training is "reasonable," courts should defer to the judgment of qualified professionals.[229]

Justices Harry Blackmun, William Brennan, and Sandra Day O'Connor wrote a concurring opinion in *Youngberg*, arguing that the Court did not resolve the issue of whether a state could involuntarily confine a person for "care and treatment" under state law, but then "constitutionally refuse to provide him any treatment."[230] The concurrence cited the Court's earlier, unanimous holding in *Jackson v. Indiana*, finding that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[231] The Justices then reasoned, similar to Senator Ervin's argument discussed above, that if the state involuntarily committed a person for care and treatment, the commitment would not be reasonably related to the purpose of confinement if the state did not provide treatment.[232] The three concurring Justices also argued that the majority's requirement of "minimally adequate training" should include training that is necessary to prevent a deterioration of skills as the result of a confinement.[233] For example, if a committed patient is able to feed or dress himself prior to confinement, he should be provided training, if needed, during his confinement to ensure he retains those skills.[234] The concurrence observed that for patients with mental illness, "the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they will ever know."[235]

In a concurrence with the judgment, Chief Justice Warren Burger disagreed with Justices Blackmun, Brennan, and O'Connor, arguing he "would hold flatly that respondent has no constitutional right to training . . . *per se.*"[236] The Chief Justice noted that the patient's family

"habilitation" can both be used to refer to programs to assist patients with mental illness, but "habilitation" is often focused on training and skill development.

[225] 457 U.S. at 307.

[226] *Id*. at 319.

[227] *Id*. at 318, 322.

[228] *Id*. at 317 (internal citations omitted). In the *Youngberg* case, the state conceded it had duties to provide adequate shelter, food, clothing, and medical care to residents of the mental institution; the Court observed these were "the essentials of the care that the state must provide." *Id*. at 324.

[229] *Id*. at 322.

[230] *Id*. at 325 (Blackmun, Brennan & O'Connor, JJ., concurring).

[231] *Id*. (citing Jackson v. Indiana, 406 U.S. 715 (1972)).

[232] *Id.* at 326.

[233] *Id*. at 327.

[234] *Id*.

[235] *Id*.

[236] *Id*. at 329 (Burger, J., concurring in the judgment).

requested his institutionalization "to meet a serious need," and felt the state was satisfying its responsibilities to the patient by providing food, shelter, safe conditions, and medical care, thus justifying the patient's hospitalization.[237] In his view, "the Constitution does not otherwise place an affirmative duty on the State to provide any particular kind of training or habilitation."[238]

The Right to Refuse Medical Treatment

In addition to outlining the constitutional parameters protecting the right of the civilly committed to receive medical treatment or rehabilitative services, courts have also considered the protected rights of these patients to refuse medical treatment. In 1982, the Supreme Court decided *Mills v. Rogers*, in which it considered whether a class of involuntarily committed patients had a constitutionally protected right to refuse antipsychotic medication.[239] The district court held in the patients' favor on the basis that the Constitution protected their privacy and liberty interests.[240] The district court noted that although subject to involuntary confinement, the patients had not been found incompetent under state law, thus they could refuse psychiatric medication.[241] The First Circuit agreed that involuntarily hospitalized patients had a right to refuse drug treatment, but it disagreed with the district court with regard to the circumstances under which the state's interest in forced drug treatment would outweigh the patients' interests.[242]

In deciding *Mills*, the Supreme Court discussed both substantive and procedural aspects of the rights of patients who are forced to take psychiatric medication, noting that both were "intertwined with questions of state law."[243] The Court explained that the U.S. Constitution defines the minimum protections for substantive rights, which can be supplemented by states, and that liberty interests created by state law receive protection from the Fourteenth Amendment's Due Process Clause.[244] In this way, questions of a patient's right to refuse medical treatment could be tied to both state and federal law.[245] To illustrate this point, the Court cited a recent

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[237] *Id*.

[238] *Id*.

[239] Mills v. Rogers, 457 U.S. 291 (1982).

[240] *See* Cong. Rsch. Serv., *supra* note 49.

[241] *Mills*, 457 U.S. at 294–95. The district court did not identify a particular provision of the U.S. Constitution as protective of the patients' rights to privacy and liberty. The district court's ruling distinguished involuntary confinement from an order of incompetency, finding that when a patient was involuntarily confined for mental health treatment, this did not infer incompetency under Massachusetts law. The court concluded that "until a judicial finding of incompetency has bene made . . . the wishes of the patients generally must be respected." Rogers v. Okin, 478 F. Supp. 1352, 1361–62, 1365–68 (D. Mass 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated*, *Mills*, 457 U.S. at 291.

[242] *Mills*, 457 U.S. at 295–96 (citing *Rogers*, 634 F.2d at 650). The First Circuit found that the state police power to maintain order and provide safety and the *parens patriae* power to provide effective treatment were strong state interests which outweighed the possibility of harm to the patients if forcibly medicated. *Id.* at 296.

[243] *Id.* at 298–99. For purposes of its decision, the Court assumed the Constitution protects the right of mentally ill patients to refuse antipsychotic drug treatment. *Id*. at 299. The procedural question at issue concerned what procedures were constitutionally required before the state could forcibly medicate a patient. *Id*. The substantive questions were what aspect(s) of the Constitution protected the patients' liberty interest, and when the state's interests would outweigh the patients'. *Id*. Only the Court's findings with respect to the substantive legal issues are discussed here.

[244] *Id*. at 300. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 488 (1980).

[245] *Mills*, 457 U.S. at 300 ("Because state-created liberty interests are entitled to the protection of the federal Due Process Clause, 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.").

Massachusetts state court decision, *In re Guardianship of Roe*, which recognized the rights of incompetent patients to refuse antipsychotic drugs, which the state court said could be overridden "only by an overwhelming state interest."[246] Applying the logic of *Roe*, the Supreme Court observed: "[I]t is distinctly possible that Massachusetts recognizes liberty interests of persons adjudged incompetent that are broader than those protected directly by the Constitution of the United States."[247] In remanding to the First Circuit, the Court stated: "[u]ntil certain questions have been answered, we think it would be inappropriate for us to attempt to weigh or even identify relevant liberty interests that might be derived directly from the Constitution, independently of state law."[248] The Court reasoned that in light of *Roe*, it was unclear whether the delineation of the patients' Fourteenth Amendment interests would resolve the case.[249]

The First Circuit's decision on remand was limited to the rights afforded to mentally ill patients under the Fourteenth Amendment's Due Process Clause.[250] The court acknowledged that "Massachusetts recognizes substantive and procedural rights that extend above the floor set by the due process clause of the Fourteenth Amendment,"[251] and that under state law, a patient could be forcibly medicated only "if [he] poses an imminent threat of harm to himself or others, and only if there is no less intrusive alternative to antipsychotic drugs."[252] The First Circuit then decided that although it could delineate the minimum constitutional standards afforded to mentally ill patients, it need not do so because Massachusetts law offered more protection than the Fourteenth Amendment.[253]

Since *Mills v. Rogers* was decided, the Supreme Court has not directly addressed the issue of whether and under what conditions a state could force a noncriminal, involuntarily hospitalized patient to take antipsychotic drugs. It appears from the Court's decision in *Mills* that a patient's constitutionally protected liberty interest is implicated by forced medication.[254] It remains unclear, however, how that interest is defined and the extent to which it could be outweighed by a competing state interest.

The Supreme Court has also discussed the rights of individuals to refuse medical treatment in other contexts. For example, the Court recognized in *Cruzan v. Director* that "a competent person

[246] *Id*. at 300–01 (citing 421 N.E.2d 40, 51 (Mass. 1981)). In *Roe*, the Massachusetts court rested its recognition of the right to refuse treatment in both the U.S. Constitution as well as the state common law. *Id.* at 42.

[247] *Mills*, 457 U.S. at 303.

[248] *Id*. at 305.

[249] *Id*. at 306. The Court instructed the court of appeals to "determine . . . whether *Roe* requires revision of its holdings or whether it may call for the certification of potentially dispositive state-law questions to the Supreme Judicial Court of Massachusetts. The Court of Appeals also may consider whether this is a case in which abstention is now appropriate." *Id*. (internal citations omitted).

[250] Rogers v. Okin, 738 F.2d 1, 3 (1st Cir. 1984). The First Circuit's holding was limited to this question due to the Supreme Court's ruling in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), in which the Court held the Eleventh Amendment barred federal courts from awarding injunctive relief ordering state officials to comply with state law.

[251] *Rogers*, 738 F.2d at 3.

[252] *Id.* at 3, 6 (internal citations omitted). The First Circuit noted that with respect to the substantive and procedural rights afforded to the patients by Massachusetts state law, under the Supreme Court's decision in *Pennhurst*, those rights "are no longer directly enforceable by federal courts in injunctive actions against state officials." *Id.* at 3–4.

[253] *Id.* at 9.

[254] The *Mills* Court observed: "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 the identification of the conditions under which competing state interests might outweigh it." 457 U.S. at 299.

has a liberty interest under the Due Process Clause in refusing unwanted medical treatment."[255] And the Court held in *Washington v. Harper* that a federal prisoner with SMI had a "significant liberty interest" under the Fourteenth Amendment's Due Process Clause when the state attempted to forcibly medicate him.[256] Although neither of these cases addresses the specific issue of the right of an involuntarily hospitalized patient to refuse medical treatment, each offers insight into the limitations that the Due Process Clause places on a state's ability to force a person with SMI to take antipsychotic medication and when the state's interests override those of the patient.

Other federal circuit courts have considered the circumstances under which a state may forcibly medicate an involuntarily hospitalized patient. For example, in *Rennie v. Klein*, the Supreme Court directed the Third Circuit to consider the issue in light of its holding in *Youngberg v. Romeo*.[257] The Third Circuit recognized that the mentally ill patient at issue had a constitutionally protected liberty interest in refusing mental health treatment.[258] Under New Jersey law, the state could compel an institutionalized patient to take medication only if the person, "in the exercise of professional judgment," "constitute[d] a danger to himself or to others."[259] The court then found that the state placed sufficient procedural safeguards to protect patients' rights.[260] In a concurrence, one judge expressed his disagreement with the majority's holding, arguing that the issue before the court was whether the appropriate "professional judgment" from *Youngberg* was followed. The concurring judge argued that states justify involuntary commitment on the basis that the patient is a danger to self or others, so the state using the same precondition for involuntary hospitalization and forced medication "would not appear to conform to the constitutional professional judgment standard."[261]

Considerations for Congress

There is ongoing scholarly debate over the use of forced institutionalization for patients with SMI, with some advocates claiming that such hospitalizations are helpful for vulnerable populations, such as unhoused people, and others arguing they actually cause more harm than

[255] 497 U.S. 261, 262 (1990). In *Cruzan*, the Court considered the rights of an incompetent patient and her surrogate to terminate her nutrition and hydration supplements after a car accident left her in a "persistent vegetative state." *Id.* at 266. The case concerned a state law that required clear and convincing evidence of a patient's wishes to decline lifesaving treatment. *Id.* at 261. The Court recognized the Fourteenth Amendment's Due Process Clause protects the interests of competent individuals not to be forced to undergo unwanted medical treatment, but held that the Due Process Clause did not prevent the state from establishing a procedural requirement of clear and convincing evidence of a patient's wishes prior to declining treatment. *Id.* at 278–80. After recognizing the individual's liberty interest in refusing unwanted treatment, the Court stated that the individual interest must be balanced against the state's interest in protecting life, finding the state interest more compelling. *Id.* at 281.

[256] 494 U.S. 210, 221–22 (1990). The Court decided the case in the same term as *Cruzan*. In *Harper*, a federal inmate challenged a state correctional facility's attempt to forcibly treat his mental illness with antipsychotic medication, arguing that it violated his rights under the Due Process Clause. *Id.* at 221. Under a state policy, a prisoner could be forcibly medicated if he had a mental disorder and was gravely disabled or posed a serious threat of harm to himself, others, or property. *Id.* at 215. The Court recognized that the prisoner had a significant liberty interest in refusing medication, but it applied an earlier, deferential standard for considering a state's interest in prison safety, finding that "the proper standard for determining the validity of a prison regulation that infringes on an inmate's liberty is to ask if the regulation is 'reasonably related to legitimate penological interest.'" *Id.* at 223. Under this standard, the Court reasoned that the prison had the duty to ensure the safety of its staff and other prisoners, and that forcibly medicating dangerous inmates was a rational means of furthering the state's interest in maintaining safety. *Id.* at 225.

[257] Rennie v. Klein, 720 F.2d 266 (3d Cir. 1983).

[258] *Id.* at 268 (citing Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated*, 458 U.S. 1119 (1982)).

[259] *Rennie*, 720 F.2d at 269.

[260] *Id.* at 270.

[261] *Id.* at 272 (Adams & Becker, JJ., concurring in the judgment).

good and deter individuals with SMI from seeking care.[262] Stakeholders continue to advocate for the rights of those involuntarily committed, arguing that states require additional resources to treat patients with SMI and provide them with better care.[263] Others have suggested that the United States should instead curb Medicaid and other federal health care spending, arguing that it is increasing federal government debt.[264]

More recently, patient advocates, several Members of Congress, and the White House have stressed the need for increased outpatient mental health services to be available for both children and adults, many of whom are unable to access those services posthospitalization.[265] Others have called attention to the national shortage of mental and behavioral health professionals.[266]

While Congress does not directly control the processes and procedures governing involuntary civil commitment, as this is traditionally an area left to state law, Congress could influence state standards indirectly in a variety of ways. Congress could expand existing federal statutes that provide rights to institutionalized patients who are housed in facilities that receive federal funding. For example, Congress could create additional rights for children and youth facility residents, as outlined in the CHA, which currently recognizes "the right to be free from physical or mental abuse, corporal punishment, and any restraints or involuntary seclusions imposed for purposes of discipline or convenience."[267] Congress could also expand SAMHSA's authority in the Act to promulgate regulations ensuring that facilities have adequate, professional staff who are properly trained and/or could give SAMHSA more enforcement authority to police mental health facilities.

Congress could also indirectly influence the civil commitment process by increasing federal protections for individuals with SMI through legislation providing greater, more accessible care for institutionalized patients. For example, patients' rights advocates have urged Congress to do

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[262] *Compare* Maya Kaufman, *Democratic Mayors Lead Course Correction on Psychiatric Commitments*, POLITICO, Mar. 1, 2023, https://www.politico.com/news/2023/03/01/democratic-mayors-lead-course-correction-on-psychiatric-commitments-00084387, *with* Andy Newman, *Advocates for Mentally Ill New Yorkers Ask Court to Halt Removal Plan*, N.Y. TIMES, Dec. 9, 2022, https://www.nytimes.com/2022/12/08/nyregion/nyc-mental-health-restraining-order.html. *See also* Betsy Reed, I was Hospitalized Against My Will. I Know Firsthand the Harm it can Cause, THE GUARDIAN, Dec. 23, 2022, https://www.theguardian.com/society/2022/dec/23/involuntary-hospitalization-policy-new-york-city-eric-adams; Morgan C. Shields, et al., Expanding Civil Commitment Laws is Bad Mental Health Policy, HEALTH AFFAIRS, Apr. 6, 2018, https://www.healthaffairs.org/content/forefront/expanding-civil-commitment-laws-bad-mental-health-policy.

[263] *E.g.*, *Advocacy*, TREATMENT ADVOC. CTR., https://www.treatmentadvocacycenter.org/fixing-the-system (last accessed Mar. 24, 2023).

[264] Maya MacGuineas, How Medicare, Medicaid, and Social Security are Driving the National Debt – and How We Can Fix It, GEORGE W. BUSH INSTITUTE (2020), https://www.bushcenter.org/catalyst/federal-debt/macguineas-medicaid-medicare-social-security-national-debt.

[265] Dan Frosch, More Money for Mental Health Programs Gets Bipartisan Support in Many States, WALL STREET JOURNAL, (Feb. 5, 2023), https://www.wsj.com/articles/more-money-for-mental-health-programs-gets-bipartisan-support-in-many-states-11675614344; Press Release, Office of Sen. Tina Smith, U.S. Senators Smith, Murkowski, Hassan Reintroduce Bipartisan Bill to Expand Mental Health Care Workforce (Feb. 23, 2023), https://www.smith.senate.gov/u-s-senators-smith-murkowski-hassan-reintroduce-bipartisan-bill-to-expand-mental-health-care-workforce/. The bill was introduced in the 117th Congress as the Mental Health Professionals Workforce Shortage Loan Repayment Act of 2021, S. 1578, 117th Cong. (2021) and H.R. 3150, 117th Cong. (2021), and then reintroduced as S.462, 118th Cong. (2023). GOVERNMENT ACCOUNTABILITY OFFICE, Behavioral Health: Available Workforce Information and Federal Actions to Help Recruit and Retain Providers (Oct. 27, 2022), https://www.gao.gov/products/gao-23-105250; The White House, Reducing the Economic Burden of Unmet Mental Health Needs, Issue Brief (May 31, 2022), https://www.whitehouse.gov/cea/written-materials/2022/05/31/reducing-the-economic-burden-of-unmet-mental-health-needs/.

[266] *See*, *e.g.*, St. George, *supra* note 8.

[267] 42 U.S.C. §§ 290ii(a), 290jj(a)(1).

away with the current "institutions for mental disease" or "IMD" exclusion so that Medicaid funds may be more easily used to provide institutionalized care for nongeriatric adults.[268] Other advocacy groups have resisted a repeal of the IMD exclusion, saying that it "would do more harm than good" and would divert state resources to institutionalization and away from services that keep patients with SMI in their communities.[269]

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[268] *See, e.g.*, TREATMENT ADVOC. CTR., THE MEDICAID IMD EXCLUSION AND MENTAL ILLNESS DISCRIMINATION (2016), https://www.treatmentadvocacycenter.org/evidence-and-research/learn-more-about/3952.

[269] *See, e.g.*, Hannah Katch, House Bill Partially Repealing "IMD Exclusion" Would Do More Harm Than Good, CENTER ON BUDGET AND POLICY PRIORITIES, (Jun. 20, 2018), https://www.cbpp.org/blog/house-bill-partially-repealing-imd-exclusion-would-do-more-harm-than-good.; CENTER FOR PUBLIC REPRESENTATION, Institutions for Mental Diseases Exclusion, available at https://medicaid.publicrep.org/feature/institutions-for-mental-diseases-exclusion/ (last accessed May 22, 2023).