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Mental Health - Restraint or Treatment in Institutions - Right to Refuse Treatment Based on Right of Privacy

Ron Goodman

Recent Case

MENTAL HEALTH — RESTRAINT OR TREATMENT IN INSTITUTIONS — RIGHT TO REFUSE TREATMENT BASED ON RIGHT OF PRIVACY

Plaintiff had a long history of psychiatric problems which had precipitated several previous admissions to the state psychiatric hospital.[1] On August 10, 1976, plaintiff was involuntarily committed to that hospital.[2] This action was brought to enjoin the staff of the hospital from forcibly administering drugs to the plaintiff in a non-emergency without his consent.[3] The plaintiff's

1. Rennie v. Klein, 462 F. Supp. 1131, 1135 (D.N.J. 1978).

2. *Id.* at 1136 (D.N.J. 1978). Plaintiff was involuntarily committed on August 10, 1976, pursuant to N.J. STAT. ANN. § 30:4-27 (West 1964). The plaintiff was committed to Ancora Psychiatric Hospital, a state-operated hospital for the mentally ill. The plaintiff had been admitted there on eleven occasions prior to his most recent admission. His first admission occurred in April, 1973. The plaintiff usually had entered the hospital on a voluntary basis. He was diagnosed at various times as paranoid schizophrenic, and manic-depressive. *Id.* at 1135-36.

Paranoid schizophrenia is defined as follows:

> The *paranoid type* is characterized by self-centered, unrealistic thinking. There are delusions of persecution and/or grandeur, ideas of reference (an exaggerated impression that the actions of others, such as smiling or conversing, have reference to oneself), and hallucinations. There may be unfounded suspiciousness, hostility, and an aggressive attitude.

3 SCHMIDT'S ATTORNEY'S DICTIONARY OF MEDICINE S-30 (1978).

Manic-depressive illness is defined as follows:

> A mental illness which is one of a group marked by severe swings in mood ranging from abnormal elation to profound depression. Other characteristics are delusions, illusions, and hallucinations. There is a tendency for remissions (a temporary return to normal) and recurrences. The manic type (in which mania predominates) is marked by elation, excessive talkativeness, irritability and physical activity. In the depressive type, there is predominace of depression as well as mental and physical lethargy. In the mixed type of manic-depressive psychosis, there is a mixture of both manic and depressive symptoms.

Id. at M-18.

3. 462 F. Supp. at 1134. The injunction was sought pursuant to rule 65(a) of the FEDERAL RULES OF CIVIL PROCEDURE which states as follows:

> (a) *Preliminary Injunction*
> (1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

complaints about the drugs concerned the side effects he was experiencing.[4] The plaintiff alleged violations of several rights.[5] A preliminary injunction was granted only on the issue of the right to refuse medication.[6] The United States District Court of New Jersey

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(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

FED. R. CIV. P. 65 (a).

Plaintiff was maintained on several different drugs during his various stays at the hospital, but the drugs he primarily objected to were lithium carbonate and prolixin decanoate. 462 F. Supp. at 1139 n.4, 1140-41.

Prolixin decanoate is described as a highly potent behavior modifier of the psychotropic (phenothiazine) group of medications. In this particular form, the drug is especially long acting and is used primarily to control manifestations of schizophrenia. PHYSICIAN'S DESK REFERENCE 1667 (33rd ed. 1979).

Lithium carbonate is described as indicated in the treatment of the manic-depressive illness. The medication will help alleviate the typical mania symptoms of excessive speech, motor hyperactivity, reduced need for sleep, flight of ideas, grandiosity, elation, poor judgment and aggressiveness. The exact biochemical action of lithium carbonate in the body is unknown. *Id.* at 1497.

4. 462 F. Supp. at 1137-38. All psychotropic drugs, including prolixin decanoate, cause problems in central nervous system functioning with prolonged use. One side effect common to the central nervous system is akinesia. Akinesia refers to a state of diminished spontaneity, and feelings of weakness and muscle fatigue. *Id.* at 1138, citing Zander, *Prolixin Decanoate: A Review of the Research,* 2 MENTAL DISABILITY L. REP. 37 (1977).

Another central nervous system side effect is tardive dyskinesia. "Tardive dyskinesia is characterized by rhythmical, repetitive, involuntary movements of the tongue, face, mouth or jaw, sometimes accompanied by other bizarre muscular activity." 462 F. Supp. at 1138, citing Zander, 2 MENTAL DISABILITY L. REP. 37 (1977).

Lithium carbonate has several potential side effects including the creation of potentially serious thyroid, heart and brain abnormal reactions. PHYSICIAN'S DESK REFERENCE 1498 (33rd ed. 1979).

The plaintiff suffered from several minor physical symptoms associated with the drugs and had the beginning symptoms of tardive dyskinesia from his use of prolixin decanoate. 462 F. Supp. at 1140-41, 1144. The plaintiff had also complained of the lithium carbonate causing him to be depressed in the past. *Id.* at 1139 n.4.

5. *Id.* at 1134. Plaintiff had a six count complaint, but the court interpreted the complaint as charging the defendants with violations of four rights, "(1) the right to refuse medication in nonemergent circumstances, (2) the right to treatment, (3) the right of access to counsel, and (4) the right to be free from physical abuse while in custody." *Id.*

6. *Id.* Plaintiff's complaint was grounded on 42 U.S.C. § 1983 with federal jurisdiction applicable under 28 U.S.C. § 1343.

42 U.S.C. § 1983 (1974) provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

28 U.S.C. § 1343 (1976) provides as follows:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> (1) to recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
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> (2) to recover damages from any person who fails to prevent or aid in preventing

recognized the state's strong interests in maintaining the plaintiff on the prescribed therapeutic regime,[7] but *held* an involuntarily committed mental patient may have the right to refuse non-emergency medications based on a constitutional right of privacy.[8] In addition, a due process hearing is required prior to the forced administration of drugs in non-emergency situations.[9] *Rennie v. Klein,* 462 F. Supp. 1131 (D.N.J. 1978).

The common law recognized a right of privacy in a different sense than is recognized constitutionally in the United States.[10] The common law recognized the torts of assault and battery as invasions of the right of privacy for which the injured individual could seek legal redress.[11] The individual could consent to the touching of his person, but this consent could be limited.[12] The courts began to recognize the rights of the mentally ill individual to protect himself against unwanted medical invasions of his body early in this century.[13] The common law has continued to recognize this right up to the present day.[14]

The United States Constitution does not specifically identify a

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any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights including the right to vote.

Id.

7. 462 F. Supp. at 1145-47. The court realized that the right to refuse treatment could not be absolute. The court also recognized three specific state interests which must be considered in its decision. The court recognized the state's interest in confining those mentally ill individuals dangerous in society. The court also recognized the doctrine of *parens patriae.* Finally, the state has an interest in providing for the least restrictive treatment alternatives for its mentally ill citizens. *Id.* at 1145-46.

8. 462 F. Supp. at 1144. The right of privacy regarding choice of medical care was first alluded to in *Griswold v. Connecticut,* 381 U.S. 479 (1965). The right was given more exact constitutional status in *Roe v. Wade,* 410 U.S. 113 (1973). *See infra* notes 15-23.

9. 462 F. Supp. at 1147. *See infra* notes 40-45.

10. Union Pacific Ry. v. Botsford, 141 U.S. 250 (1891). *Botsford* recognized the common law right to bodily privacy. The Court stated that "[n]o right is held more sacred, or is more carefully guarded by the common law, then the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 251.

11. Kline v. Kline, 158 Ind. 602, 64 N.E. 9 (1902); O'Brien v. Cunard S. S. Co., 154 Mass. 272, 28 N.E. 266 (1891); Mailand v. Mailand, 83 Minn. 453, 86 N.W. 445 (1901). *See* W. PROSSER, LAW OF TORTS § § 9, 10, 18 (4th ed. 1971).

12. *Id.* § 18 at 103-05.

13. Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906) (A mentally ill woman sued her physician for operating on her without her consent and was allowed to recover damages). *See also,* Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914) in which the court stated, "[e]very human being or adult years and sound mind has a right to determine what shall be done with his own body. . . ." *Id.* at 129, 105 N.E. at 93.

14. In re Pescinski, 67 Wis.2d 4, 226 N.W.2d 180 (1975). In this case the Supreme Court of Wisconsin would not allow a county court to order a kidney transfer operation on a mentally incompetent ward without a showing of benefit to the ward or without informed consent given by the ward or his guardian ad litem. The court made this ruling in spite of the fact that the ward's sister was in dire need of a kidney donor. *Id.*

right to refuse treatment, but the Supreme Court of the United States has long recognized the right of the individual to control his own body.[15] The Court, however, did not begin to formulate a concept of a right of privacy until 1928.[16] The privacy right did not obtain solid constitutional status until the Court's ruling in *Griswold v. Connecticut.*[17] The Court continued to develop the constitutional right to privacy in subsequent holdings dealing with the control of one's person.[18] In *Roe v. Wade*[19] the Court recognized the individual's right to private bodily self-determination in most instances.[20] The Court has also held that the individual has a right of freedom from governmental interference with his mind.[21] The general right of bodily privacy has continued to be protected since *Roe v. Wade.*[22]

In spite of the general recognition of a right of privacy, the Supreme Court has not directly considered the constitutionality of a committed mental patient's right to refuse medical treatment. The Court has only considered the mental patient's rights on a piecemeal basis.[23] State and federal courts, however, have directly

15. Boyd v. United States, 116 U.S. 616 (1886). The United States Supreme Court made clear that "[c]onstitutional provisions for the security of person and property should be liberally construed." *Id.* at 617.

16. Olmstead v. United States, 277 U.S. 438 (1928). The dissenting opinion spoke of a general ight to be left alone as one of the most fundamental rights in human society. *Id.* at 478 (Brandies, J., dissenting).

17. 381 U.S. 479 (1965). This case enuniciated the penumbra theory, that there is a general right of privacy protected by the first, third, fourth, fifth, and ninth amendments of the Bill of Rights of the Constitution, and by the fourteenth amendment to the Constitution. Griswold v. Connecticut, 381 U.S. 479, 481-86 (1965). In 1966, however, the Court upheld unconsented blood drawing on individuals involved in driving while intoxicated cases. Schmerber v. California, 384 U.S. 757 (1966).

In 1961, considering a search and seizure case, the Court made reference to a right of privacy based on the fourth amendment. Mapp v. Ohio, 367 U.S. 643 (1961). The Court cited several of its prior holdings concerning privacy in the search and seizure area. *Id.* at 647-57. For a discussion of right to privacy prior to *Griswold, see* Beaney, *The Constitutional Right to Privacy in the Supreme Court,* 1962 S. CT. REV. 212.

18. Doe v. Bolton, 410 U.S. 179 (1973) (declaring a Georgia statute unduly restrictive on a woman's right to an abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating a Massachusetts statute which denied unmarried persons access to contraceptives); Stanley v. Georgia, 394 U.S. 557 (1969) (holding that the first amendment as made applicable to the states by the fourteenth amendment prohibits making private possession of obscene material a crime).

19. 410 U.S. 113 (1973).

20. Roe v. Wade, 410 U.S. 113, 154 (1973). "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . A State may properly assert important interests in safeguarding health, in maintaining medical standards and in protecting potential life." *Id.* at 153-54.

21. Stanley v. Georgia, 394 U.S. 557, 565 (1969).

22. 410 U.S. 113 (1973). *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (the Court held that a Missouri abortion statute which required either spousal or parental consent for an abortion was unconstitutional).

23. *See* O'Connor v. Donaldson, 422 U.S. 563, 573-76 (1975) (indicating a state may not constitutionally confine a non-dangerous mental patient against his will); Jackson v. Indiana, 406 U.S. 715, 731 (1972) (invalidating an Indiana statute indefinitely confining a criminal defendatnt solely on his lack of capacity to stand trial); In re Gault, 387 U.S. 1 (1967) (requiring that a minor be given access to legal counsel prior to commitment to a state institution); Baxstrom v. Harold, 383 U.S. 107 (1966) (invalidating a New York statute allowing for civil commitment of a mentally ill individual immediately after the expiration of his prison term without benefit of a jury review of his situation).

considered the constitutional aspects of the right of privacy and the right to refuse treatment as applied to mental health patients,[24] but present day law in this area varies greatly among jurisdictions.[25] The doctrine of *parens patriae,*[26] for example, has resulted in the reluctance of several jurisdictions to allow the mentally ill patient the right to refuse medical or psychiatric treatment ordered by the state in a non-emergency situation.[27]

In *Rennie v. Klein,* the court noted it was adjudicating a federal constitutional claim involving the right of a committed mental health patient to refuse non-emergency medication.[28] The *Rennie* court recognized the possibility of the right claimed by the plaintiff as existing in several areas of the Bill of Rights of the Constitution.[29] The *Rennie* court felt that the constitutional right of privacy and the individual's right to due process contained the strongest justifications in favor of a ruling for the plaintiff.[30] The court relied on several cases in support of the contention that the right of privacy included the right to protect mental processes from state interference in non-emergency circumstances.[31]

24. Kaimowitz v. Michigan Dept. of Mental Health, Civ. No. 73-19434-AW (Cir. Ct. Wayne County, Mich. July 10, 1973), summary at 42 U.S.L.W. 2063 (July 31, 1973). *Kaimowitz* involved a situation in which a mentally ill individual refused, through court intervention, to participate in an experimental psychosurgery program. The case primarily concerns the issue of informed consent. The court based its ruling on the constitutional right of privacy as developed by the United States Supreme Court. The court concluded that the right of privacy extends to the protection of the individual's thoughts. *Id.* at 2064. For a comprehensive treatment of *Kaimowitz, see* Note, *Kaimowitz v. Department of Mental Health: A Right to be Free from Experimental Psychosurgery?* 54 B.U.L. REV. 301 (1974).

Winters v. Miller, 446 F.2d 65 (2d Cir. 1971), *cert. denied,* 404 U.S. 985 (1971), considered an involuntarily committed mental health patient's right to refusal of a purely physical medical diagnostic procedure. *Id.*

Bell v. Wayne County General Hospital, 384 F. Supp. 1085 (E.D. Mich. 1974) invalidated as unconstitutional a Michigan statute allowing for unconsented bodily intrusions of mental health patients. The court based its decision on right of privacy and due process grounds. *Id.* at 1100.

25. *See* N.H. REV. STAT. ANN. § 135-B:15 (1977). This statute indicates that voluntary patients may refuse any treatment, but a similar provision is not made for the involuntarily committed patient. MISS. CODE ANN. § 41-41-3 (1973) allows substituted consent to treatment for a person of unsound mind. There is no indication that the person has to be adjudicated incompetent prior to obtaining the substituted consent. *See also* Plotkin, *Limiting the Therapeutic Orgy: Mental Patient's Right to Refuse Treatment,* 72 N.W.U.L. REV. 461 (1977).

26. West Virginia v. Charles Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971). "*Parens patriae* literally 'parent of the country,' refers traditionally to the role of the state as sovereign and guardian of persons under legal disability." *Id.* at 1089.

27. *Id. See also* Scott v. Plante, 532 F.2d 939 (3d Cir. 1976).

28. 462 F. Supp. at 1142.

29. *Id.* at 1142-48. The court noted the United States Supreme Court's position upholding the individual's autonomy over his body, citing *Roe v. Wade,* 410 U.S. 113 (1973). *Id.* at 1144. The court also considered and rejected the possibility of cruel and unusual punishment claims based on the eighth amendment. *Id.* at 1143.

30. *Id.* at 1144-45, 1147-48.

31. *Id.* at 1144, citing Stanley v. Georgia, 394 U.S. 557, 565 (1969) (indicating that the state has no right to control men's minds by dictating what they may or may not read or watch in the privacy of their homes); Winters v. Miller, 446 F.2d 65, 68 (2d Cir. 1971) (allowing a tort action and recovery for a mentally ill patient who received medical treatment against her will); In re Quinlan, 70 N.J. 10, 40, 355 A.2d 647, 663 (1976) (indicating that the state had to have a compelling interest in keeping a comatose girl on life support systems against her parents' wishes); Kaimowitz v. Department of Mental Health, Civ. No. 73-19434 AW (Cir. Ct. Wayne County, Mich., July 10, 1973), summary at 42 U.S.L.W. 2063 (July 31, 1973) (indicating that a mentally ill patient may not

The *Rennie* court described its decision as a practical one because expert testimony revealed that psychiatric treatment of a mentally ill patient without his cooperation was less effective than the same treatment accepted voluntarily.[32] The court further noted that the patient is the only one who can know the negative effects he receives from a particular drug.[33] The divergence of opinion among physicians concerning the proper treatment required for a given mentally ill patient was also recognized.[34]

In arriving at the holding regarding the right to privacy, the *Rennie* court discussed three interests the state has in requiring that mental health patients receive certain medical and psychiatric care.[35] First, the court recognized the state's interest in confining a mentally ill individual who is "dangerous in a free society."[36] The court felt such a right did not give the state the power to medically treat the patient involuntarily because "once confined, the patient cannot hurt those outside."[37] Second, the court recognized the doctrine of *parens patriae* as giving the state certain responsibilities in the case of mental health patients who have been declared mentally incompetent.[38] The *Rennie* court, however, felt a hearing on mental competence should be held before the state could be justified in using the *parens patriae* doctrine as a basis for medicating a mentally ill patient against his wishes in a non-emergency situation.[39] Third, the court felt the concept of the least restrictive treatment alternatives should be considered in any medical treatment decisions the state makes regarding involuntarily committed patients.[40]

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be allowed to participate in an experimental psychosurgery program without giving an informed consent).

Of particular note is the *Winters* case. In this case, the federal court stated that it cannot be presumed an individual is not competent to handle his own affairs because he has been committed to a mental institution. 446 F.2d at 68.

32. 462 F. Supp. at 1144.

33. *Id.* at 1145. *See supra* note 4. The court feared the plaintiff would deteriorate further by continuing on the drugs he did not wish to take. 462 F. Supp. at 1146-47.

34. *Id. See also supra* note 2.

35. 462 F. Supp. at 1145-47.

36. *Id.* at 1145.

37. *Id.* The court realized a patient's desire to refuse medication or other psychiatric treatment must be overridden by the state's interest in protecting other mental patients or state employees from any danger a patient might present without such treatment. *Id.*

38. *Id. See supra* note 26.

39. 462 F. Supp. at 1146. The plaintiff had never been adjudicated incompetent and was lucid at times. *Id.*

40. *Id.* The court noted prior decisions justifying the concept of least restrictive alternatives as applied to choice of custodial settings and felt the concept should be extended to choice of medications in order to protect the patient's due process rights. *Id.* at 1146, citing Eubanks v. Clarke, 434 F. Supp. 1022, 1028 (E.D. Pa. 1977) (requiring that committed mentally ill patients who have committed no crime be given access to the least restrictive treatment alternative); Welsh v. Tikins, 373 F. Supp. 487, 501 (D. Minn. 1974) (indicating that state authorities must seek the least restricitve alternative treatment for committed mentally ill patients under the due process clause of the fourteenth amendment). One of the psychiatrists indicated a trial treatment of lithium and an

The court also detailed several duties the state must comply with in order to fulfill constitutional due process requirements.[41] The patient must be allowed to participate in the planning of his treatment program,[42] the patient must be given access to legal counsel,[43] and the patient is entitled to an evaluation and subsequent testimony at a due process hearing by a psychiatrist independent from the state institutional setting.[44] The state must also provide the patient's attorney and the outside psychiatrist with access to the patient's records so a fair evaluation of his situation may be made.[45] Finally, the state must provide funds for an attorney and an independent psychiatrist if the patient cannot afford them.[46]

In arriving at its decision, the court noted that the New Jersey Superior Court[47] had recently held that an involuntarily committed mental patient could not refuse non-emergency medication.[48] The New Jersey court interpreted a state statute[49] which allowed

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antidepressant might be a less restrictive alternative than the drug regime the plaintiff had been on. The court agreed to the offered treatment. 462 F. Supp. at 1146.

41. *Id.* at 1147-48. In the discussion of due process the court also noted shortcomings in New Jersey's Bulletin 78-3 regarding the administration of psychotropic medication. The bulletin did not provide for a due process hearing prior to the forced administration of medication. The bulletin also failed to provide for an evaluation of patients by an independent psychiatrist. Finally, the bulletin did not provide for access to the patient's records by his lawyer and the independent psychiatrist so they might make an appropriate assessment of the patient. *Id.*

In September, 1979, the court described the procedural due process requirements which must be met prior to the administration of psychotropic drugs in all but emergency situations. The court made this ruling as a result of further relief requested by the plaintiff. The patient must be advised of his right to refuse the medication, and the administering agency must obtain the patient's written permission to administer the drugs on forms explaining this constitutional right to the patient.

The consent forms also must detail the state's responsibility to provide qualified patient advocates (attorneys, psychologists, social workers, registered nurses or paralegals under the supervision of an attorney or psychiatrist in the state mental health department) for those patients who refuse offered medication, or those patients who request such an advocate. Rennie v. Klein, (D.N.J.), summary at 48 U.S.L.W. 2211 (Sept. 25, 1979).

42. *Id.* at 1147, citing In Re W. S. Jr., 152 N.J. Super. 298, 377 A.2d 969 (1977). In the *W. S. Jr.* case, the New Jersey Superior Court indicated that mentally ill patients have the right to be informed of and to participate in any treatment programs they are subjected to. *Id.* at 300, 377 A.2d at 971. The New Jersey Superior Court is a court of original general jurisdiction throughout the state of New Jersey. It has an appellate division, a law division, and a chancery division. The appellate division serves as an intermediate step between the New Jersey county courts and the New Jersey Supreme Court.

43. 462 F. Supp. at 1147, citing In re Gault, 387 U.S. 1, 36 (1967). The *Gault* case held that an individual must be advised of his right to legal counsel if there is a possibility that his freedom will be curtailed. A parent, a guardian, or the court cannot be expected to adequately protect his rights. *Id.* at 34-41.

44. 462 F. Supp. at 1147-48.

45. *Id.* at 1148.

46. *Id.*

47. 462 F. Supp. at 1141, citing In re Hospitalization of B, 156 N.J. Super. 231, 383 A.2d 760 (1977). In this case the court held an involuntarily committed mental patient in New Jersey did not have a statutory right to refuse medication. *Id.* at 234, 383 A.2d at 763.

48. *Id.*

49. N.J. STAT. ANN. § 30:4-24.2(d)(1)(Supp. 1979). The statute provides as follows:

> No medication shall be administered unless at the written order of a physician. Notation of each patient's medication shall be kept in his treatment records. At least weekly, the attending physician shall review the drug regimen of each patient under his care. All physicians' orders or prescriptions shall be written with a termination

voluntary patients to refuse medication as implying that involuntarily committed mental patients could not refuse offered medication.[50]

The North Dakota Legislature recently revised North Dakota's statutory scheme for involuntary commitment and treatment of mentally ill patients.[51] This corrected many of the constitutional problems inherent in the statutes concerning mental health commitments.[52] There were further changes made in the last legislative session.[53] The latest changes appear to bring North Dakota law in very close parallel with the federal district court's ruling in *Rennie.*

The latest revisions provide for medical treatment of an involuntarily committed patient over his objections only in the event that "these treatments are necessary to prevent bodily harm to the patient or others or to prevent imminent deterioration of the respondent's physical or mental conditions."[54] The current statutes also provide for an independent expert examination[55] paid for by

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date, which shall not exceed 30 days. Medication shall not be used as punishment, for the convenience of staff, as a substitute for a treatment program, or in quantities that interfere with the patient's treatment program. Voluntarily committed patients shall have the right to refuse medication.

Id.

50. 156 N.J. Super. at 235, 383 A.2d at 764. In the situation involving the plaintiff in the *Rennie* case, the court would not issue an injunction against the hospital administering certain drugs to the plaintiff because the medication he objected to had been discontinued. The *Rennie* court stated that due process hearings would be scheduled to examine any further refusal of the plaintiff to take prescribed non-emergency medications. Before issuing any future injunction requested by the plaintiff the court made clear it would examine the following points in a hearing regarding the plaintiff's refusal to take non-emergency medications, "(1) plaintiff's physical threat to patients and staff at the institution, (2) plaintiff's capacity to decide on his particular treatment, (3) whether any less restrictive treatments exist, and (4) the risk of permanent side effects from the proposed treatment." 462 F. Supp. at 1148.

The plaintiff did ask for another injunction to stop medication he did not wish to take. The plaintiff's psychiatric condition had worsened. The court examined the four points it had described earlier and denied the injunction. The hospital staff was allowed to continue the administration of antipsychotic medication to the plaintiff against his wishes. *Id.* at 1151-54.

51. N.D. CENT. CODE ch. 25-03.1 (1977). For a discussion of the constitutional problems inherent in North Dakota's commitment laws prior to the 1977 revisions, *see* Lockney, *Constitutional Problems with Civil Commitment of the Mentally Ill in North Dakota,* 52 N.D.L. REV. 83 (1975). The North Dakota Supreme Court did not have the opportunity to rule on the constitutionality of North Dakota's commitment laws prior to the changes. The Federal District Court of North Dakota had a case before it in which the petitioner asked that North Dakota's laws in this area be declared unconstitutional but the case was dismissed due to petitioner's lack of standing. Poe v. Smith, Civ. No. A2-74-84 (D.N.D. memo in order for motion to dismiss granted Dec. 30, 1974).

52. *See* N.D. CENT. CODE ch. 25-03 (1970). *See also* Lockney, *Constitutional Problems with Civil Commitment of the Mentally Ill in North Dakota,* 52 N.D.L. REV. 83.

53. N.D. CENT. CODE ch. 25-03.1 (Supp. 1979).

54. N.D. CENT. CODE § 25-03.1-24 (Supp. 1979). *See also* section 12-05-05(4) of the North Dakota Century Code which refers to the physician's right to use force to administer medication. N.D. CENT. CODE § 12-05-05(4) (1977).

55. N.D. CENT. CODE § 25-03.1-31 (Supp. 1979). Section 25-03.1-02(7) of the North Dakota Century Code states that, " 'independent expert examiner' means a licensed physician, psychiatrist, or clinical psychologist chosen at the request of the respondent to provide an independent evaluation of whether the respondent meets the criteria of a person requiring treatment." N.D. CENT. CODE § 25-03.1-02(7) (Supp. 1979). Section 25-03.1-09(2) points out that the respondent will be given the opportunity to select the examiner. N.D. CENT. CODE § 25-03.1-09(2) (Supp. 1979).

the patient's home county, and due process hearings.[56]

Two potential problems seem to continue to exist in spite of the legislature's efforts at revision. The first concerns the statute's definition of those patients requiring treatment.[57] The statute distinguishes the seriously mentally ill patient from the patient who is dangerous to himself or others. A person who is not dangerous and yet is still liable for involuntary commitment in an inpatient treatment facility would not be getting the benefit of the least restrictive treatment alternative.[58]

Another potential problem concerns the commitment hearing and its relationship to the giving of non-emergency medication to the involuntarily committed patient against his wishes. The *Rennie* court required a due process type hearing prior to any emergency such administration of drugs.[59] The North Dakota Century Code provides for due process hearings prior to commitment,[60] and for review of the patient's status while he is in treatment.[61] The North Dakota Century Code, however, does not provide for any due process hearings prior to administration of medication or other treatment of a patient against his wishes in a non-emergency situation.[62]

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56. N.D. CENT. CODE § 25-03.1-09 (Supp. 1979).

57. N.D. CENT. CODE § 25-03.1-02(11)(a) & (b) (Supp. 1979). These sections provide as follows:

> "Person requiring treatment" means either a person:
> (a) who is severly mentally ill; or
> (b) who is mentally ill, an alcoholic or drug addict, and there is a reasonable expectation that if the person is not hospitalized there exists a serious risk of harm to himself, others or property. "Serious risks of harm" means a substantial likelihood of:
> (1) Suicide as manifested by suicidal threats, attempts, or significant depression relevant to the suicidal potential; or
> (2) Killing or inflicting serious bodily harm on another person, inflicting significant property damage, as manifested by acts or threats; or
> (3) substantial deterioration in physical health, or substantial injury, disease or death resulting from poor self-control or judgment in providing one's shelter, nutrition, or personal care.

Id.

58. *See supra* note 40. Representative Wayne Stenejhem of Grand Forks was the House of Representatives sponsor of the bill (Senate Bill No. 2411) providing for the 1979 changes in North Dakota Century Code chapter 25-03.1. Mr. Stenejhem recommended that section 25-03.1-02(11)(a) of the North Dakota Century Code be deleted from the bill because he felt it was unconstitutional. The section was retained over his objections. Telephone call from Ronald E. Goodman to Wayne Stenejhem (April 12, 1979).

59. 462 F. Supp. at 1147. *See supra* note 41.

60. N.D. CENT. CODE §§ 25-03.1-09, 10, 11, 12, 13 (Supp. 1979).

61. N.D. CENT. CODE § 25-03.1-31 (Supp. 1979).

62. *See* N.D. CENT. CODE § 25-03.1-40(10) (Supp. 1977). Section 25-03.1-40 of the North Dakota Century Code sets out the rights of mentally ill patients in treatment facilities in general. N.D. CENT. CODE § 25-03.1-40. The section is subject, however, to the limitations authorized by section 25-03.1-41 of the North Dakota Century Code which reads as follows:

> The rights enumerated in section 25-03.1-40 may be limited or restricted by the treating physician or psychiatrist or clinical psychologist, if in his medical judgment to do so would be in the best interests of the patient and the rights are restricted or limited in the manner authorized by the rules and regulations promulgated pursuant to

The *Rennie* decision appears to be in line with the general direction of the United States Supreme Court in the area of the right to privacy.[63] North Dakota's present law also appears compatible with the United States Supreme Court and the *Rennie* ruling, except for the problem with the person who is not dangerous and yet is still subject to involuntary commitment and the question regarding due process hearings for forced non-emergency medication and treatment.[64]

A problem with the *Rennie* ruling is the limits it seems to place on professionals in a mental health setting. The requirement of a due process hearing prior to forced administration of unwanted medication places a burden on the courts. The due process hearing requirement may, in some cases, protect the patient's constitutional rights by delaying treatment which may be of benefit to the patient.

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section 25-03.1-46. Whenever a physician, psychiatrist or clinical psychologist responsible for the treatment of a particular patient imposes a special restriction on the rights of patient as authorized by the rules and regulations, a written order specifying the restrictions and the reasons therefor shall be signed by the physician, psychiatrist, or clinical psychologist and attached to the patient's chart. These restrictions shall be reviewed at intervals of not more than fourteen days and may be renewed by following the procedure set out in this section.

N.D. CENT. CODE § 25-03.1-41 (Supp. 1979).

Section 25-03.1-41 thus limits the rights given the patient in section 25-03.1-40 of the North Dakota Century Code. The patient's rights are limited by section 25-03.1-41 if the treating physician or clinical psychologist feels such limitations are in the patient's best interest. The section further provides that the treating physician or clinical psychologist must give his reasoning for restricting the patient's rights, but the section does not provide for patient input into the procedure for restricting the patient's rights. *Id.*

Section 25-03.1-41 of the North Dakota Century Code may also have the effect of allowing the physician to prescribe unwanted or unnecessary medication to a patient in non-emergency situations. Section 25-03.1-24 of the North Dakota Century Code specifically permits the giving of medications or other treatment to mentally ill patients in emergency situations. There is no specific definition of emergency situation within the code. An emergency situation, as implied by this section, could be defined as follows, "[t]reatment. . . necessary to prevent bodily harm to the patient or others or to prevent imminent deterioration of the respondent's physical or mental condition." N.D. CENT. CODE § 25-03.1-24 (Supp. 1979).

Section 25-03.1-41 allows the physician or clinical psychologist to interfere with patient's rights (including the right to be free from unnecessary medication) on the basis of the treating professional's judgment. Section 25-03.1-41 does not limit the physician or clinical psychologist to emergency situations as does section 25-03.1-24. N.D. CENT. CODE § 25-03.1-24 and § 25-03.1-41 (Supp. 1979).

63. *See supra* notes 16-22.

64. *See supra* note 60.