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INDIGENTS AND THE DENIAL OF DUE PROCESS AT INVOLUNTARY TREATMENT HEARINGS: THE NEED FOR INDEPENDENT PSYCHIATRIC ASSISTANCE

INTRODUCTION

At first glance, the due process rights guaranteed in New York State to an indigent involuntarily committed mentally ill patient appear to be sufficient. For example, the New York Court of Appeals has attempted to guarantee due process protection to indigent patients as evidenced by the 1986 decision in *Rivers v. Katz*,¹ which recognized the right of involuntarily committed mentally ill patients to refuse antipsychotic medication.² The *Rivers* case established the right of involuntarily committed patients to obtain a hearing to contest unwanted treatment.³ Thus, a patient is susceptible to involuntary treatment programs through the state's police powers only when that patient is adjudicated dangerous or, according to *Rivers*, through the state's *parens patriae* powers when the patient is incapable of making a reasoned decision regarding treatment.⁴ The determination of

1. 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986).

2. *Id.* at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78 ("[E]very individual of adult years and sound mind has a right to determine what shall be done with his own body.") (quoting *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914)). In *Rivers*, the New York Court of Appeals held that an involuntarily committed mentally ill patient has a liberty interest in determining the course of his or her own medical treatment and, therefore, has a right to refuse treatment. *Id.* at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78. However, the court recognized that this right is not absolute and may have to yield to compelling state interests. *Id.* at 495, 495 N.E.2d at 343, 504 N.Y.S.2d at 80. The state may forcibly medicate when the patient presents a danger to himself or herself or to others, or when he or she engages in potentially destructive behavior. *Id.* In these situations, the state may act according to its police powers. *Id.*

3. *Id.* at 497, 495 N.E.2d at 343-44, 504 N.Y.S.2d at 81.

4. *Id.* at 495-96, 495 N.E.2d at 343, 504 N.Y.S.2d at 80.

whether a patient has the capacity to make a reasoned decision regarding treatment is made at a "*Rivers* hearing."⁵ Additionally, an indigent "civil committee"⁶ who is in danger of being forcibly medicated, is provided with legal assistance⁷ in accordance with due process rights enumerated in the New York State Constitution.⁸ Finally, section 35 of the Judiciary Law⁹ affords the court discretion to appoint no more than two neutral psychiatrists to aid the court in making its determination.¹⁰

At face value, the aggregate of statutory protections, common law guarantees, and state constitutional rights appear to adequately safeguard the indigent civil committee's liberty interests.

5. *Id.* at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

6. Throughout this Comment the term "civil committee" refers to a patient who is involuntarily hospitalized in a psychiatric center.

7. See N.Y. MENTAL HYG. LAW § 9.07 (McKinney 1988). Section 9.07 provides:

(a) Immediately upon the admission of any patient to a hospital or upon his conversion to a different status, the director shall inform the patient in writing of his status, including the section of this chapter under which he is hospitalized, and of his rights under this article, including the availability of the mental hygiene legal service. At any time thereafter, upon the request of the patient or of anyone on the patient's behalf, the patient shall be permitted to communicate with the mental hygiene legal service and avail himself of the facilities thereof.

(b) The director of every hospital shall post copies of a notice, in a form and manner to be determined by the commissioner, at places throughout the hospital where such notice shall be conspicuous and visible to all patients, stating the following:

1. the availability of the mental hygiene legal service.
2. a general statement of the rights of patients under the various admission or retention provisions of this article.
3. the right of the patient to communicate with the director, the board of visitors, the commissioner of mental health, and the mental hygiene legal service.

Id.

8. N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law.").

9. N.Y. JUD. LAW § 35 (McKinney 1983 & Supp. 1991).

10. See Act of July 11, 1985, ch. 315, § 1, 1985 N.Y. Laws 889, 889 (McKinney) (codified as amended at N.Y. JUD. LAW § 34(4) (McKinney Supp. 1991)). For a discussion regarding court appointed neutral psychiatrists provided for in Section 35, see *infra* notes 45-52 and accompanying text.

A closer look, however, reveals the absence of the most important element of protection against involuntary treatment. The indigent involuntary patient is unable to construct an adequate defense to allegations of incompetency or dangerousness¹¹ because the patient is denied the opportunity to retain an independent psychiatrist at the state's expense.¹² As will be discussed, denial of this necessary element invariably leads to a gross disadvantage and a violation of the patient's due process rights.

Part I of this Comment will illuminate the inadequacies of the common law and statutory provisions that have been the only source of protection for indigent civil committees to date. Specifically, Part I section A will discuss how the rights established in *Rivers v. Katz*¹³ are constructively denied. Part I section B will examine the inadequacy of court-appointed neutral psychiatrists. Part I section C will propose that due to the immense impact of medical testimony upon the disposition of involuntary treatment hearings, access to an independent psychiatrist is indispensable in the construction of an indigent civil committee's defense. Part II of this Comment will present a survey of the judicial activism that has taken place in the criminal arena by recognizing the indispensability of medical experts in creating and presenting an insanity defense for the indigent criminal defendant. This Comment will conclude with an argument supporting the extension of such judicial activism into forcible medication hearings due to the quasi-criminal nature of such proceedings.¹⁴ An analogy will be drawn between the special position and needs of

11. The constitutionality of court orders providing for forcible medication in psychiatric centers for short-term dangerousness rather than incompetency has not been clearly decided in New York and is beyond the scope of this Comment.

12. See N.Y. JUD. LAW § 35(4) (McKinney Supp. 1991); *infra* notes 45-77 and accompanying text.

13. 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986).

14. This Comment will discuss and demonstrate that due process concerns in both the criminal judicial proceeding and the civil involuntary treatment hearing are similar in nature, as both the patient and the criminal are afforded many of the same procedural safeguards. See *infra* notes 205-60 and accompanying text.

the indigent patient in danger of forced medical treatment and that of the criminal defendant who relies on an insanity defense.

I. THE INADEQUACY OF NEW YORK'S COMMON LAW AND STATUTORY PROTECTIONS IN SAFEGUARDING DUE PROCESS RIGHTS GUARANTEED BY THE NEW YORK STATE CONSTITUTION

A. *The Constructive Denial of Rights Established by Rivers v. Katz*

In *Rivers v. Katz*,¹⁵ the New York Court of Appeals reaffirmed the common law right, recognized in *In re Storar*,¹⁶ of an individual to refuse medical treatment, whether such treatment is

15. 67 N.Y.2d at 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986).

16. 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981). In *In re Storar*, the New York Court of Appeals addressed the issue of whether two incompetent patients, an eighty-three year old man being maintained by a respirator and a fifty-two year old profoundly retarded man with terminal cancer, had a right to refuse medical treatment that was being used to prolong their lives. *Id.* at 369, 420 N.E.2d at 66, 438 N.Y.S.2d at 268. The court unequivocally stated that a competent adult has a common law right in New York to refuse medical treatment "although the treatment may be beneficial or even necessary to preserve the patient's life." *Id.* at 377, 420 N.E.2d at 71, 438 N.Y.S.2d at 273. However, the court noted that the State of New York has a "legitimate interest in protecting the lives of its citizens" and, therefore, the common law right should yield to the state's interests in certain circumstances. *Id.* In addition, the court adopted a "clear and convincing" standard of proof when it is alleged that a person, subsequently rendered incompetent, would have wanted medical treatment terminated in the event that there was no hope of recovery. *Id.* at 379, 420 N.E.2d at 72, 438 N.Y.S.2d at 274. Applying this standard the court concluded that there was "clear and convincing" evidence that the eighty-three year old patient made the decision to terminate treatment before he became incompetent, but that the state could require treatment for the fifty-two year old profoundly retarded patient because he had always been incompetent and, therefore, unable to make reasoned decisions regarding medical treatment. *Id.* at 378-82, 420 N.E.2d at 71-73, 438 N.Y.S.2d at 274-76.

simply beneficial or absolutely necessary to preserve life.¹⁷ The court proceeded to extend this right to the involuntarily committed mentally ill patient as “coextensive with the patient’s liberty interest protected by the due process clause of our State Constitution.”¹⁸ The *Rivers* court held that involuntary commitment, without more, is not a sufficient basis to assume the lack of mental capacity necessary to make a reasoned decision regarding medical treatment.¹⁹ Thus, the court established the common law right of an involuntarily committed mentally ill patient to obtain a hearing to determine mental capacity prior to involuntary medical treatment.²⁰ Although the *Rivers* court was genuinely concerned with the civil committee’s “autonomy and freedom from unwanted interference,”²¹ it recognized that the right to refuse medication may have to yield to compelling state interests.²² Accordingly, the state may, via its police powers,²³ authorize the administration of medication over the patient’s objection, when the “patient presents a danger to himself or to other members of society or engages in dangerous or potentially destructive conduct within the institution”²⁴ In the event the state’s police power is exercised, the state may forcibly medicate the patient as long as the emergency situation persists.²⁵ Furthermore, the state may medicate over a patient’s objection pursuant to its *parens*

17. *Rivers*, 67 N.Y.2d at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78. The court of appeals recognized that our system of government cherishes free choice and individual autonomy. *Id.* (citing *In re Storar*, 52 N.Y.2d at 377, 420 N.E.2d at 71, 438 N.Y.S.2d at 273).

18. *Id.*; see also N.Y. CONST. art. I, § 6.

19. *Rivers*, 67 N.Y.2d at 493-94, 495 N.E.2d at 341-42, 504 N.Y.S.2d at 79.

20. *Id.* at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

21. *Id.* at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78.

22. *Id.* at 495, 495 N.E.2d at 343, 504 N.Y.S.2d at 80.

23. See generally 8 THE GUIDE TO AMERICAN LAW 219 (West 1984). Police power has been defined as “[t]he authority conferred upon the states by the Tenth Amendment to the Constitution and which the states delegate to their political subdivisions to enact measures to preserve and protect the safety, health, and welfare of the community.” *Id.*

24. *Rivers*, 67 N.Y.2d at 495, 495 N.E.2d at 343, 504 N.Y.S.2d at 80.

25. *Id.* at 496, 495 N.E.2d at 343, 504 N.Y.S.2d at 80.

patriae powers²⁶ if it is determined at the *Rivers* hearing, by clear and convincing evidence, that a patient lacks the capacity to make a reasoned decision regarding the proposed treatment.²⁷ Still, the court strongly stated in dictum that the patient's decision must be respected in order "to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires."²⁸ Clearly,

26. In *Rivers*, the court noted that since there was no claim that the involuntarily committed patients were a danger to themselves or to others, the state's police power would not justify forced medication. 67 N.Y.2d at 496, 495 N.E.2d at 343, 504 N.Y.S.2d at 80. Rather, the court determined that the respondents were relying upon the state's *parens patriae* interest as justification for administration of medication over the patient's objections. *Id.* The court stated that invocation of the state's *parens patriae* power was appropriate when "the individual himself [is] incapable of making a competent decision concerning treatment on his own." *Id.* (quoting *Rogers v. Okin*, 634 F.2d 650, 657 (1st Cir. 1980)). Consequently, the court held that the decision whether the patient has the capacity to make a competent decision regarding his treatment should be made at a de novo hearing. *Id.* at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 81. *See also* *Boggs v. New York City Health & Hosp. Corp.*, 132 A.D.2d 340, 342, 523 N.Y.S.2d 71, 72 (1st Dep't 1987) ("The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable to care for themselves . . ."); *see generally* BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) ("*Parens Patriae* originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants.").

27. *Rivers*, 67 N.Y.2d at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 81. *See, e.g., In re McConnell*, 147 A.D.2d 881, 882-83, 538 N.Y.S.2d 101, 102-03 (3d Dep't 1989) (pursuant to the state's *parens patriae* interest, forcible medication was justified).

28. *Rivers*, 67 N.Y.2d at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78. Moreover, in the event a determination is made that the patient lacks the capacity to make a reasoned decision regarding his or her treatment, the concern for the patient's autonomy does not subside. Rather, "the court must determine whether the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances . . ." *Id.* at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 81. *See also* *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 257 (1891) (plaintiff could not be compelled over her objection to submit to a pre-trial surgical examination); *Davis v. Hubbard*, 506 F. Supp. 915, 929 (N.D. Ohio 1980) (right to refuse medical treatment is inherent in the concept of "liberty" guaranteed by the due process clause of the fourteenth amendment); *Erickson v. Dilgard*, 44 Misc. 2d 27, 28, 252 N.Y.S.2d 705, 706 (Sup. Ct. Nassau

the *Rivers* court intended to give full effect to a patient's dignity and liberty interests.²⁹

In exercising the right to a *Rivers* hearing, expert medical testimony is crucial in three ways. First, such testimony will greatly impact upon whether one will be retained involuntarily.³⁰ Second, expert medical testimony often directly addresses the issue of a patient's short-term dangerousness or capability of making a reasoned decision regarding treatment.³¹ Finally, medical testimony will be used to determine whether a forced treatment program is narrowly tailored to give substantive effect to a patient's liberty interest.³²

Although the New York Court of Appeals has recognized that there is a liberty interest at stake, as it required a hearing prior to involuntary treatment,³³ New York courts have been ambivalent with regard to procedural protections afforded to the civil committee.³⁴ Although an indigent patient is provided with an ap-

County 1962) ("[I]t is the individual who is the subject of a medical decision who has the final say and that this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires.").

29. See *Rivers*, 67 N.Y.2d at 498, 495 N.E.2d at 344, 504 N.Y.S.2d at 81 (due process requires a balance of the individual's liberty interest against the state's asserted compelling needs).

30. See Hiday, *Judicial Decisions in Civil Commitment: Facts, Attitudes, and Psychiatric Recommendations*, 17 LAW & SOC'Y REV. 517, 526-27 (1983) (Studies showed that "both the 'facts' and psychiatric opinion significantly influence court decisions in civil commitment cases . . ."); *infra* notes 78-95 and accompanying text.

31. See Hiday, *Reformed Commitment Procedures: An Empirical Study in the Courtroom*, 11 LAW & SOC'Y REV. 651, 655 (1977) [hereinafter *Reformed Commitment*] ("Judges and lawyers tend to be unaware of the weak basis of psychiatric prediction of dangerousness, and hence frequently defer to such 'expert' opinion."); *infra* notes 78-95 and accompanying text.

32. *Rivers*, 67 N.Y.2d at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

33. *Id.*

34. See *Ughetto v. Acrish*, 130 A.D.2d 12, 24, 518 N.Y.S.2d 398, 405 (2d Dep't 1987) (allowing counsel to observe prehearing psychiatric examinations); *Lesser v. Carmela*, 146 Misc. 2d 1072, 1075, 554 N.Y.S.2d 953, 955 (Sup. Ct. Queens County 1989) (requiring that an involuntarily committed patient have the right to be represented at the initial review of request for administration of antipsychotic medication).

pointed attorney,³⁵ the patient is not afforded the opportunity to meet with a medical expert of his choice.³⁶ Functions of an independent psychiatrist may include gathering facts, examining the patient, assisting the appointed attorney in preparing a defense by analyzing information, drawing conclusions, and scrutinizing conclusions and opinions formed by the hospital psychiatrist expected to testify on behalf of the state.³⁷ Without an independent psychiatrist, the court's reliance on any medical testimony is based on interpretations and conclusions of the hospital's psychiatrist only.³⁸ As a result, the patient's due process rights are violated and the hearing provided to protect these rights is transformed into a mere exercise of formality.³⁹ *Rivers'* promise

However, recent New York case law suggests a limitation of due process protection during a civil commitment hearing. *See, e.g., Savastano v. Nurnberg*, 152 A.D.2d 290, 299, 548 N.Y.S.2d 555, 560 (2d Dep't 1989) ("[N]either under the Federal nor State Constitution is there any basis for requiring a judicial hearing prior to the transfer of patients who object to their transfers from municipal facilities to State psychiatric facilities."), *aff'd*, 77 N.Y.2d 300, 569 N.E.2d 421, 567 N.Y.S.2d 618 (1990); *Ughetto*, 130 A.D.2d at 19, 518 N.Y.S.2d at 402 ("It would, however, be equally inflexible to suggest that since confinement to a State mental hospital is a form of imprisonment, all protections afforded by the bill of rights to a criminal defendant must . . . be likewise afforded to a person thought to be dangerously mentally ill.").

35. *See* N.Y. MENTAL HYG. LAW § 9.07 (McKinney 1988); *supra* note 7.

36. *See* N.Y. JUD. LAW § 35(4) (McKinney Supp. 1991). Section 35(4) provides for the appointment of no more than two psychiatrists, psychologists or physicians to examine the patient and testify at the hearing. *Id.* For a detailed discussion regarding section 35 of the Judiciary Law see *infra* notes 45-52 and accompanying text.

37. *See Ake v. Oklahoma*, 470 U.S. 68, 80 (1985) ("[T]hey analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition"); Farrell, *The Right of an Indigent Civil Commitment Defendant to Psychiatric Assistance of His Own Choice at State Expense*, 11 IDAHO L. REV. 141, 145 (1975) [hereinafter Farrell] ("The functions such an expert could be expected to perform might include examination of the defendant, working with his counsel, and testifying on his behalf at the commitment hearing.").

38. For a discussion concerning the immense impact of medical testimony, see *infra* notes 78-95 and accompanying text.

39. *See Anonymous No. 1 v. La Burt*, 17 N.Y.2d 738, 217 N.E.2d 31, 270 N.Y.S.2d 206, *cert. denied*, 385 U.S. 936 (1966). In *La Burt*, the New

of due process protection, that is, to give full effect to a patient's dignity,⁴⁰ is thus in danger of becoming an empty one.

While this deprivation of constitutional rights is unfair and appalling in a civil commitment hearing,⁴¹ this writer believes that the effect of this deprivation is especially egregious when the hearing is to determine whether an involuntary patient should be forcibly medicated. This is so because when one is subjected to forcible medication, his body is violated in a most intrusive and personal way.⁴² Beyond this, common side effects produced by

York Court of Appeals held that an inmate of a state hospital who challenges a finding of incompetence, on the return of a writ of habeas corpus, may request the court to appoint an independent psychiatrist in a civil commitment hearing. *Id.* at 740, 217 N.E.2d at 32, 270 N.Y.S.2d at 207. Other jurisdictions have recognized the absolute necessity of an independent psychiatrist during a civil commitment hearing. *See, e.g., In re Gannon*, 123 N.J.Super. 104, 106, 301 A.2d 493, 494 (Somerset County Ct. 1973) ("Such a hearing is of little value, if not actually a sham, when the only testimony is that of the certifying psychiatrist.").

40. In *Rivers*, the court stated that the right to refuse medical treatment is protected by the due process clause of the New York State Constitution and "extends equally to mentally ill persons who are not to be treated as persons of lesser status or dignity because of their illness." 67 N.Y.2d at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78. In addition, the court reasoned that "[i]f the law recognizes the right of an individual to make decisions about . . . life out of respect for the dignity and autonomy of the individual, that interest is no less significant when the individual is mentally or physically ill." *Id.* (ellipses in original) (quoting *In re K.K.B.*, 609 P.2d 747, 752 (Okla. 1980)).

41. *See Savastano v. Nurnberg*, 152 A.D.2d 290, 299, 548 N.Y.S.2d 555, 560 (2d Dep't 1989) ("It is beyond cavil that involuntarily-admitted mentally-ill patients have liberty interests subject to Federal and State constitutional requirements of due process, which are not abandoned at the facility door."), *aff'd*, 77 N.Y.2d 300, 569 N.E.2d 421, 567 N.Y.S.2d 618 (1990) (citing, *inter alia*, *Rivers v. Katz*, 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986)); *Ughetto v. Acrish*, 130 A.D.2d 12, 18, 518 N.Y.S.2d 398, 402 (2d Dep't 1987) (procedures must conform to the dictates of due process).

42. The process of forcible medication entails another person administering a foreign, mind altering substance into the patient's body. *See Mills v. Rogers*, 457 U.S. 291, 293 n.1 (1982) (antipsychotic drugs are "mind altering"). The involuntarily committed patient, therefore, must not only withstand confinement, but must be subjected to a bodily infringement that will devour whatever dignity remains. Consequently, any deprivation during a *Rivers* hearing is unquestionably egregious. *See Union Pac. Ry. v. Botsford*,

the most frequently used drugs in treating mental illness can be heinous, as well as irreversible.⁴³ The failure to sufficiently protect liberty interests extended to the indigent civil committee by *Rivers* is a potential license for the state to subject a patient to possibly unneeded, and certainly unwanted, treatment that may result in irreversible side effects.⁴⁴ Therefore, the due process

141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by common law, than the right to 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.").

43. The most serious effect of antipsychotic medications is tardive dyskinesia, a disabling disorder that is often irreversible. *See* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 2104, 2105 (11th ed. 1987) [hereinafter HARRISON'S PRINCIPLES] ("Usually the symptoms of tardive dyskinesia appear late and consist of involuntary repetitive movements of the lips, tongue (tongue thrusting, lip smacking, etc.) and not infrequently, of the extremities and trunk."); *see also* Gutheil & Appelbaum, "Mind Control," "Synthetic Sanity," "Artificial Competence," and *Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 HOFSTRA L. REV. 77, 108 (1983) ("A long term side effect that is often referred to in court decisions on the right to refuse treatment is tardive dyskinesia."); Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 MIAMI L. REV. 1, 71 (1989) ("Tardive dyskinesia [is] a persistent neurological syndrome affecting a substantial percentage of patients subjected to long-term antipsychotic drug treatment . . ."). Although the exact percentage of patients who develop tardive dyskinesia is unclear, reports disclose that the percentage of patients who suffer from the condition can be as high as 60% and as low as 10%. *See* AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE ON LATE NEUROLOGICAL EFFECTS OF ANTIPSYCHOTIC DRUGS, TARDIVE DYSKINESIA 43-44 (1979); SCHATZBERG & COLE, *MANUAL OF CLINICAL PSYCHOPHARMACOLOGY* 99 (1986).

44. Common side effects which accompany the use of antipsychotic medications include: muscle spasms of the eyes, arms and face; drowsiness and depression; weight-gain; lethargy; postural hypotension; skin pigmentation and hypersensitivity to sunlight; and male impotence. The most bothersome side effects are muscle dystonic reactions (a Parkinson's Syndrome-like reaction), and akathisia (restlessness and agitation). *See* Plotkin, *Limiting the Therapeutic Orgy: Mental Patient's Right to Refuse Treatment*, 72 Nw. U. L. REV. 461, 474-75 (1977); *see also* HARRISON'S PRINCIPLES, *supra* note 43, at 2104 (number of patients that receive antipsychotic drugs for their mental disorders is a significant majority of patients with serious mental illness); Note, *The Nightmare of Forcible Medication: the New York Court of Appeals Protects the Rights of the Mentally Ill Under the State Constitution: Rivers v.*

considerations expressed in *Rivers* are constructively unenforced.

B. Neutral Court Appointees Provided for in Section 35 of the Judiciary Law Do Not Shield Due Process Rights

One may argue that the solution to such vulnerability on the part of indigent involuntarily committed mentally ill patients exists in Section 35 of the Judiciary Law.⁴⁵ This statute affords the court discretion to appoint no more than two neutral psychiatrists "to examine and testify at the [*Rivers*] hearing upon the condition of such person."⁴⁶ Here, too, the statutory attempt to safeguard liberty interests established in *Rivers* for civil committees in dan-

Katz, 53 BROOKLYN L. REV. 885, 886 (1987) (antipsychotic drugs cause adverse side effects and are often abused in state mental institutions).

45. N.Y. JUD. LAW § 35 (McKinney 1983 & Supp. 1991). However, in *Goetz v. Crosson*, 769 F. Supp 132 (S.D.N.Y. 1991), the Southern District of New York refused to appoint an independent psychiatrist to assist an involuntarily committed patient and his counsel at a retention hearing. *Id.* at 137. The court reasoned that section 35(4) affords an involuntarily committed patient "all the protections to which they are entitled." *Id.* Although the court was cognizant of the fact that judges rely heavily upon the testimony of a section 35 psychiatrist because "he usually is dealing with an unbiased doctor who has no stake in the ultimate decision to release or retain the patient," the court concluded that due process does not demand a "patient psychiatrist" during retention hearings. *Id.* at 136-37.

46. N.Y. JUD. LAW § 35(4) (McKinney Supp. 1991). Section 35(4) provides:

In any proceeding described in paragraph (a) of subdivision one of this section, when a person is alleged to be mentally ill, mentally defective or a narcotic addict, the court which ordered the hearing may appoint no more than two psychiatrists, certified psychologists or physicians to examine and testify at the hearing upon the condition of such person. A psychiatrist, psychologist or physician so appointed shall, upon completion of his services, receive reimbursement for expenses reasonably incurred and reasonable compensation for such services, to be fixed by the court. Such compensation shall not exceed two hundred dollars if one psychiatrist, psychologist or physician is appointed, or an aggregate sum of three hundred dollars if two psychiatrists, psychologists or physicians are appointed, except that in extraordinary circumstances the court may provide for compensation in excess of the foregoing limits.

Id. § 35(4).

ger of being forcibly medicated is insufficient.⁴⁷ The first reason for its failure to meet the *Rivers* standard is that the court has *discretion* to appoint a section 35 neutral psychiatrist; the court is not required to do so.⁴⁸ Secondly, since the section 35 psychiatrist is a neutral witness, the state facility may also call the doctor as a witness to substantiate their claims.⁴⁹ Consequently, if the section 35 psychiatrist reaches conclusions adverse to the patient's case, the patient is once again without any means to present a meaningful defense.⁵⁰ Most importantly, the appointed psychiatrist, regardless of his opinion or interpretation of the underlying facts, is not appointed to aid the defendant in preparation of his case or defense.⁵¹ Rather, the psychiatrist is a completely neutral party, and therefore, will not aid the patient's attorney by interpreting conclusions made by the state facility's psychiatrist.⁵²

In 1969, the District of Columbia Circuit Court of Appeals interpreted a request for an independent psychiatrist as a plea to "shop around" for a medical expert who would give the patient a

47. In *Rivers*, the court unequivocally reaffirmed the common-law right of a competent adult to refuse medical treatment and stated that "[t]his common-law right is coextensive with the patient's *liberty interest* protected by the due process clause of our State Constitution." 67 N.Y.2d at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78 (emphasis added).

48. See N.Y. JUD. LAW § 35(4) (McKinney Supp. 1991); *supra* note 46; see also *Goetz v. Crosson*, 769 F. Supp 132, 135 (S.D.N.Y. 1991) (presiding judge has discretion to make such appointment).

49. See Wexler, *Mental Health Law and the Movement Toward Voluntary Treatment*, 62 CALIF. L. REV. 671, 745 (1974) [hereinafter Wexler]. Wexler found that cross-examination of neutral expert witnesses is often meaningless and stated "the psychiatrist might report only those portions of the prospective patient's comments and actions which would support an inference that the individual was disturbed, even though 99 percent of what he or she said and did would be entirely consistent with what we regard as normal behavior." *Id.*

50. It is widely recognized that psychiatric opinion will vary in the area of diagnosis. However, "[t]he use of court-appointed experts who jointly examine the mentally ill person may obscure the existence of these differences, if diagnosis is up at all, since professional give-and-take may result in presenting the court with a compromise diagnosis." Farrell, *supra* note 37, at 182-83.

51. See N.Y. JUD. LAW § 35(4) (McKinney Supp. 1991); *supra* note 46.

52. See *id.*

favorable diagnosis during a civil commitment hearing.⁵³ Further, the court reasoned that a physician expert witness is not partisan to the state's cause simply because he is paid by the state to examine a patient and testify as to his diagnosis.⁵⁴ Rather, the court stated that the roles of an expert witness and that of an appointed attorney are similar because both exercise independent judgment even though they are paid by the state.⁵⁵ The court concluded that an expert witness is properly involved in judicial proceedings as a neutral assistant to the court.⁵⁶ Finally, the court cautioned against transforming treatment hearings into a battle of the experts, each owing "partisan allegiance to some litigant."⁵⁷

This argument is seriously flawed for four reasons. First, and most importantly, although an appointed counsel is paid by the state, he is not hired to play a neutral role, as is the appointed expert physician witness.⁵⁸ The appointed attorney's job is not to render neutral opinions based on underlying facts. Rather, the function of the appointed attorney is to represent his client zeal-

53. See *Proctor v. Harris*, 413 F.2d 383 (D.C. Cir. 1969). In *Proctor*, the court did not recognize the relief sought as an attempt to protect an indigent civil committee's due process rights and freedom from unwanted bodily invasion, but only as a quest for an expert to "guide[] the lawyer in how to conduct cross-examination of other psychiatrists . . ." *Id.* at 385.

54. *Id.* at 386 (quoting *McGarty v. O'Brien*, 188 F.2d 151, 155 (1st Cir. 1951)).

55. *Id.*

56. *Id.* at 387 (quoting *De Marcos v. Overholser*, 137 F.2d 698, 700 (D.C. Cir. 1943)).

57. *Id.*

58. See *Polk v. Dodson*, 454 U.S. 312 (1981). In *Polk*, the Supreme Court rejected the respondent's claim that a public defender acts under color of state law when exercising his or her independent professional judgment in a criminal proceeding. *Id.* at 319-25. Rather, the Court stated that "[o]nce a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program." *Id.* at 318 (quoting ABA Standards for Criminal Justice, Standard 4-3.9 (2d ed. 1980)). The majority concluded by finding that "[a]lthough the employment relationship is certainly a relevant factor, we find it insufficient to establish that a public defender acts under color of state law within the meaning of §1983." *Id.* at 321.

ously, defend his client, and protect his client's rights to the best of his ability.⁵⁹ Therefore, an appointed counsel's role cannot be compared to that of a court appointed medical expert who is simply another arm of the court. The second flaw in the *Proctor* argument is that a wealthy client *can* retain an expert to aid in the preparation of his defense.⁶⁰ Therefore, the *Proctor* court's theory of the "proper" neutral role of an independent expert⁶¹ is an actuality only for the *indigent* civil committee.⁶²

The *Proctor* decision failed to address the inequities resulting from economic disparities between civil committees. The problem was simply dismissed in dictum by stating that poor committees are not entitled to every advantage of wealthy committees.⁶³ Therefore, the only people who must accept the court's decision are those who are too poor to circumvent it. Wealthy patients in danger of forced medication are able to prepare a meaningful defense against serious bodily invasion by presenting experts who

59. In *Polk*, the Supreme Court reasoned that:

First, a public defender is not amenable to administration direction in the same sense as other employees of the State . . . State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, a public defender works under the canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.

Id. (citation omitted).

60. See Farrell, *supra* note 37, at 188. Farrell noted that the *Proctor* court did acknowledge that a defendant with financial resources would be able to find an expert willing to give favorable testimony, "but rejected the notion that this constituted a deprivation of equal protection." *Id.*

61. The *Proctor* court embraced the observations articulated by the court in *McGarty v. O'Brien*, 188 F.2d 151, 155 (1st Cir. 1951), that both the assigned counsel and appointed physician are "given a purely professional job to do -- counsel to represent the defendant to the best of his ability, the designated psychiatrists impartially to examine into and report upon the mental condition of the accused." *Proctor*, 413 F.2d at 386.

62. See Farrell, *supra* note 37, at 188-89.

63. *Proctor*, 413 F.2d at 385-86. In rejecting the appellant's plea for an independent psychiatric examination, the court stated, "[n]either sound administration, basic fairness, nor constitutional standards require such a course." *Id.* at 386.

will recognize weak arguments as well as unsubstantiated interpretations and opinions in the state psychiatrist's diagnosis and supportive reasoning.⁶⁴ The indigent patient, on the other hand, is compelled to concede major medical issues solely because his lawyer is not educated in medicine and psychiatry.⁶⁵ Although courts cannot completely repair economic disparities between involuntarily committed patients, dismissal of gross discrimination based upon economic class cannot be the answer to this problem. The *Proctor* decision, therefore, rendered indigent patients' due process rights ineffective. Such blatant refusal to try to remedy the denial of due process rights flies directly in the face of *Rivers*.⁶⁶

The third problem with *Proctor* lies in the misconception that the request for an independent physician expert is an attempt to create a battle of the experts, each owing allegiance to either side.⁶⁷ The ultimate goal of aid from an expert witness is quite

64. See *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) ("By organizing a defendant's mental history, examination results and behavior . . . the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them.").

65. In his concurring opinion in *Proctor*, Judge Bazelon wrote:

This court has often pointed out the difficulty a lawyer untutored in the arcane mysteries of psychiatry may encounter when appointed to represent an indigent who is mentally disturbed. If the attorney is cut off from all sources of expert assistance on these matters, the patient may be effectively denied his right to an adversarial determination of his mental health and likely dangerousness.

Proctor, 413 F.2d at 389 (Bazelon, J., concurring) (footnote omitted). See also Farrell, *supra* note 37, at 186 (expert assistance may enable counsel to avoid commitment and find alternative solutions for the indigent civil committee); Wexler, *supra* note 49, at 745 ("[M]any attorneys accept psychiatric judgments at face value, possibly because they feel incapable of challenging such judgments.").

66. See *supra* notes 15-29 and accompanying text.

67. But see *Goetz v. Crosson*, 769 F. Supp. 132 (S.D.N.Y. 1991). The *Goetz* court rejected a request to appoint an independent psychiatrist to assist a patient and his counsel during a retention hearing, and stated that "[i]f, for example, the state's expert and the patient's expert proffer inconsistent opinions, the judge will likely seek a third expert, at state expense, to resolve the dispute." *Id.* at 136. However, it would be at least paradoxical to refrain from appointing an independent expert simply because he may actually believe

the opposite. It is to provide equal protection of the laws to all civil committees by affording them the opportunity to defend themselves against allegations of incompetence or dangerousness.⁶⁸ The fourth problem with the *Proctor* rationale is that if an indigent involuntary patient is provided a hearing to determine either his competency to make a reasoned decision regarding treatment, or whether he is dangerous to himself or to others, there is no reasonable basis for preventing the patient from creating and presenting an "unspirited defense."⁶⁹

Thus far, the tools provided to an indigent patient to build a defense have not yielded fairness or impartiality. The indigent patient facing a *Rivers* hearing without the aid of an independent psychiatrist, must rely solely upon an appointed attorney who, although educated in the law, may not be equipped to effectively present a defense or conduct an effective cross-examination of a psychiatrist simply because he does not possess a wealth of

that antipsychotic medication is not a necessary part of a patient's treatment plan. The court should not refrain from assisting a patient in the construction of an adequate defense simply because the patient's rights may actually be protected by such assistance. The opinion of multiple experts can only aid the fact-finder in making a determination based upon all possible interpretations of underlying data. *See Farrell, supra* note 37, at 185 (Appointment of an independent psychiatrist insures reliability because the judge will be presented with various opinions which may, in effect, enable him to "reassume his role as the real decision-maker."). In addition, the expert may not, contrary to the *Goetz* court's belief, "only testify if the patient likes what he is going to say." *Goetz*, 769 F. Supp. at 137. Rather, whether or not the independent expert reaches a favorable diagnosis, the testimony can aid the patient's attorney in interpreting the diagnosis of the state's expert witness. *See infra* notes 174-78 and accompanying text.

68. *See, Farrell, supra* note 37, at 188. Farrell further noted that: Rather than being a mere luxury, an expert of the defendant's choice may have the ability to profoundly change the "kind of trial a man gets," from a non-adversary proceeding in which the decisive expert opinions go unchallenged to an adversary proceeding in which all possible challenges to the expert's testimony are made and in which all information favorable to the defendant is presented. An allegedly mentally ill person who does have financial resources now has the ability to effect this qualitative change in a civil commitment hearing.

Id.

69. *Id.* at 171.

knowledge about psychiatry.⁷⁰ The result of this disadvantage in the courtroom is almost predetermined.⁷¹ Appointed attorneys cannot be expected to present an effective defense with respect to expert medical testimony without the opportunity to consult an independent psychiatrist (as opposed to a section 35 neutral psychiatrist) to aid in the interpretation of the state's medical testimony. Without such help, an attorney cannot possibly represent his client zealously.⁷² "If the attorney is cut off from all sources of expert assistance on these matters, the patient may be effectively denied his right to an adversarial determination of his mental health and likely dangerousness."⁷³ Other states have been conscious of this problem and have taken the initiative to

70. See *Ake v. Oklahoma*, 470 U.S. 68 (1985). In *Ake*, the Supreme Court addressed the issue of whether federal due process requires the appointment of a psychiatric examination when an indigent's sanity is seriously in question. *Id.* at 70. The Court stated that a psychiatrist "know[s] the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." *Id.* at 80. In addition, the Court noted that "[w]hen jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial and a virtual necessity if an insanity plea is to have any chance of success." *Id.* at 81 (quoting Gardiner, *The Myth of the Impartial Psychiatric Expert -- Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 LAW & PSYCHOLOGY REV. 99, 113-14 (1976)). Concluding that states rely upon psychiatrists, the Court stated that "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witness[], the risk of an inaccurate resolution of sanity issues is extremely high." *Id.* at 82. Lastly, the Court reasoned that the appointment of a psychiatrist is mandated by the Constitution when the defendant's sanity is in issue because "[i]t is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success." *Id.* at 83.

71. See Hiday, *Judicial Decisions in Civil Commitment: Facts, Attitudes, and Psychiatric Recommendations*, 17 LAW & SOC'Y REV. 517, 526-29 (1983).

72. See Farrell, *supra* note 37, at 185-87.

73. *Proctor*, 413 F.2d at 389 (Bazelon, J., concurring). Judge Bazelon further stated that "if an indigent patient needs and is entitled to a lawyer, far more may he also need the assistance of a psychiatrist in the preparation of his case." *Id.*

provide for such an effective defense.⁷⁴ The final problem with section 35 court appointed medical experts is the scarce number of psychiatrists willing to serve on the section 35 panel.⁷⁵ Therefore, *if* the patient motions for a section 35 psychiatrist and *if* the court grants the motion, the physicians willing to participate will be few and far between. One reason physicians are hesitant to serve as section 35 medical experts is that two hundred dollars⁷⁶ is a *de minimis* amount of compensation for a doctor to examine a patient, prepare a report, and testify in court. This low compensation provides little incentive for doctors to offer their

74. See, e.g., WASH. REV. CODE ANN. § 71.05.370 (West Supp. 1991). Section 71.05.370 provides in pertinent part:

Insofar as danger to the individual or others is not created, each person involuntarily detained, treated in a less restrictive alternative course of treatment or committed for treatment and evaluation pursuant to this chapter shall have, in addition to other rights not specifically withheld by law, the following rights, a list of which shall be prominently posted in all facilities, institutions, and hospitals providing such services:

(7) Not to consent to the performance of shock treatment, the administration of antipsychotic medications, or surgery, except emergency life-saving surgery, and not to have shock treatment, antipsychotic medications, or nonemergency surgery in such circumstance unless ordered by a court of competent jurisdiction pursuant to the following standards and procedures . . .

(C) The person shall be present at any hearing on a request to administer shock treatment or antipsychotic medications filed pursuant to this subsection. *The person has the right:* (i) To be represented by an attorney; (ii) to present evidence; (iii) to cross-examine witnesses; (iv) to have the rules of evidence enforced; (v) to remain silent; (vi) to view and copy all petitions and reports in the court file; and (vii) to be given reasonable notice and an opportunity to prepare for the hearing. *The court may appoint a psychiatrist, psychologist within their scope of practice, or physician to examine and testify on behalf of such person.* The court shall appoint a psychiatrist, psychologist within their scope of practice, or physician designated by such person or the person in cases where an order for shock treatment is sought.

Id. § 71.05.370(7)(c) (emphasis added).

75. Although empirical data is presently unavailable, the fact that this issue has been raised by counsel representing indigent civil committees seemingly suggests that psychiatrists are reluctant to serve on the section 35 panel. See, e.g., *Goetz v. Crosson*, 769 F. Supp. 132 (S.D.N.Y. 1991).

76. See N.Y. JUD. LAW § 35(4) (McKinney Supp. 1991); *supra* note 46.

services as section 35 expert witnesses.⁷⁷

*C. The Immense Impact of Medical Testimony on the Court
Renders Availability of Independent Psychiatric Assistance
Indispensable*

Although New York courts have been sensitive to *Rivers*, by allowing counsel to be present during different stages of administrative proceedings before the final hearing,⁷⁸ the patient still lacks the opportunity to meet with an independent psychiatrist who can aid the patient and his attorney in preparing a meaningful defense. The patient is, therefore, unable to rebut testimony of the facility's psychiatrist, conduct an effective cross examination, or offer favorable testimony during his case in chief.⁷⁹ Although the patient will attempt to enumerate favorable

77. See *In re Machuca*, 113 Misc. 2d 1044, 451 N.Y.S.2d 338 (Sup. Ct. Suffolk County 1982). In *Machuca*, the court recognized that section 35 does not provide sufficient compensation for expert witnesses. *Id.* at 1047-48, 451 N.Y.S.2d at 340-41. More specifically, Judge Spatt stated:

Parenthetically, the Court wishes to note that even in the "ordinary cause," the limited funds now available by statute with which to fund court-appointed psychiatrists and other medical witnesses is inadequate. This became clearly evident during the period that this Court presided at hearings at Pilgrim State Hospital with regard to applications to retain or release civilly committed patients and applications for authorization to perform surgical procedures.

Id. at 1047-48, 451 N.Y.S.2d at 341.

78. See *Ughetto v. Acrish*, 130 A.D.2d 12, 518 N.Y.S.2d 398 (2d Dep't 1987) (involuntarily committed patient has a right to have counsel present during psychiatric examination); *In re Lesser*, 144 Misc. 2d 359, 544 N.Y.S.2d 902 (Sup. Ct. Queens County 1989) (requiring a patient's counsel to be present during final administrative review); *Lesser v. Carmela*, 146 Misc. 2d 1072, 554 N.Y.S.2d 953 (Sup. Ct. Queens County 1989) (involuntarily committed patient has a right to be represented at the initial review of request for the administration of antipsychotic medication); see also *Savastano v. Nurnberg*, 152 A.D.2d 290, 293, 548 N.Y.S.2d 555, 556 (2d Dep't 1989) ("Mental Hygiene Law § 9.01 contemplates that the patient's constitutional rights will be protected by provisions for judicial review at various stages of the patient's hospitalization."), *aff'd*, 77 N.Y.2d 300, 569 N.E.2d 421, 567 N.Y.S.2d 618 (1990).

79. See *Slobogin, Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 157 (1984) ("Qualified clinical experts can 'enable defendants to explore and

facts and draw conclusions about his own psychological condition, the court's decision is usually based on expert opinion.⁸⁰ "Judges have routinely deferred to the psychiatrist's expert testimony, abdicating their decisional role to the medical professional, even when their intuitions tell them that the professional's testimony is highly inaccurate."⁸¹ Cases have also been reported where judges have blindly deferred to psychiatric opinion.⁸² One author states that "many attorneys accept psychiatric judgments at face value, possibly because they feel incapable of challenging such judgments."⁸³ One California hearing examiner reported that "[i]n many hearings, the only evidence of mental disorder was the doctor's diagnosis at the time the patient was admitted to the facility."⁸⁴ The report disclosed that "because the patient

present subjective defenses and assist triers of fact to assess the plausibility and significance of such claims.") (citation omitted).

80. See *Reformed Commitment*, *supra* note 31, at 663 ("The significance of the failure of judge and counsel to elicit a preponderance of the evidence for imminent danger is that, in the absence of testimony, the court is unable to reach a decision independent of the psychiatrist's recommendation."); see also Hiday, *Judicial Decisions in Civil Commitment: Facts, Attitudes, and Psychiatric Recommendation*, 17 LAW & SOC'Y REV. 517, 526-27 (1983).

81. Kaufman, "Crazy" Until Proven Innocent? *Civil Commitment of the Mentally Ill Homeless*, 19 COLUM. HUM. RTS. L. REV. 333, 362 (1988). Judges and lawyers, lacking knowledge of mental illness and psychiatry, frequently defer to expert medical opinion, allowing the psychiatrist to become, in effect, the decision maker. See *Reformed Commitment*, *supra*, note 31, at 655. An Arizona study showed such deference in more than 96% of all cases. *Id.* Other studies have shown 100% agreement between medical reports and court decisions. *Id.* In addition, it has been stated that "[w]here neither counsel nor judge questions conclusory psychiatric labels, commitment hearings are superficial and brief." *Id.* Likewise, "[i]nformal conversations with judges and attorneys suggest that they defer to psychiatric opinion because they feel they lack the requisite expertise and want to obtain help for those in need." *Id.* at 665. See also Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97 (1984). Slobogin also suggests that "when expert predictive testimony is the evidence in question, judges usually are swayed by it, despite the fact that it is often wrong." *Id.* at 147.

82. See *Reformed Commitment*, *supra* note 31, at 664 ("[j]udge: They [psychiatrists] have ways of knowing -- tests and tricks not known to us").

83. See Wexler, *supra* note 49, at 745.

84. Morris, *Civil Commitment Decisionmaking: A Report on One Decisionmaker's Experience*, 61 S. CAL. L. REV. 291, 311 (1988).

advocate lacked the ability to obtain an independent psychiatric evaluation, the facility's assertion of mental disorder went unchallenged in all but one case."⁸⁵ The hearing examiner admitted that this type of evidence often influenced his judgment.⁸⁶ Furthermore, "psychiatric terminology often conveys misleading information, which is usually prejudicial to the prospective patient."⁸⁷ The magnitude of reliance by the court on medical testimony, coupled with "the propensity of psychiatrists to overpredict dangerousness,"⁸⁸ often leads to commitment and/or forcible medication without any real chance to prove that the allegations of incompetence or dangerousness are incorrect.⁸⁹ Beyond this, one author noted that the prediction of a patient's future dangerousness is not necessarily within the realm of expertise of a psychiatrist.⁹⁰

85. *Id.*

86. *Id.* at 312.

87. Wexler, *supra* note 49, at 744.

88. *Reformed Commitment*, *supra* note 31, at 654. "Physicians are socialized to be cautious . . . They operate on the theory that it is best to treat when in doubt." *Id.* Furthermore, "[t]here is a greater willingness to choose a false positive -- to treat a nonsick individual -- than a false negative -- to allow a sick person [to] go untreated." *Id.*

89. See Kaufman, "Crazy" Until Proven Innocent? Civil Commitment of the Mentally Ill Homeless, 19 COLUM. HUM. RTS. L. REV. 333 (1987). Kaufman noted that studies have shown that psychiatrists "overpredict" dangerousness for the following reasons:

[A] miscalculation resulting in violence invites professional and litigious charges of incompetence; the label "dangerous" may be the only way to commit someone whom the psychiatrist feels generally needs treatment; predictions consistently appear accurate since the detained individual is not a threat to society and, once released, is considered nonviolent; and a mistake in favor of confinement is more likely to be accepted by other professionals. In addition, mental health professionals are predisposed to provide mental health care and are less inclined to safeguard liberty rights, particularly when those professionals are trainees.

Id. at 361 (footnotes omitted).

90. See Dix, *Mental Health Professionals in the Legal Process: Some Problems of Psychiatric Dominance*, 6 LAW & PSYCHOLOGY 1, 4 (1981) ("Unfortunately, courts have tended to uncritically assume that prediction of behavior, especially assaultive actions, is inherently related to mental health expertise, and, consequently, that qualification of a witness as an expert in

Due to the mental health experts' pivotal role in the outcome of involuntary treatment hearings,⁹¹ the lack of access to an independent psychiatrist can mean deprivation of the civil committee's due process rights and liberty interests through denial of the right to prepare an effective defense. The disadvantage experienced here by the civil committee is absolutely unheard of and inconsistent with our adversarial system.⁹² The American forum is not built to operate in this manner.⁹³ Our judicial system is premised on the expectation that every person against whom allegations are made need not withstand such an imbalance of power

diagnosing and treating mental disorders also qualifies that person as an expert in predicting behavior."); *see also* Wexler, *supra* note 49, at 744 ("[E]ven though descriptive statements about behavior are assumed to be objective, too often they are based in substantial part on subjective judgment and opinions.").

91. *See* Bank & Poythress, *The Elements of Persuasion in Expert Testimony*, 10 J. PSYCHIATRY & LAW 173 (1982). Persuasiveness of the mental health expert has a significant impact on the trier of fact. *Id.* at 174. Factors such as the expert's trustworthiness, dynamism, and expertise all lend to the credibility of each mental health expert. *Id.* at 175-78. *See also* Farrell, *supra* note 37, at 174. Moreover, Farrell believes that an expert's opinion can be a conclusive factor in the final determination because:

No careful judge is likely to assume the responsibility of allowing an alleged insane person to go free when the sole expert opinion in the record advises him that such a course is dangerous Yet no judge would be justified in using his own amateur judgment in classifying a paranoiac as a mild case, against the opinion of psychiatrists who were holding him in custody, unless he were supported by the opinion of some independent expert.

Id. at 151 (quoting *De Marcos v. Overholser*, 137 F.2d 698, 699 (D.C. Cir.)), *cert. denied*, 320 U.S. 785 (1943).

92. Farrell stated that a major cause of this deprivation "is that the allegedly mentally ill person is denied access to the weapons for mounting such an attack, unless he has the *funds* to procure them himself." Farrell *supra* note 37, at 181 (emphasis added). Farrell further suggests that "[t]he civil commitment process may cause deprivations of liberty even more extensive than those possible in the criminal justice system." *Id.*

93. *See* *Boddie v. Connecticut*, 401 U.S. 371 (1971). In *Boddie*, the Supreme Court unequivocally held that federal due process prohibits a state from denying indigents access to the judicial system solely because of their inability to pay court costs and fees. *Id.* at 383.

and disadvantage in the courtroom.⁹⁴ As can be seen, the due process provision of the New York State Constitution⁹⁵ is simply not being maintained during forcible medication hearings since the indigent patient has no access to an independent psychiatrist.

II. JUDICIAL ACTIVISM IN PROVIDING INDEPENDENT PSYCHIATRIC ASSISTANCE TO THE CRIMINAL DEFENDANT

A. *Ake v. Oklahoma: The Realization of Economic Disparity Resulting in the Denial of Due Process Rights*

In 1979, the Supreme Court acknowledged the particularly delicate situation of the potential civil involuntary committee.⁹⁶ In *Addington v. Texas*,⁹⁷ the Supreme Court noted that “[it] repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”⁹⁸ To further this end, the Court required a heightened standard of proof in determining whether a patient is dangerous in a civil commitment proceeding.⁹⁹ The Court stated that this higher standard should be used to avert “the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct.”¹⁰⁰ The Court further concluded that “[i]ncreasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps [] reduce the chances that inappropri-

94. *Id.* at 375 (“Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State’s monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things.”).

95. N.Y. CONST. art. I, § 6 (“No person shall be deprived of life, liberty or property without due process of law.”).

96. *See Addington v. Texas*, 441 U.S. 418 (1979).

97. *Id.*

98. *Id.* at 425.

99. *Id.* at 426.

100. *Id.* at 427.

ate commitments will be ordered."¹⁰¹

In 1985, the due process concern expressed in *Addington* was reflected in a United States Supreme Court decision regarding the criminal involuntary committee.¹⁰² In *Ake v. Oklahoma*,¹⁰³ the Supreme Court acknowledged the special need for psychiatric assistance in the preparation of an insanity defense.¹⁰⁴ The Court recognized the fact that mere access to the courthouse does not insure a fair adversarial proceeding.¹⁰⁵ The Court reasoned that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."¹⁰⁶ Indigent defendants must receive "an adequate opportunity to present their claims fairly within the adversary system."¹⁰⁷ The Court focused on providing tools to the indigent defendant in order to present an adequate defense.¹⁰⁸ In particular, the Court recognized that a psychiatrist is needed to aid a defense attorney in interpreting answers given by his adversary's expert witness, ascertaining what questions to ask the state's

101. *Id.* Although the Court was addressing the issue of involuntary commitment, the same rationale should be applied to forcible medication, as the concern at a *Rivers* hearing is heightened because the patient may be forced to ingest medication that has potential heinous and irreversible side effects. *See supra*, notes 42-44 and accompanying text. In a civil commitment proceeding, one is in danger of losing his freedom. Therefore, the court seeks to protect the patient's due process rights. Similarly, as seen in *Rivers*, courts are concerned with the due process rights of an indigent civil committee who is in danger of being forcibly medicated. *See supra* note 78. Because the Court in *Addington* sought to avert inappropriate commitments to protect due process rights, it must be the case that they would also seek to avert inappropriate, forced treatment which is potentially a more invasive violation of one's due process and liberty interests.

102. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

103. *Id.*

104. *Id.* at 83. The Court held that when a defendant's sanity is a significant factor, the state must provide the defendant a psychiatrist to assist in the preparation of the defense. *Id.*

105. *Id.* at 77.

106. *Id.*

107. *Id.* (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)).

108. *Id.*

physician expert witness, and identifying “‘elusive and often deceptive’ symptoms of insanity.”¹⁰⁹ The Court held that the state must provide an indigent criminal defendant access to a psychiatrist for preparation and presentation of his defense.¹¹⁰ “[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.”¹¹¹ The Court explained that without such assistance, a defendant’s case may be devastated.¹¹² “[W]e recognize today . . . that when the state has made the defendant’s mental condition relevant to . . . the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant’s ability to marshal his defense.”¹¹³ On the other hand, if such assistance is provided, the defendant *may* have a reasonable chance of success.¹¹⁴ Thus, at least the United States Supreme Court has recognized the criminal defendant’s need for an independent psychiatrist in constructing a meaningful defense. Therefore, when the defendant’s sanity is a significant factor at trial, “the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.”¹¹⁵

The inability of an indigent criminal defendant to present an ef-

109. *Id.* at 80 (quoting *Sollesbee v. Balkcom*, 339 U.S. 9, 12 (1950)).

110. *Id.* at 83. The Court reasoned that “without the assistance of a psychiatrist to conduct a professional examination . . . and to assist in preparing the cross examination of a State’s psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high.” *Id.*

111. *Id.* at 76 (emphasis added). The Court further stated that “when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a *fair opportunity* to present his defense.” *Id.* (emphasis added).

112. *Id.* at 83. “It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant *might* have a reasonable chance of success.” *Id.* (emphasis added).

113. *Id.* at 80 (emphasis added). In addition, the Court noted that “[t]he risk of error from denial of such assistance as well as its probable value, is most predictably at its height when the defendant’s mental condition is seriously in question.” *Id.* at 82.

114. *See id.* at 83.

115. *Id.* (emphasis added).

fective insanity defense, via denial of expert psychiatric assistance, creates an inequality between the indigent criminal defendant and the non-indigent defendant. Such failure to apply equal protection of the laws is prohibited by the United States Constitution,¹¹⁶ as well as by respective state constitutions.¹¹⁷ The imbalance created by an indigent's poverty prevents that indigent from developing an effective defense, thus his due process rights are violated.¹¹⁸

Even prior to *Ake*, lower federal courts recognized this economic disparity. In *United States v. Theriault*,¹¹⁹ the United States Court of Appeals for the Fifth Circuit held that pursuant to the 1964 Criminal Justice Act¹²⁰ an indigent federal prisoner was entitled to have access to a psychiatric expert at the government's expense to assist in his defense.¹²¹ In his concurring opinion, Judge Wisdom construed the 1964 Criminal Justice Act as requiring authorization for expert services in cases where an attorney representing an indigent criminal defendant reasonably believes that he would otherwise acquire an expert for a client

116. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities . . . nor deny to any person within its jurisdiction the equal protection of the laws.").

117. *E.g.*, N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof.").

118. See Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632, 641 (1970) [hereinafter *Adequate Defense*] ("[l]ack of funds could in reality prevent an indigent defendant from offering a defense").

119. 440 F.2d 713 (5th Cir. 1971).

120. Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1988). Section 3006A(e)(1) provides:

UPON REQUEST.---Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

Id. § 3006A(e)(1).

121. *Theriault*, 440 F.2d at 715-17.

who has the financial means to fund a meaningful defense.¹²² Furthermore, the United States District Court, Eastern District of New York, in *Edny v. Smith*,¹²³ wrote that denial of such assistance also violates a criminal defendant's sixth amendment right to effective counsel.¹²⁴ One writer believes that while "[t]he sixth amendment does not demand a favorably conclusive defense for the indigent, [] effective assistance does require that each defense in the defendant's favor should be sought out, efficiently prepared, and adequately presented."¹²⁵

Furthermore, federal courts have rejected court appointed neutral psychiatrists in criminal cases as sufficient to meet the needs of a criminal defendant, just as this author rejects court appointed neutral psychiatrists in the civil context.¹²⁶ In *United States v. Chavis*,¹²⁷ the court held that *up to four psychiatrists appearing for the government or the court did not constitute adequate expert assistance for the preparation of a defense for a criminal defendant*.¹²⁸ The court held that it was error to refuse the defen-

122. *Id.* at 717 (Wisdom, J., concurring). Judge Wisdom interpreted the 1964 Criminal Justice Act "as requiring authorization for defense services when the attorney makes a reasonable request in circumstances in which he would independently engage such services if his client had the financial means to support his defenses." *Id.*

123. 425 F. Supp. 1038 (E.D.N.Y. 1976).

124. *Id.* at 1048. The court stated that "[e]ffectiveness requires, among other things, adequate trial preparation including resort to expert witnesses where appropriate." *Id.*; see also *Adequate Defense*, *supra* note 118, at 632-33 (while the government need not alleviate one's poverty altogether, it should not allow it to interfere with the administration of justice).

125. *Adequate Defense*, *supra* note 118, at 641.

126. See *United States v. Reason*, 549 F.2d 309 (4th Cir. 1977) (defendant improperly denied the appointment of a psychiatrist to assist in the preparation of his defense of competency and criminal responsibility); *United States v. Bass*, 477 F.2d 723 (9th Cir. 1973) (appointment of an expert witness was required by statute when an affidavit, filed in support of a motion for appointment of a defense, sufficiently stated that the defendant exhibited mental disorders); *United States v. Chavis*, 486 F.2d 1290 (D.C. Cir. 1973) (when insanity is the defendant's sole defense, the defendant is to be provided with a psychiatrist of his own choice).

127. 486 F.2d 1290 (D.C. Cir. 1973).

128. *Id.* at 1292.

dant's request for "*only one psychiatrist of his own choice.*"¹²⁹ The appointment of neutral psychiatrists by the court to aid in its determination simply does not obviate the need for expert assistance for the defendant.¹³⁰ The court in *United States v. Bass*,¹³¹ perceptively distinguished between a neutral court appointed expert and an independent expert retained to aid the defendant. The court noted that an appointed expert is neutral, detached, and acts as a reporter to the court.¹³² Conversely, the independent expert gives trial and pre-trial assistance to the defendant.¹³³ An independent psychiatrist affords the accused an opportunity for an expert to assist *him* in his defense.¹³⁴

Other federal courts have also recognized the indispensable need for an independent psychiatrist in the preparation of a meaningful defense of insanity.¹³⁵ Such courts rely on the 1964 Criminal Justice Act,¹³⁶ which provides the criminal defendant with an opportunity to request such an expert when services are "necessary for an adequate defense"¹³⁷ If it is found, at an

129. *Id.* (emphasis in original).

130. *Id.* at 1291. The court reasoned that a 50 minute examination by a court appointed psychiatrist, "with no opportunity to consult personally with the defense attorney before trial, was hardly adequate psychiatric assistance by any test." *Id.*; see also *Bass*, 477 F.2d at 725 (appointment of two experts to investigate competency and sanity did not obviate defendant's right to an expert under section 3006A(e)).

131. 477 F.2d 723 (9th Cir. 1973).

132. *Id.* at 725-26.

133. *Id.* at 726.

134. See *United States v. Reason*, 549 F.2d 309, 311 (4th Cir. 1977) (Section 3006A(e) "affords to an accused the reasonable opportunity to procure the services of a psychiatrist to assist *him* in *his* defense") (emphasis in original).

135. See, e.g., *United States v. Schultz*, 431 F.2d 907 (8th Cir. 1970).

136. See *supra* note 120.

137. 18 U.S.C. 3006A(e) (1988). "The Criminal Justice Act of 1964 . . . was enacted to 'assure adequate representation in the Federal courts of accused persons with insufficient means.'" *Proffit v. United States*, 582 F.2d 854, 857 (4th Cir. 1978) (quoting S. REP. No. 346, 88th Cong., 1st Sess. 1 (1963)). See also *United States v. Durant*, 545 F.2d 823, 827 (2d Cir. 1976) ("[T]he purpose of § 3006A(e) of the Criminal Justice Act [is] to provide the accused with a fair opportunity to prepare and present his case"); *United States v. Fogarty*, 538 F. Supp. 856, 861 (E.D. Tenn. 1982) ("It seems obvious that

ex parte hearing, that expert services are necessary to an adequate defense and that the defendant is financially unable to retain them, the Criminal Justice Act requires the court to authorize counsel to obtain such services.¹³⁸ Courts have construed the terms "necessary for an adequate defense" to include a criminal defendant relying principally upon the defense of insanity who seeks the help of an independent psychiatrist.¹³⁹ In *United States v. Durant*,¹⁴⁰ the United States Court of Appeals for the Second Circuit stated that the purpose of the Criminal Justice Act is "to provide the accused with a fair opportunity to prepare and present his case" ¹⁴¹ In *United States v. Taylor*,¹⁴² the United States Court of Appeals for the Fourth Circuit noted that "[t]he expert services made available under that statute clearly

the Congressional purpose in adopting this statute was to seek to place indigent defendants as nearly as may be on a level of equality with nonindigent defendants in the defense of criminal cases.") (quoting *United States v. Tate*, 419 F.2d 131, 132 (6th Cir. 1969)); 110 CONG. REC. 18521 (1964) ("An adequate representation commonly entails more than the mere presence of a lawyer To prepare his defense he may need investigative, expert, or other services These are accorded by the terms of the bill").

138. See 18 U.S.C. 30006A(e); *supra* note 120.

139. See *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1973) (appointment of a psychiatric expert was required because defendant's mental history suggested that an insanity defense might be appropriate); *United States v. Chavis*, 486 F.2d 1290, 1292 (D.C. Cir. 1973) (appointment of a psychiatric expert was required because insanity was the defendant's sole defense); *Alvord v. Wainwright*, 564 F. Supp. 459, 484 (M.D. Fla. 1983) ("[U]nder appropriate circumstances, a defendant must be provided a psychiatric examination when such is necessary to a reasonable investigation of an insanity defense."); *Edny v. Smith*, 425 F. Supp. 1038, 1048 (E.D.N.Y. 1976) ("Where, as here, insanity is the principal defense, access to psychiatric experts is essential to assist the attorney in presenting an adequate case.").

140. 545 F.2d 823 (2d Cir. 1976).

141. *Id.* at 827. The court held that the district court erred in refusing to grant the indigent criminal defendant's request for the appointment of a fingerprint expert. *Id.* at 824. The court reasoned that "the purpose of the Act, confirmed by its legislative history, is clearly to redress the imbalance in the criminal process when the resources of the United States Government are pitted against an indigent defendant." *Id.* at 827.

142. 437 F.2d 371 (4th Cir. 1971).

comprehend psychiatric assistance.”¹⁴³ The same goal was also articulated in the legislative history of the Criminal Justice Act of 1964, which stated: “[r]ecognizing that defendants often did not have the resources to obtain counsel or defense services, the act provided compensation for appointed counsel and payment for necessary expert and investigative services.”¹⁴⁴ A letter written by John F. Kennedy to the Congress stated the purpose of the act:

To diminish the role which poverty plays in our Federal System of criminal justice [. . .] to assure effective legal representation for every man whose limited means would otherwise deprive him of an adequate defense against criminal charges . . . [i]n the typical criminal case [where] the resources of government are pitted against those of the individual. To guarantee a fair trial under such circumstances requires that each accused person have ample opportunity to gather evidence, and prepare and present his cause. Whenever the lack of money prevents a defendant from securing an experienced lawyer, trained investigator or technical expert, an unjust conviction may follow.¹⁴⁵

The key phrase in the statute is “an adequate defense.” A defense is inadequate and unjust under those circumstances which prevent a defendant from gathering evidence needed to properly protect himself against charges made against him.¹⁴⁶ A criminal defendant whose sanity is questioned, therefore, has at least a “*minimum* . . . constitutional right to one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review . . . [and the] opportunity to utilize the analysis in preparation and conduct of the defense.”¹⁴⁷ The

143. *Id.* at 377. The court concluded that the district court erred in denying the indigent defendant expert psychiatric assistance so as to determine whether an insanity defense may have existed. *Id.* at 373.

144. H.R. REP. NO. 1546, 91st Cong., 2d Sess. 15, 18, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 3982, 3984.

145. President's Message to the Congress Transmitting for Consideration the Criminal Justice Act (March 8, 1963), JOHN F. KENNEDY PUB. PAPERS 244-45 (1963).

146. *See id.*

147. *Alvord v. Wainwright*, 564 F. Supp. 459, 484 (M.D. Fla. 1983) (emphasis in original) (quoting *Blake v. Zant*, 513 F. Supp. 772, 787 (S.D.

Fourth Circuit noted that the assistance of a psychiatrist is so crucial that without it, a defense will only be successful in rare cases where there is extreme sympathy for the defendant.¹⁴⁸ The court reasoned that:

*Consultation . . . [between counsel and a psychiatrist] attunes the lay attorney to unfamiliar but central medical concepts and enables him, as an initial matter, to assess the soundness and advisability of offering the defense . . . [and] [m]ost importantly, it permits a lawyer inexperienced in the science of psychiatry to probe intelligently the foundations of adverse testimony.*¹⁴⁹

The State of New York has likewise recognized the need for a criminal defendant to obtain independent psychiatric assistance in constructing an adequate defense when his mental capacity is in issue. New York's article 18B of the County Law, section 722-c¹⁵⁰ is very similar to section 3006A(e) of the Federal Criminal Justice Act of 1964.¹⁵¹ The statute provides that when "expert or other services are necessary and that the defendant is financially unable to obtain them, the court *shall* authorize counsel . . . to obtain the services on behalf of the defendant."¹⁵² A letter written by then Governor Nelson A. Rockefeller, on approval of the bill, points out that the right to a fair trial is as indispensable as the right to counsel in our society

Ga. 1981)).

148. *Taylor*, 437 F.2d at 377 n.9.

149. *Id.* (emphasis added).

150. N.Y. COUNTY LAW § 722-c (McKinney 1972 & Supp. 1991).

151. Criminal Justice Act of 1964, 18 U.S.C. § 3600A(e); *supra* note 120.

152. N.Y. COUNTY LAW § 722-c (McKinney 1972 & Supp. 1991) (emphasis added). Section 722-c provides in pertinent part:

Upon a finding in an ex parte proceeding that the defendant or other person described in section two hundred forty-nine or section two hundred sixty-two of the family court act or section four hundred seven of the surrogate's court procedure act, is financially unable to obtain them, the court shall authorize counsel, whether or not assigned in accordance with a plan, to obtain the services on behalf of the defendant or such other person. The court upon a finding that timely procurement of necessary services could not await prior authorization may authorize the services nunc pro tunc.

Id. § 722-c (McKinney Supp. 1991).

and "both must be protected if our system of justice under law is to continue and flourish."¹⁵³ Governor Rockefeller construed this statute as providing the "machinery for guaranteeing the true exercise" of the undeniable right to counsel.¹⁵⁴ He believed that New York had always been the leader in the protection of its citizens rights and that this statute was simply one more step in New York's grand scheme of common law and statutory protection of liberty.¹⁵⁵

In 1978 the New York Supreme Court Appellate Division, Second Department applied section 722-c, in *People v. Hatterson*,¹⁵⁶ and held that denial of a motion for a physician and a psychiatrist at the city's expense "constituted an improvident exercise of discretion."¹⁵⁷ The Second Department reversed the trial court which utilized testimony of an expert in psychotherapy against the defendant, as it denied the defendant a similar opportunity to consult with a psychiatrist at the city's expense.¹⁵⁸ Similarly, in *People v. Franco*,¹⁵⁹ the Supreme Court Appellate Division, Second Department concluded that the trial court correctly granted an indigent criminal defendant's initial application for a psychiatrist/expert witness at the county's expense.¹⁶⁰

More recently, in *People v. Vale*,¹⁶¹ the Supreme Court Appellate Division, First Department followed the United States Supreme Court's reasoning articulated in *Ake v. Oklahoma*.¹⁶² In *Vale*, the court held that a criminal defendant exercising an insanity defense was wrongly denied access to a psychiatrist in developing a defense.¹⁶³ The court stated that such denial

153. Governor's Memoranda Approval of ch. 878, N.Y. Laws (July 16, 1985), reprinted in 1965 LEGIS. ANN. 524-25.

154. *Id.* at 525.

155. *See id.*

156. 63 A.D.2d 736, 405 N.Y.S.2d 297 (2d Dep't 1978).

157. *Id.* at 736, 405 N.Y.S.2d at 298.

158. *Id.*

159. 120 A.D.2d 609, 502 N.Y.S.2d 82 (2d Dep't 1986).

160. *Id.* at 610, 502 N.Y.S.2d at 82-83.

161. 133 A.D.2d 297, 519 N.Y.S.2d 4 (1st Dep't 1987).

162. *Id.* at 300, 519 N.Y.S.2d at 7. For a review of the Supreme Court's opinion in *Ake*, see *supra* notes 103-15 and accompanying text.

163. *Vale*, 133 A.D.2d at 299, 519 N.Y.S.2d at 6.

“[d]eprived [defendant] of all realistic opportunity to defend himself effectively The defendant was entitled to more.”¹⁶⁴ The reasoning applied in *Ake* was thus adopted, as the court noted:

[W]hen a State undertakes to prosecute an indigent defendant, it must also take whatever measures are necessary to assure that the defendant is able to participate meaningfully in the proceeding. The proceeding will otherwise be fundamentally unfair and offensive to the due process guarantees of the Fourteenth Amendment.¹⁶⁵

B. Ake v. Oklahoma: Due Process Requires Access to an Independent Psychiatrist for a Criminal Defendant Whose Mental Capacity is in Issue

The United States Supreme Court has stated that “due process is flexible and calls for such procedural protections as the particular situation demands.”¹⁶⁶ In 1976, the Supreme Court, in *Mathews v. Eldridge*,¹⁶⁷ articulated a three part test to be applied when deciding whether due process calls for procedural protections in any given situation. Courts should consider:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute

164. *Id.* at 301, 519 N.Y.S.2d at 7-8. The court further added that “[c]learly, in the interests of justice and fundamental fairness, he should have been permitted access to the expert psychiatric assistance he needed in order to present an adequate defense.” *Id.*

165. *Id.* at 299, 519 N.Y.S.2d at 6-7 (citing *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985)); see also *People v. Evans*, 141 Misc. 2d 781, 783, 534 N.Y.S.2d 640, 642 (Sup. Ct. New York County 1988) (“It is indisputable that an indigent defendant is entitled to access to expert assistance at public expense.”).

166. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

167. 424 U.S. 319 (1976).

procedural requirement would entail.¹⁶⁸

In 1985, the Supreme Court applied this test in *Ake v. Oklahoma*,¹⁶⁹ to determine “whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent [criminal] defendant with access to competent psychiatric assistance in preparing a defense.”¹⁷⁰ The Supreme Court considered part one of the test, the private interest, to be “uniquely compelling.”¹⁷¹ It expressed a particular concern with the accuracy of a criminal proceeding “that places an individual’s life or liberty at risk”¹⁷² This concern, the Court explained, weighed heavily in their analysis.¹⁷³

In analyzing part two of the *Mathews* formula, the Court regarded the probable value of this particular procedural safeguard as crucial.¹⁷⁴ “More than 40 States, as well as the Federal Government, have decided either through legislation or judicial decision that indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist’s expertise.”¹⁷⁵ The Court recognized the significant role that a psychiatrist plays in creating and presenting a defense, as well as the many ways a psychiatrist can assist the defendant and his attorney.¹⁷⁶

168. *Id.* at 335.

169. 470 U.S. 68 (1985).

170. *Id.* at 77.

171. *Id.* at 78.

172. *Id.*

173. *Id.*

174. *Id.* at 79.

175. *Id.*

176. *Id.* at 80. The Court reasoned that:

In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant’s mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant’s mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party’s psychiatrists and how to interpret their answers.

Id.

“[W]here permitted by evidentiary rules, psychiatrists can translate medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand.”¹⁷⁷ The Court concluded that:

[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State’s psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high.¹⁷⁸

The Court proceeded to trivialize the state’s fiscal concern in requiring this procedural safeguard.¹⁷⁹ The Court held that the state’s financial burden was simply not substantial enough to preclude psychiatric assistance to an indigent criminal defendant whose mental capacity was in issue.¹⁸⁰ The Court listed a number of states that have overcome the financial burden of providing at least one psychiatrist for the indigent criminal, mentally ill defendant.¹⁸¹ The Court stated that “it is difficult to identify any interest of the State, other than in its economy, that weighs against recognition of this right”¹⁸² but, concluded that since the state also has an “interest in the fair and accurate adjudication of criminal cases,”¹⁸³ the government’s interest in denying the right to an independent psychiatrist is not substantial.¹⁸⁴ The Court held that at a minimum, the state *must* provide such a defendant with a competent psychiatrist “who will conduct an appropriate examination and assist in evaluation,

177. *Id.*

178. *Id.* at 82.

179. *See id.* at 78.

180. *Ake*, 470 U.S. at 79.

181. *Id.* at 78-79. The Court explained that “[m]any States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance.” *Id.* at 78.

182. *Id.* at 79.

183. *Id.*

184. *Id.*

preparation, and presentation of the defense.”¹⁸⁵

This is precisely the reasoning that must be applied to the civilly committed patient in danger of forced medication.¹⁸⁶ Just

185. *Id.* at 83.

186. *But see* *Goetz v. Crosson*, 769 F. Supp. 132 (S.D.N.Y. 1991). In *Goetz*, the Southern District of New York applied the three part test first articulated in *Mathews*, concerning the appointment of independent psychiatric assistance at commitment hearings, and held that federal due process standards are not violated when the court refuses to appoint such an expert witness at a civil commitment hearing. *Id.* at 135-37. However, the holding in *Goetz* is inapplicable to the civilly committed patient in danger of being forcibly medicated for three reasons. First, the *Goetz* case involved civil commitment hearings where physical liberty is at stake as opposed to bodily autonomy and the potential danger of irreversible side effects. *Id.* at 133-34. Second, the *Goetz* court relied, in part, on the proposition that the New York State Legislature has attempted to insure that “committed persons may be released after the briefest time in confinement.” *Id.* at 135. (quoting *Allen v. Illinois*, 478 U.S. 364, 370 (1986)). However, the legislature has not provided for mandatory review of a forcible medication order. Therefore, an involuntarily committed patient could be forcibly medicated for a longer period of time than necessary. *See In re McConnell*, 147 A.D.2d 881, 882, 538 N.Y.S.2d 101, 103 (3d Dep’t 1989) (“Respondent expresses a very legitimate concern over the absence of any time limit or mandatory review of the forced medications being allowed.”). Third, *Goetz* was decided on federal due process grounds. *Goetz*, 769 F. Supp. at 137. This Comment focuses on state constitutional rights and privileges with respect to the indigent civilly committed patient. As such, it must be noted that in New York “[a]lthough State courts may not circumscribe rights guaranteed by the Federal Constitution, they may interpret their own law to supplement or expand them.” *People v. P.J. Video Inc.*, 68 N.Y.2d 296, 302, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986), *cert. denied*, 479 U.S. 1091 (1987). Further, New York has “frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties.” *Id.* at 303, 501 N.E.2d at 561, 508 N.Y.S.2d at 912. In his concurring opinion in *Beach v. Shanley*, 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984), then Judge Wachtler stated, “that the Federal Constitution only guarantees minimum protections, leaving to the States the task of affording additional or greater rights under their Constitutions, tailored to the special needs and traditions of the various States.” *Id.* at 255, 465 N.E.2d at 312, 476 N.Y.S.2d at 773 (Wachtler, J., concurring). Finally, two years later Chief Justice Wachtler, writing for the majority, stated that “[t]he function of the comparable provisions of the State Constitution, . . . is to supplement those rights to meet the needs and expectations of the particular State.” *People v. Cloud Books, Inc.*, 68 N.Y.2d

as the Supreme Court reasoned in *Ake v. Oklahoma* that a criminal defendant's private interest is uniquely compelling because the outcome of the judicial proceeding may put defendant's life or liberty at risk,¹⁸⁷ so too, the determination made at an involuntary treatment hearing may put the patient's life or liberty at risk. *Rivers v. Katz* distinctly established the fact that *a patient has a liberty interest in deciding whether or not to be medicated*.¹⁸⁸ The interest of the mentally ill patient is at least as great, if not greater, (because of the irreversibility and severity of common side effects of many commonly used drugs), than the criminal defendant's interest in the outcome of a judicial proceeding.¹⁸⁹ Just as the Supreme Court in *Ake* reasoned that the state's financial burden is minimal as compared to the significant personal interest at stake in a criminal proceeding,¹⁹⁰ this reasoning is equally compelling with regard to the personal interest at stake in an involuntary treatment proceeding.¹⁹¹

As the *Ake* Court opined, all that is needed is *one* psychiatrist to aid the defendant (here, the patient) in creating and presenting

553, 557, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986).

187. *Ake*, 470 U.S. at 78.

188. See *Rivers*, 67 N.Y.2d 485, 495, 495 N.E.2d 337, 342, 504 N.Y.S.2d 74, 79-80 (1986). The court further stated that, "[w]e likewise reject any argument that involuntarily committed patients lose their liberty interest in avoiding the unwanted administration of antipsychotic medication." *Id.* at 495, 495 N.E.2d at 342-43, 504 N.Y.S.2d at 80.

189. But see *Goetz*, 769 F. Supp. at 134-35. The *Goetz* court refused to recognize that a patient in danger of civil commitment had a liberty interest equivalent to that of a criminal defendant. *Id.* at 135-37. Notwithstanding the *Goetz* determination, it is this author's position that the civil committee in danger of forced treatment must have a "uniquely compelling" interest since the patient will most likely suffer discomfort and pain, as well as possible irreversible side effects. See *supra* notes 42-44 and accompanying text.

190. *Ake*, 470 U.S. at 78-79.

191. Cf. *Goetz*, 769 F. Supp. at 135-36. In rejecting the plaintiff's claim that federal due process mandated the appointment of an independent psychiatrist at a civil commitment hearing, the court acknowledged that state fiscal concerns are insufficient to overcome the grave personal interest at stake. *Id.* at 136. However, the court failed to identify another existing state interest that would be strong enough to overcome the personal interest involved.

a meaningful defense.¹⁹² Likewise, just as the state has an interest in a fair and accurate criminal adjudication, its interest is escalated in a forced medication proceeding.¹⁹³ As the state has an interest in the justness of its adjudicatory system,¹⁹⁴ the state equally has an interest in the health, safety and welfare of its citizens.¹⁹⁵ Therefore, the state's interest manifests in the accuracy of an involuntary treatment hearing, rather than in its fiscal concerns.

192. *Ake*, 470 U.S. at 83. However, the *Goetz* court believed that such assistance could create an ethical dilemma for the independent psychiatrist in determining whether allegiance lies with the patient or the attorney "who wants to 'win' the case." *Goetz*, 769 F. Supp. at 136. The court distinguished this ethical dilemma from that of an appointed attorney in a criminal proceeding who must defend his client zealously even if he or she believes that the client is guilty because, the court summarily opined, that the criminal defendant is "obviously . . . better served if he is not incarcerated." *Id.* On the contrary, this distinction is not so clear. The appointed criminal defense attorney must focus on creating the best defense possible for the defendant so that when all the evidence is presented, the neutral factfinder can base the decision on all available evidence, rather than solely on the state's evidence. Furthermore, appointment of such an expert is not to obtain a favorable diagnosis, but to aid the defense attorney in understanding and interpreting the state psychologist's analysis and conclusions, thereby allowing the neutral factfinders to properly execute their duty. Finally, if a criminal defendant is "better served if he is not incarcerated," then the logical assumption that follows must be that rehabilitation and deterrence play little, if any, role in the American Judicial System.

193. The state's interest in an involuntary treatment proceeding is greater than that in a civil commitment hearing because, unlike the various levels of protection for the potential civil committee in the New York Mental Hygiene Law, the involuntary treatment hearing stands alone as the protection against unwanted medical treatment. See N.Y. MENTAL HYG. LAW §§ 9.27-.31 (McKinney 1988).

194. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) ("[T]he judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy.").

195. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) ("The state has a legitimate interest under its *parens patriae* powers providing care to its citizens who are unable because of emotional disorders to care for themselves . . . [and] under its police power to protect the community from the dangerous tendencies of some who are mentally ill."); see also *supra* notes 20-28 and accompanying text.

At least one court has acknowledged the fact that due process may require the appointment of an independent expert psychiatrist to aid an involuntarily committed mentally ill patient in danger of forced medication in the preparation of an effective defense.¹⁹⁶ In *Sanders v. New Mexico Health and Environment Department*, an involuntarily committed patient was appointed an independent mental health professional to testify on his behalf at a hearing to determine whether a "treatment guardianship" should be terminated.¹⁹⁷ However, New Mexico law provided for the appointment of psychiatric assistance only to aid the court in determining whether the patient was competent to make reasoned decisions regarding medical treatment.¹⁹⁸

196. See *Sanders v. New Mexico Health and Env't Dep't*, 108 N.M. 434, 773 P.2d 1241 (Ct. App. 1989).

197. *Id.* at 435, 773 P.2d at 1242. In *Sanders*, the patient had been found incompetent to stand trial and was admitted to the Forensic Treatment Unit at the Las Vegas Medical Center. *Id.* Following a hearing, an order appointing a "treatment guardian" was entered. *Id.* The patient then moved to terminate the treatment guardianship, claiming that he was competent to make his own treatment decisions and requested an evaluation by an independent mental health expert. *Id.*

198. See N.M. SCRA § 11-706(A) (1986). Section 11-706(A) provides:

Appointment. The judge may on his own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint one or more expert witnesses of his own selection to give evidence in the action except that, if the parties agree as to the experts to be appointed, he shall appoint only those designated in the agreement. An expert witness shall not be appointed by the judge unless he consents to act. A witness so appointed shall be informed of his duties by the judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the judge or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

Id. § 11-706(A) (emphasis in original). The New Mexico Court of Appeals examined the statute and concluded that "[t]he above rule authorizes the trial court to appoint an independent expert unaligned with either party to assist the court in determining significant issues in the proceeding." *Sanders*, 108 N.M. at 439-40, 773 P.2d at 1246-47.

Notwithstanding the language of the statute, the New Mexico Court of Appeals expressly recognized that although independent psychiatric assistance was not provided for in the statute, such assistance may indeed be a necessity if due process is to be protected.¹⁹⁹ “*We agree that the statute does not expressly provide for judicial appointment of an expert to assist petitioner . . . [n]evertheless, the constitutional right of due process may require appointment for an indigent in certain circumstances*”²⁰⁰ Most importantly, the court found authority for their proposition in *Ake v. Oklahoma*.²⁰¹ Consequently, this court has made the critical connection between the criminal defendant in need of expert assistance to present an adequate defense when sanity is at issue and the involuntary civil committee in need of an independent expert in order to prepare a meaningful defense to the state’s allegations of incompetency.²⁰²

Beyond this, the court ordered that the expert witness be compensated with court funds.²⁰³ By recognizing the vulnerability of indigent involuntarily committed patients’ due process rights, the need for independent expert assistance in “certain circumstances,”²⁰⁴ and by supporting these propositions with the *Ake* decision, it is clear that at least one state has contemplated the need to extend the *Ake* reasoning into the civil arena when an indigent involuntarily committed patient is in danger of being forcibly medicated.

199. *Sanders*, 108 N.M. at 439-40, 773 P.2d at 1246-47.

200. *Id.* at 439, 773 P.2d at 1246 (emphasis added).

201. *Id.*; see *supra* text accompanying notes 169-85.

202. See *id.*

203. *Id.* at 440, 773 P.2d at 1247.

204. *Id.* at 439, 773 P.2d at 1246.

III. THE QUASI-CRIMINAL NATURE OF INVOLUNTARY TREATMENT HEARINGS NECESSITATES INDEPENDENT PSYCHIATRIC ASSISTANCE

The due process protection extended to a criminal defendant whose mental capacity is in issue should be extended to a civil committee in danger of being forcibly medicated because the patient's mental capacity is also in issue. The judicial proceedings afforded to both the criminal defendant and the civil committee are quite similar and, therefore, a *Rivers* hearing to determine mental capacity should be labeled quasi-criminal in nature. For example, the due process concerns in both proceedings are virtually the same, and in some ways, much more troublesome for the potential involuntary committee. This is because both the civil committee and the criminal defendant are in danger of losing liberties.²⁰⁵ However, beyond this loss of physical liberty, the civil committee who is forcibly medicated is in danger of suffering irreversible harm caused by the side effects of the unwanted treatment.²⁰⁶

In addition, the indigent civil committee has certain inalienable due process rights,²⁰⁷ as does the indigent criminal defendant.²⁰⁸ The involuntarily committed patient in danger of forced treatment

205. See *Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil commitment for any purpose constitutes a significant deprivation of liberty).

206. See *supra* notes 42-44 and accompanying text.

207. See *Rivers v. Katz*, 67 N.Y.2d 485, 494, 495 N.E.2d 337, 342, 504 N.Y.S.2d 74, 79 (1986) ("[n]or does the fact of mental illness result in the forfeiture of a person's civil rights . . ."); *Savastano v. Nurnberg*, 152 A.D.2d 290, 299, 548 N.Y.S.2d 555, 560 (2d Dep't 1989) (indigent civil committees have liberty interests subject to federal and state due process protection), *aff'd*, 77 N.Y.2d 300, 569 N.E.2d 421, 567 N.Y.S.2d 618 (1990).

208. See *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985) ("[T]he Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.").

is afforded a judicial proceeding, in accordance with due process rights, to determine the validity of allegations made by the state.²⁰⁹ During the judicial proceeding, the civil committee is afforded the opportunity to defend against allegations made by the state.²¹⁰ Furthermore, both the civil committee and the criminal defendant are provided with an attorney, if indigent, to try to ensure effective representation.²¹¹ While it is true that the criminal defendant's confinement is punitive in nature and the civil committee's proposed treatment plan is allegedly "rehabilitative,"²¹² the ultimate violation of liberty is still present.

However, the New York Supreme Court Appellate Division, Second Department held, in *Ughetto v. Acrish*,²¹³ that the involuntarily committed patient has no fifth amendment rights against self-incrimination during prehearing interviews.²¹⁴ The court stated that it would be "inflexible to suggest that since confinement to a State mental hospital is a form of imprisonment, all protections afforded by the bill of rights to a criminal defendant must, as a matter of due process, be likewise afforded to a person thought to be dangerously mentally ill."²¹⁵ The court reasoned that since civil confinement is not punitive in nature, the allegedly mentally ill person has no fifth amendment right to remain silent at a prehearing psychiatric interview.²¹⁶ The court

209. See *Rivers*, 67 N.Y.2d at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 79.

210. See *id.*

211. It is well established that an indigent defendant in a criminal prosecution has the right to have counsel appointed for him. See *Gideon v. Wainwright*, 372 U.S. 335 (1963). Similarly, the indigent civil committee who is in danger of being forcibly medicated is provided with legal assistance in accordance with due process rights enumerated in the New York State Constitution. See *Rivers*, 67 N.Y.2d at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

212. *Ughetto v. Acrish*, 130 A.D.2d 12, 19, 518 N.Y.S.2d 398, 402 (2d Dep't 1987) (quoting *In re Gregory*, 19 N.Y.2d 55, 62, 224 N.E.2d 102, 106, 277 N.Y.S.2d 675, 680 (1966)).

213. 130 A.D.2d 12, 518 N.Y.S.2d 398 (2d Dep't 1987).

214. *Id.* at 21, 518 N.Y.S.2d at 403.

215. *Id.* at 19, 518 N.Y.S.2d at 402.

216. *Id.* at 20-21, 518 N.Y.S.2d at 403.

further stated that, “the overall purpose of the proceeding[], including the prehearing interview, is to ensure that patients receive the care and treatment *that is necessary based upon their condition*”²¹⁷ This statement is of particular concern for two reasons. First, the proceeding that this statement focuses upon is a commitment hearing.²¹⁸ The proceeding presently being discussed is an involuntary treatment hearing, which supersedes a commitment hearing. Second, the court *assumes* that treatment is in fact “necessary based upon [the committee’s] condition”²¹⁹ The court *assumes that simple confinement invariably leads to the need for medication*, even if such treatment is contrary to a patient’s wishes. This assumption flies directly in the face of established New York common law.²²⁰ In *Rivers*, the New York Court of Appeals held, on no uncertain terms, that “neither the fact that . . . [patients] are mentally ill nor that they have been involuntarily committed, without more, constitutes a sufficient basis to conclude that they lack the mental capacity to comprehend the consequences of their decision to refuse medication”²²¹ The determination of whether a civil committee has the capacity to make a treatment decision must be determined at a hearing before drugs may be administered.²²² Furthermore, the state bears the burden of demonstrating the patient’s incapacity to make a treatment decision, by clear and convincing evidence.²²³ The *Ughetto* court concerned itself solely with the lack of punitive nature of the civil commitment

217. *Id.* at 20, 518 N.Y.S.2d at 403 (emphasis added).

218. *Id.* at 18, 518 N.Y.S.2d at 401.

219. *Id.* at 20, 518 N.Y.S.2d at 403.

220. *See In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981); *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914).

221. *Rivers*, 67 N.Y.2d 485, 494, 495 N.E.2d 337, 341-42, 504 N.Y.S.2d 74, 79 (1986).

222. *Id.* at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 81. The court stated that “[w]e reject any argument that the mere fact that appellants are mentally ill reduces in any manner their fundamental liberty interest to reject antipsychotic medication.” *Id.* at 495, 495 N.E.2d at 342, 504 N.Y.S.2d at 79-80.

223. *Id.* at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

hearing, thereby ruling out certain due process protections.²²⁴ The court determined that a patient's statements at pre-hearing interviews are not admitted "against" him at a commitment hearing, as a criminal's statements are admitted "against" him in a criminal trial.²²⁵ The court stated that, "the mere fact that statements adduced during the interview will be used at a hearing, which may result in confinement and a deprivation of liberty, will not suffice to convert the nature of the proceeding from civil to criminal."²²⁶ This court, therefore, did not construe confinement to a mental institution as punitive.²²⁷ However, it must be questioned whether this court or others would reach the same conclusion regarding involuntary medication -- a much more personal invasion and deprivation of liberty.²²⁸ This author, at least, considers the determination of incompetency or dangerousness, without a fair and impartial hearing, to be an egregious punishment, especially when one considers that the victim may suffer irreversible harm by side effects produced by the most commonly used antipsychotic medication.²²⁹ There can be no harsher punishment.²³⁰

224. See *Ughetto*, 130 A.D.2d at 18-21, 518 N.Y.S.2d at 402-03.

225. *Id.* at 21, 518 N.Y.S.2d at 403.

226. *Id.* at 20, 518 N.Y.S.2d at 403.

227. See *id.*

228. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975). In his concurring opinion, Chief Justice Burger stated:

The *quid pro quo* theory is a sharp departure from, and cannot coexist with, due process principles. As an initial matter, the theory presupposes that essentially the same interests are involved in every situation where a State seeks to confine an individual; that assumption, however, is incorrect. It is elementary that the justification for the criminal process and the unique deprivation of liberty which it can impose requires that it be invoked only for commission of a specific offense prohibited by legislative enactment.

Id. at 586 (Burger, C.J., concurring).

229. See *supra* notes 42-44 and accompanying text; see also Farrell, *supra* note 37, at 177-78 (labeling a patient "incompetent" negatively effects self-perception as well as the perception by others -- including physicians).

230. But see *Goetz v. Crosson*, 769 F. Supp. 132 (S.D.N.Y. 1991). In refusing plaintiff's request for the aid of an independent expert witness at a commitment hearing, the court relied, in part, on the distinction between the

Regardless, the holding and dictum of the *Ughetto* court, challenged here, applied only to the issue of the fifth amendment right against self incrimination during pre-commitment interviews.²³¹ Alternatively, this author is arguing that New York State due process rights emanating from article I section 6²³² should be adequately protected.²³³ Despite the *Ughetto* court's faulty reasoning, the court did acknowledge that the involuntary patient does, indeed, have due process rights.²³⁴ The court relied upon *In re Gregory*²³⁵ to assert that "[a]ny commitment -- whether civil or criminal, whether assertively for punitive or rehabilitative purposes -- involves a grave interference with personal liberty."²³⁶ The court stated in dictum that "*there is no essential distinction to be made between the confinement which often follows as a consequence of one's having been convicted of a serious crime, and the confinement which follows as a consequence of one's having been found to be mentally ill and danger-*

punitive nature of a criminal proceeding and the rehabilitative nature of a civil commitment proceeding. *Id.* at 135. However, reliance on this distinction disregards the underlying purpose of the Supreme Court's decision in *Ake* to provide expert psychiatric assistance to the indigent criminal defendant when sanity is at issue. The purpose for such an appointment is not solely the punitive nature of the criminal proceeding, but the due process concerns in allowing an appointed criminal attorney to present an effective defense. See *supra* text accompanying notes 103-15.

231. See *Ughetto*, 130 A.D.2d at 21, 518 N.Y.S.2d at 403.

232. N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law.").

233. See *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 302, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986) ("When . . . [state] courts interpret State statutes or the State Constitution the decisions of these courts are conclusive if not violative of Federal law."), *cert. denied*, 479 U.S. 1091 (1987).

234. *Ughetto*, 130 A.D.2d at 24, 518 N.Y.S.2d at 405. The court stated "[w]ere we not to find, however, that a statutory basis exists for allowing the presence of counsel at preretention hearings, we would be prepared, nonetheless, to conclude, as did Special Term, that it is required by due process." *Id.* Furthermore, "[t]he courts have repeatedly commented on the vagueness of the term due process and on the flexibility with which it is applied." *Id.*

235. 19 N.Y.2d 55, 224 N.E.2d 102, 277 N.Y.S.2d 675 (1966).

236. *Ughetto*, 130 A.D.2d at 19, 518 N.Y.S.2d at 402 (quoting *In re Gregory*, 19 N.Y.2d at 62, 224 N.E.2d at 106, 277 N.Y.S.2d at 680).

ous.”²³⁷ The court further acknowledged that, although differences do exist in the character and purpose of confinement, “*the degree of interference with personal liberty inherent in the confinement is essentially the same, whether the confinement be classified as civil or criminal.*”²³⁸ Therefore, the court held that in accordance with due process rights, the patient’s counsel was allowed to be present during a psychiatric examination taken in preparation of a precommitment hearing.²³⁹ “Permitting counsel to observe at such examinations would serve to assist the plaintiff’s attorneys in preparation for retention hearings and, thus, enhance the reliability of such hearings as to the truth-finding functions.”²⁴⁰ Furthermore, the court found that “the absence of counsel from these prehearing examinations would substantially impair the basic procedural right of the plaintiffs to cross-examine the State’s expert psychiatrist.”²⁴¹ Since the court was concerned with a patient’s due process rights as well as his personal liberties during a civil commitment hearing, this concern must be heightened when an involuntary medication hearing is at issue. Invasion of liberty by forcible medication, as mentioned previously, can only be considered one of the gravest violations of personal liberty.²⁴²

Other types of judicial proceedings have been labeled quasi-criminal in nature, where a party’s liberty interest was not identical to that of a criminal defendant and the relief was not punitive, yet the party was afforded due process protection.²⁴³ For exam-

237. *Id.* at 18, 518 N.Y.S.2d at 402 (emphasis added).

238. *Id.* at 18-19, 518 N.Y.S.2d at 402 (emphasis added). The court reasoned that “[h]ere the . . . [involuntary committees] have, of course, been subjected to involuntary confinement away from their homes, their families, and their friends and have been deprived of their liberty [A]ctions of the State must, therefore, be subjected to careful judicial review with respect to constitutional requirements of due process.” *Id.* at 18, 518 N.Y.S.2d at 402.

239. *Id.* at 25, 518 N.Y.S.2d at 406.

240. *Id.* at 24, 518 N.Y.S.2d at 405-06.

241. *Id.* at 25, 518 N.Y.S.2d at 406.

242. *See supra* notes 41-44 and accompanying text.

243. *See, e.g., In re Ruffalo*, 390 U.S. 544, 551 (1968) (disbarment proceedings are quasi-criminal in nature); *Hynes v. Hartman*, 63 A.D.2d 1, 3, 406 N.Y.S.2d 818, 819 (1st Dep’t 1978) (proceeding to punish for civil

ple, paternity proceedings have been labeled quasi-criminal in nature by the United States Supreme Court and New York State courts.²⁴⁴ In *Little v. Streater*,²⁴⁵ the Supreme Court applied the three part test articulated in *Mathews v. Eldridge*²⁴⁶ in determining that in accordance with due process rights, indigent putative fathers must be provided with certain blood grouping tests, at the state's expense, to aid in creating a defense at a paternity proceeding.²⁴⁷ The Supreme Court reasoned that since the

contempt is quasi-criminal in nature, therefore, it must be proven with reasonable certainty that respondent failed to comply with court order); *D'Elia v. Philip*, 57 A.D.2d 836, 836, 394 N.Y.S.2d 50, 51 (2d Dep't 1977) (paternity proceeding is quasi-criminal in nature); *Duerr v. Wittman*, 5 A.D.2d 326, 330, 171 N.Y.S.2d 444, 448 (1st Dep't 1958) (Although a filiation proceeding is not a prosecution for punishment of a crime, and the proceeding has different procedural characteristics, such as a different standard of proof, corroboration is not required, and the defense against double jeopardy is unavailable, it is still a creature that is *sui generis* and "may be properly denominated as quasi-criminal in nature."); *Anonymous v. Anonymous*, 41 Misc. 2d 597, 600, 246 N.Y.S.2d 93, 96 (Fam. Ct. New York County 1963) (property seizure proceeding is quasi-criminal in nature); *Anonymous v. Anonymous*, 13 Misc. 2d 718, 719-20, 180 N.Y.S.2d 183, 185-86 (Special Sessions Ct. 1958) (Although a filiation proceeding is not a prosecution for punishment of a crime and allegations need only be established by clear and convincing evidence, it is a creature *sui generis*, therefore, it is a civil proceeding which is quasi-criminal in nature.); *In re Scro*, 200 Misc. 2d 688, 691, 108 N.Y.S.2d 305, 308 (Kings County Ct. 1951) (police removal case is quasi-criminal in nature since rights of the officer and his good name are at stake and, consequently, hearsay evidence may not be admissible); *but see, e.g., Miller v. Gordon*, 58 A.D.2d 1027, 1027, 397 N.Y.S.2d 500, 501 (4th Dep't 1977) (paternity proceeding is civil in nature, not quasi-criminal).

244. See *Little v. Streater* 452 U.S. 1, 10 (1981) ("Although the State characterizes such proceedings as 'civil', they have quasi-criminal overtones.") (citation omitted); *D'Elia*, 57 A.D.2d at 836, 394 N.Y.S.2d at 51 ("Disclosure of the records of the Department of Social Services should be allowed under circumstances such as these, where the proceeding is quasi-criminal in nature."); *Duerr*, 5 A.D.2d at 330, 171 N.Y.S.2d at 448 ("[T]he filiation proceeding . . . may be properly denominated as quasi-criminal, or . . . 'special proceedings of a criminal nature.'") (citation omitted).

245. 452 U.S. 1 (1981).

246. 424 U.S. 319 (1976). For a review of the three part test set forth in *Mathews*, see *supra* text accompanying note 168.

247. *Little*, 452 U.S. at 6-17.

Connecticut statute labeled a proven putative father as "guilty" and provided that punishment for non-compliance with a court order for support is a term of imprisonment, the proceeding had quasi-criminal overtones.²⁴⁸

In addition, New York courts have also construed Person In Need of Supervision (PINS) proceedings to be quasi-criminal in nature even though the behavior of the respondent is not of a criminal nature.²⁴⁹ In *In re Andrew*,²⁵⁰ the court determined that a PINS proceeding is quasi-criminal in nature since there is a potential for governmental interference with the liberty of a child.²⁵¹ The respondent's rights cannot be taken away "merely because . . . [his] conduct is noncriminal" ²⁵²

A patient's liberty interests, as well as the state's interest in a just and accurate determination, is at least as great as the interests at stake in proceedings defined by state and federal courts as quasi-criminal in nature.²⁵³ Although the patient in danger of forced medication is not found "guilty" and punished by a term of imprisonment, in the event the patient is found "incompetent" at the *Rivers* hearing and forcibly medicated, it is possible that the patient's liberty interests are violated by the administration of the unwanted treatment. New York courts have been clear in that the determination of whether a proceeding is quasi-criminal does

248. *Id.* at 10.

249. *See, e.g., In re Keith*, 569 N.Y.S.2d 555 (Fam. Ct. Dutchess County 1990); *In re Andrew*, 115 Misc. 2d 937, 454 N.Y.S.2d 820 (Fam. Ct. Richmond County 1982); *In re Kenneth*, 114 Misc. 2d 676, 452 N.Y.S.2d 176 (Fam. Ct. Richmond County 1982).

250. 115 Misc. 2d 937, 454 N.Y.S.2d 820 (Fam. Ct. Richmond County 1982).

251. *Id.* at 939, 454 N.Y.S.2d at 821.

252. *Id.* at 939, 454 N.Y.S.2d at 822 (quoting *In re Reynaldo*, 73 Misc. 2d 390, 394, 341 N.Y.S.2d 998, 1003 (Fam. Ct. Kings County 1973)). *See also In re Keith*, 569 N.Y.S.2d at 557-58 (court was concerned with providing procedural safeguards to protect fundamental constitutional rights where liberty interests were at stake in a PINS proceeding); *In re Kenneth*, 114 Misc. 2d at 677, 452 N.Y.S.2d at 178 ("Juvenile delinquency proceedings are, at least, quasi-criminal in nature . . . [therefore] a juvenile respondent may be subjected to a very significant interference with his freedom.") (citation omitted).

253. *See supra* notes 243-52 and accompanying text.

not hinge upon whether the proceeding is a prosecution for criminal behavior.²⁵⁴

The personal interest of a patient in danger of being forcibly medicated is at least equivalent to the personal interest at issue in a paternity proceeding. The patient's interest in being violated physically and emotionally, as well as potentially suffering from irreversible side effects of antipsychotic medication, certainly surpasses any pecuniary loss. Furthermore, the involuntarily committed patient has already lost the liberty interest facing a putative father. Although the patient does not necessarily have a familial interest, the civil committee does face possible permanent disfigurement as well as pain and discomfort resulting from the administration of antipsychotic drugs.

The mere presence of such interests should lead to the classification of the involuntary treatment hearing as quasi-criminal in nature, thereby extending the opportunity for independent psychiatric assistance to the indigent civil committee whose mental capacity is in issue, as it is extended to the indigent criminal defendant whose mental capacity is in issue. Although the patient does not necessarily have a familial interest, the civil committee is in danger of being permanently injured by the administration of the antipsychotic drugs.²⁵⁵ As noted by the Supreme Court in *Little v. Streater*, "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."²⁵⁶ Rather, the Court concluded that the concept of due process "is flexible and calls for such procedural protections as the particular situation demands."²⁵⁷

CONCLUSION

The right of a patient to receive a *Rivers* hearing before treatment is administered involuntarily is an empty shell of formality unless it is given substantive effect by providing the

254. See *supra* note 243.

255. See *supra* notes 42-44 and accompanying text.

256. 452 U.S. 1, 5 (1981) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951)).

257. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

patient with proper tools to present an effective defense to allegations of incompetency or dangerousness. One court has held that "[n]o matter how brilliant the lawyer may be, he is in 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" ²⁵⁸

As previously shown, federal and New York State courts have recognized the necessity of independent psychiatric assistance to indigent criminal defendants whose mental capacity is in issue. This Comment has also purported that the liberties at stake in both the *Rivers* hearing and the indigent criminal defendant's trial are sufficiently similar to extend the right to independent psychiatric assistance to the indigent civil committee.

Finally, this Comment presented the opinion of at least one court which acknowledged that such assistance may, indeed, be necessary for the indigent civil committee's due process rights to be properly protected. ²⁵⁹ Consequently, "[d]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." ²⁶⁰ In order for the due process rights recognized in *Rivers* to be adequately protected, an involuntarily committed patient in danger of being forcibly medicated must have access to an independent psychiatrist so that a meaningful defense may be prepared to rebut the state's allegations of incompetency.

Marcy H. Speiser

²⁵⁸ *In re Gannon*, 123 N.J. Super. 104, 105, 301 A.2d 493, 494 (Somerset County Ct. 1973).

²⁵⁹ See *supra* notes 196-202 and accompanying text.

²⁶⁰ *Little*, 452 U.S. at 5-6 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971)).