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Washington v. Harper: The Supreme Court Defines Procedural Due Process in the Prison

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Note

Washington v. Harper: The Supreme Court Defines Procedural Due Process in the Prison

I. INTRODUCTION

The mind is its own place, and in itself
Can make a heaven of Hell, a hell of Heaven[1]

The American constitutional system places great priority on the right to be left alone. That right, however, may succumb to overriding and compelling state interests. This long established principle of American governance poses a unique question in the context of the lawful imprisonment of an individual: whether an inmate's protectable due process liberty interest overrides the state's interest in the forced administration of antipsychotic drugs. More specifically, the question posits what procedural safeguards are due before the state may deprive an inmate of the right to be left alone.

In *Washington v. Harper*,[2] the United States Supreme Court addressed these issues. First, the Court held that an inmate has a substantive due process right in avoiding forced medication. The Court then applied the rational relationship test, and found that the prison regulation that allowed forced medication was constitutional. Addressing the procedural due process issue, the Court found that an administrative hearing before psychiatrists provided adequate procedural protections of the inmate's liberty interest.

This Note analyzes *Washington v. Harper* and its impact on the constitutional rights of prison inmates. The Note begins with a discussion of the substantive and procedural due process guarantees of the fourteenth amendment as they relate to prison inmates. Next, it presents in detail the lower court and the Supreme Court decisions. Finally, the Note criticizes the majority opinion's failure to provide adequate due process protections to prison inmates who still possess fundamental substantive and procedural due process rights that guarantee them the right to remain free from bodily intrusions.

1. J. MILTON, PARADISE LOST 17 (R. Hughes ed. 1935) (bk.I, ll. 254-55).
2. 110 S. Ct. 1028 (1990).

II. BACKGROUND

A. Due Process in the Prison Setting

1. Substantive Due Process

The twentieth century saw the notion of substantive due process develop into a divergent source for the protection of individual liberty interests.[3] The Constitution's due process clauses and various state laws define the individual liberty interests that guide the American constitutional system.[4]

Historically, the Court has treated imprisoned individuals differently.[5] Initially, convicted criminals forfeited all of their liberty and personal rights by virtue of their incarceration.[6] The United States Supreme Court, however, eventually recognized that an inmate retains certain substantive rights and privileges during imprisonment,[7] although these rights may be lessened or restricted during the individual's prison term.[8]

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3. The due process clause of the fourteenth amendment provides in pertinent part that a State cannot "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

4. Hewitt v. Helms, 459 U.S. 460, 466 (1983) (citing Meachum v. Fano, 427 U.S. 215, 223-27 (1976)). *Hewitt* is an example of a state law providing the source of a liberty interest. In *Hewitt*, the United States Supreme Court held that a regulation that employed unmistakably mandatory language created a protected liberty interest. *Id.* at 470-72. The Court held that a prison inmate had a liberty interest in remaining in the general prison population. *Id.* at 472. The Court stated that the Pennsylvania regulations created this interest by using the unmistakably mandatory language that certain procedures "shall," "will," or "must" be provided. *Id.* at 471. The regulation also provided that administrative segregation would not occur without certain substantive predicates. *Id.* at 472. Although the inmate had such a liberty interest, the Court decided this case on procedural due process grounds, holding that the procedures that Helms received provided him with adequate protection. *Id.* For a discussion of procedural due process, see *infra* notes 28-36 and accompanying text.

5. O'Lone v. Estate of Shabazz, 482 U.S. 342, 354-55 (1987) (Brennan, J., dissenting).

6. "[The inmate] is for the time being a slave of the state." Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

7. Meachum v. Fano, 427 U.S. 215, 225 (1976). For example, in Ingraham v. Wright, 430 U.S. 651 (1977), the Court stated that the right to personal security is an historically protected liberty interest. *Id.* at 673. In Youngberg v. Romeo, 457 U.S. 307 (1982), the Court explained the right to personal security is not extinguished even if lawful confinement is for penal purposes. *Youngberg*, 457 U.S. at 315 (citing Hutto v. Finney, 437 U.S. 678 (1978)).

8. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979). In *Greenholtz*, inmates claimed they had a constitutionally protected liberty interest in parole determination. *Id.* at 11. The Supreme Court rejected their claim that a convict possessed a constitutional or inherent right to parole that is protected by the due process clause. *Id.* at 9. The Court found that the process provided by the state statute adequately satisfied the fourteenth amendment because it provided an opportunity to be heard and an explanation of the reasons for which the parole was denied. *Id.* at 16.

The Court's decision in *Turner v. Safley*[9] demonstrated how some prison regulations may impinge on substantive due process rights, while others may satisfy legitimate state interests. In *Turner*, the Court considered the validity of two Missouri prison regulations. One regulation prohibited inmates from marrying unless a compelling reason[10] existed and the inmate obtained approval from the prison superintendent.[11] The other regulation effectively prevented inmates from writing to nonfamily inmates.[12]

The Court determined that a prison regulation that impinges on a constitutional right remains valid only if it is "reasonably related"[13] to a legitimate penological interest.[14] According to the Court, this standard of review adequately protects the inmate's constitutional rights and the "policy of judicial restraint regarding prisoner complaints."[15] Applying this reasonableness standard to the regulations in *Turner*, the Court found that the state's prohibition against unrelated-inmate correspondence qualified as a reasonable means to a legitimate penological end.[16] Furthermore, the Court found that the prohibition did not result in a total deprivation of all means of expression.[17] The Court reached a contrary result when it applied the same reasonableness standard to the marriage regulation.[18] The Court found that the regulation prohibiting marriage between inmates, absent compelling reasons, was an exaggerated response to the articulated end of prison security.[19]

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9. 482 U.S. 78 (1987).

10. Pregnancy or the birth of an illegitimate child constitute compelling reasons. *Id.* at 96-97.

11. *Id.* at 82.

12. *Id.* at 81-82.

13. *Id.* at 89-91. The Court considered four factors in assessing the reasonableness of the regulation: first, the regulation was not so remote to the security interest to render it arbitrary; second, no easy alternatives existed; third, accommodation of the constitutional right would adversely affect the prison staff, other inmates, or limited prison resources; and finally, the regulation was not an exaggerated response to a prison concern. *Id.*

14. *Id.* at 89. Eight days after the Supreme Court handed down *Turner*, the Court decided O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). In *O'Lone*, the Court applied the *Turner* reasonableness standard and explained that "prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *Id.* at 349; *see also infra* notes 20-24 and accompanying text.

15. *Turner*, 482 U.S. at 85 (citing Procunier v. Martinez, 416 U.S. 396, 406 (1974)).

16. *Id.* at 91.

17. *Id.* at 92. Similarly, the Supreme Court in *O'Lone* justified the deprivation of fundamental rights by explaining that the inmates were not deprived of all forms of religious exercise. *O'Lone*, 482 U.S. at 352.

18. *Turner*, 482 U.S. at 91.

19. *Id.* at 97.

In another decision, *O'Lone v. Estate of Shabazz*,[20] decided the same day as *Turner*, the Supreme Court again applied the rational relationship test to inmates' rights. In *O'Lone*, inmates practicing the Islamic religion claimed that a New Jersey prison policy, which prevented them from attending a congregational service, violated their first amendment rights.[21] The Court determined that the policy did not violate their rights under the first amendment's free exercise clause because it was reasonably related to the legitimate governmental interest in institutional order and security.[22] Furthermore, the policy was reasonable because it did not completely ban participation in religious ceremonies.[23] Moreover, no practicable alternative existed.[24]

Even after determining that a substantive due process right exists and that the state's regulation is reasonably related to a legitimate end, the courts must determine the amount of procedural due process necessary to preserve that substantive due process right.[25] In *Vitek v. Jones*,[26] the United States Supreme Court found that inmates retain the "right to be free from, and obtain judicial relief for, unjustified intrusions on personal security."[27] In *Vitek*, prison

20. 482 U.S. 342 (1987).

21. *Id.* at 345.

22. *Id.* at 350-51.

23. *Id.* at 352.

24. *Id.* at 352-53.

25. Hewitt v. Helms, 459 U.S. 460, 472 (1983). In *Hewitt*, the Court used the *Mathews v. Eldridge* balancing test and determined that the government's interest in safety outweighed the defendant's interest in remaining in the general prison population. *Id.* at 473-74 (citing Mathews v. Eldridge, 424 U.S. 319 (1976), discussed *infra* notes 35-37 and accompanying text). Consequently, the procedures available to Helms, which included some notice of the charge against him and an opportunity to present his side of the story, satisfied the requirements of the due process clause. *Id.* at 476-77; *see also* Morrissey v. Brewer, 408 U.S. 471 (1972). In *Morrissey*, the Court determined that a parolee had liberty interests in activities such as gainful employment, the freedom to be with friends and family, and the ability to form enduring attachments. *Morrissey*, 408 U.S. at 482. After finding these liberty interests, the Court defined the minimum due process needed for parole revocation: written notice of the claimed violation; disclosure of evidence against the parolee; an opportunity to be heard and to present evidence and witnesses; the right to cross-examine witnesses; an unbiased hearing body; and a written statement of the evidence relied on and the reasons for revoking parole. *Id.* at 489.

26. 445 U.S. 480 (1976).

27. *Id.* at 492 (citing Ingraham v. Wright, 430 U.S. 651, 673 (1977)). The Court explained that the right to be free from unjustified intrusions on personal security is one of the historic liberty interests protected by the due process clause. *Id.* at 492; *see also* Youngberg v. Romeo, 457 U.S. 307 (1982). In *Youngberg*, the Court recognized that freedom from bodily restraint is a liberty interest that has always been protected by the due process clause. *Youngberg*, 457 U.S. at 316 (citing Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part)). In Parham v. J.R., 442 U.S. 584 (1979), the Court stated that individuals have a substantial

authorities transferred an inmate from the state prison to a mental hospital,[28] where he underwent involuntary behavior modification treatment.[29] The Court explained that this involuntary confinement and treatment qualitatively differed from the terms under which the inmate originally was convicted.[30] The Court held that this transfer coupled with mandatory behavior modification constituted a deprivation of liberty that required adequate procedural protections.[31]

These recent decisions establish that lawfully incarcerated inmates may possess lower expectations of due process protections. Thus, when a prison regulation infringes upon an inmate's liberty interest, courts need only apply the reasonable relationship test to determine whether the regulation unconstitutionally violates the inmate's liberty interest. However, if the regulation constitutes an exaggerated response and is not reasonably related to the penological end, it is unconstitutional. In all cases in which a regulation infringes on a substantive right, some amount of procedural process is due.

2. Procedural Due Process

The Constitution also mandates that courts follow certain procedures before depriving an individual of a property[32] or liberty[33] in-

liberty interest in remaining free from unnecessary confinement for medical treatment. *Id.* at 600. Further, the Court assumed that individuals have a protectable liberty interest in being free from unnecessary bodily restraint and stigmatization of the label of mentally ill. *Id.* at 601.

28. *Vitek*, 445 U.S. at 484. The inmate had a liberty interest in receiving the benefits of appropriate procedures, including a hearing, to determine whether his condition warranted a transfer to a mental institution. *Id.* at 490.

29. *Id.* at 486.

30. *Id.* at 493. The Court also noted that adverse changes in confinement conditions are not by themselves sufficient to trigger due process protections. No additional due process is necessary if the "conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him." *Id.* (quoting Montanye v. Haynes, 427 U.S. 236, 242 (1976)).

31. *Id.* at 494. The *Vitek* Court decided that once a state grants a liberty interest to inmates, due process protections are required to guarantee that the right is not arbitrarily discontinued. *Id.* at 488-89.

32. Goldberg v. Kelly, 397 U.S. 254 (1970). In *Goldberg*, the United States Supreme Court required a hearing similar to a judicial trial prior to discontinuance of welfare benefits. *Id.* at 255. The Court, after determining that the state statute created a right to receive welfare benefits, balanced the private interests involved and held that the individual's interest in receiving uninterrupted public assistance outweighed the state's valid interest in conserving resources. *Id.* at 266. Thus, the Court ordered additional procedural protections prior to termination of the benefits. *Id.* at 266-67. These procedures included: timely notice of the reasons for termination; and an opportunity for the individual to defend by presenting his own evidence and oral arguments and confronting adverse

terest.[34] Traditionally, due process requires some type of hearing prior to a deprivation.[35] In *Mathews v. Eldridge*,[36] the Supreme Court specifically set forth the factors that must be considered when contemplating what procedures must be followed: (1) the private interest affected by the state action; (2) the probability of an erroneous deprivation of that interest, and the value of additional procedural safeguards; and (3) the government's interest, including the cost and burden necessitated by the additional procedure.[37]

The Court addressed the issue of procedural due process as it applies in the prison context in *Wolff v. McDonnell*.[38] In *Wolff*, the Court questioned whether Nebraska's prison disciplinary proceedings complied with the fourteenth amendment's due process clause.[39] The Nebraska prison regulations unconstitutionally deprived inmates of good-time credit by failing to provide adequate procedures in disciplinary proceedings.[40] Therefore, even though

witnesses. *Id.* at 266-70. Also, the recipient has a right to retain counsel. *Id.* at 268-71. Further, the state must provide an impartial decision maker, who should disclose the basis for the subsequent decision and the evidence that he relied on in reaching his decision. *Id.* at 268-71.

33. The deprivation of a liberty interest also requires adequate due process. Wolff v. McDonnell, 418 U.S. 539, 557 (1974). "Th[e] analysis as to liberty parallels the accepted due process analysis as to property." *Id.* The "right to be heard before being condemned to suffer a grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

34. The United States Supreme Court has concluded that the flexibility of constitutionally required procedures should be determined after considering the "precise nature of the government function involved as well as the private interest that has been affected by the governmental action." Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (citing Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

35. Mathews v. Eldridge, 424 U.S. 319, 333 (1976); *see also supra* note 32.

36. 424 U.S. 319 (1976).

37. *Id.* at 335. In this case, the deprivation was of disability benefits under the Social Security Act. *Id.* at 323. The *Mathews* Court distinguished Goldberg v. Kelly, 397 U.S. 254 (1970), discussed *supra* note 32, in which the welfare recipient was entitled to an evidentiary hearing before termination of benefits. In *Mathews*, however, the recipient of Social Security disability benefits did not require an evidentiary hearing prior to termination because eligibility for disability benefits was not based on financial need as the benefits in *Goldberg* had been and the recipient would receive full retroactive relief if successful on appeal. *Mathews*, 424 U.S. at 340.

38. 418 U.S. 539 (1974). The United States Supreme Court addressed this issue again in Vitek v. Jones, 445 U.S. 480, 495-96 (1980) (adequate procedure must be provided before transfer from prison to mental hospital occurs) and Hewitt v. Helms, 459 U.S. 460, 466-72 (1983) (adequate procedural protections required prior to inmate's removal from the general prison population into segregation).

39. *Wolff*, 418 U.S. at 543. Although the Constitution does not guarantee inmates the right to good-time credit, the state statute did. *Id.* at 557. Thus, inmates in Nebraska were entitled to minimum procedural protections required by the due process clause to make sure that their state-created right was not arbitrarily infringed. *Id.*

40. *Id.* at 563-73. The state failed to provide adequate procedures because it failed to

confined in prison, these inmates retained due process rights that guaranteed certain procedural protections of the inmate's substantive due process rights.

After recognizing that inmates retain substantive due process rights while incarcerated, and that they require procedural due process to protect those rights, the question remains: what degree of procedural due process is required when an inmate faces forced administration of antipsychotic drugs? In determining whether the forced administration of antipsychotic drugs violates the inmate's due process protections, the Court must consider the benefits and adverse side effects of these drugs.

B. Benefits and Adverse Side Effects of Antipsychotic Drugs

The United States Supreme Court has recognized the benefits and dangers[41] posed by antipsychotic drugs.[42] The benefits include the reduction of certain symptoms of schizophrenia[43] and psychosis.[44] Patients suffering from psychiatric disorders often act in vio-

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provide advance written notice of the alleged violation, a written statement reporting the evidence relied on, and the reasons for disciplinary action taken prior to changing the inmates terms of confinement. *Id.* at 563.

41. Mills v. Rogers, 457 U.S. 291, 301-04 (1982). In *Mills*, the Court discussed Guardianship of Roe, 383 Mass. 415, 421 N.E.2d 40 (1981), in which the Massachusetts Supreme Court held that a person has a protected liberty interest in "decid[ing] for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs." *Mills*, 457 U.S. at 301 (quoting *Roe*, 383 Mass. at 433 n.9, 421 N.E.2d at 51 n.9). In *Mills*, the Court held that this liberty interest can be overcome only by an overwhelming state interest. *Id.* at 301. Although the Court in *Mills* recognized the dangers of the drugs, it refused to address the constitutional issue of whether any protectable liberty interest might be derived from the Constitution itself. *Id.* at 305.

42. Antipsychotic drugs are also known as neuroleptics and major tranquilizers. Kemna, *Current Status of Institutionalized Mental Health Patients' Right to Refuse Psychotropic Drugs*, 6 J. LEGAL MED. 107, 109 (1985). The most commonly used antipsychotic drugs are Prolixin, Stelazine, Thorazine, Hadol, Navane, and Sparine. *Id.* at 109.

Antipsychotic drugs work by altering the chemical balance in the brain. This type of treatment has been equated to electroconvulsive therapy which effectively treats depression by altering the chemical balance in the brain. Amicus Curiae Brief of the American Psychological Association in Support of Respondent at 16 n.40, Washington v. Harper, 110 S. Ct. 1028 (1990) (No. 88-599) (citing Riese v. St. Mary's Hosp., 196 Cal. App. 3d 1388, 243 Cal. Rptr. 241, *modified*, 209 Cal. App. 3d 1303, 271 Cal. Rptr. 199 (1987); People v. Medina, 705 P.2d 961, 967 (Colo. 1985); Gundy v. Pauley, 619 S.W.2d 730, 731-32 (Ky. 1981)).

43. Schizophrenia is defined as "any of a group of severe emotional disorders, usually of psychotic proportions, characterized by misinterpretation and retreat from reality, delusions, hallucinations, ambivalence, inappropriate affect, and withdrawn, bizarre, or regressive behavior." THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 628 (1987).

44. Psychosis is "[a] mental disorder causing gross distortion or disorganization of a

lent and self-destructive ways. Initially, antipsychotic drugs sedate the patient and then modify certain schizophrenic symptoms.[45] As the drugs reduce and control the patient's violent tendencies,[46] less hospitalization[47] and more humane treatment[48] is possible.

Although antipsychotic drugs may offer effective treatment for psychosis,[49] three basic problems arise from the use of these drugs.[50] First, these drugs produce potentially permanent harmful and disabling side effects.[51] Second, antipsychotic drugs do not cure mental illness, but rather treat only the symptoms of psychosis.[52] Finally, these drugs ineffectively treat certain mental disorders such as manic depression[53] and are least effective when used in long-term treatment.[54]

The most serious problem posed is the possibility of permanent and disabling side effects.[55] Frequently, these side effects emerge as

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person's mental capacity, affective response, and capacity to recognize reality, communicate, and relate to others to the degree of interfering with his capacity to cope with the ordinary demands of everyday life." STEDMAN'S MEDICAL DICTIONARY 1166 (5th unabridged lawyer's ed. 1982); *see also* Comment, *An Involuntary Mental Patient's Right to Refuse Treatment with Antipsychotic Drugs: A Reassessment*, 48 OHIO ST. L.J. 1135, 1139-40 (1987); Note, *Protecting the Inmate's Right to Refuse Antipsychotic Drugs*, Harper v. State, *110 Wash. 2d 873, 749 P.2d 358 (1988)*, cert. granted,*109 S. Ct. 1337 (1989)*, 64 WASH. L. REV. 459, 462 (1989).

45. Such symptoms include hallucinations, delusions, and paranoid ideation. *See* GOODMAN & GILMAN'S THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 393, 398 (6th ed. 1980) [hereinafter GOODMAN & GILMAN]; Kemna, *supra* note 42, at 110.

46. P. BREGGIN, PSYCHIATRIC DRUGS: HAZARDS TO THE BRAIN 31 (1983); Note, *supra* note 44, at 462.

47. Kemna, *supra* note 42, at 110. Consequently, patients may remain at home and function in the community. *Id.*

48. *Id.* Staff need no longer use brutality and seclusion to maintain order. *Id.*

49. *See supra* notes 42, 44.

50. *See* Kemna, *supra* note 42, at 111. Doctors do not limit the use of antipsychotic drugs to treating psychosis, but have prescribed them to treat nonpsychotic mental illnesses such as depression and anxiety. *Id.* at 110 n.14; *see also* GOODMAN & GILMAN, *supra* note 44, at 393; Note, *supra* note 44, at 460.

51. Kemna, *supra* note 42, at 111-13.

52. *See, e.g.*, D. JESTE & R. WYATT, UNDERSTANDING AND TREATING TARDIVE DYSKINESIA 1 (1982); Kemna, *supra* note 42, at 110.

53. Note, *A Common Law Remedy for Forcible Medication of the Institutionalized Mentally Ill*, 82 COLUM. L. REV. 1720 (1982). Evidence exists indicating that doctors over-prescribe antipsychotic drugs. *See* Kemna, *supra* note 42, at 115. Estimations reveal misdiagnosis of approximately 40% of institutionalized mentally ill patients. *Id.* Thus, many individuals ingesting these drugs are unnecessarily subjected to serious side effects. *Id.*

54. Kemna *supra* note 42, at 110-11.

55. *See* Brooks, *The Constitutional Right to Refuse Antipsychotic Medications*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 179, 185 (1980); Kemna, *supra* note 42, at 111-14; Note, *supra* note 44, at 459.

extrapyramidal[56] symptoms that impair "the motor system which controls muscular movements."[57] Additional grave physical risks occur from the use of antipsychotic drugs. These include liver damage, changes in heart rate that can result in cardiac arrest, convulsions, acute dystonia (fixed involuntary rigidity), and neuroleptic malignant syndrome,[58] which can lead to death from cardiac dysfunction.[59] Often these side effects disappear with discontinuance of the drug;[60] however, the drugs can remain in a person's system for months, and some side effects are permanent.[61] These antipsychotic drugs and their disabling side effects were at issue in *Washington v. Harper.*

III. DISCUSSION

A. Facts

In 1976, Walter Harper received a prison sentence for robbery.[62] While in prison, he consented to the administration of antip-

56. The extrapyramidal motor system consists of "all of the brain structures affecting bodily . . . movement, excluding the motor neurons, the motor cortex, and the pyramidal . . . tract." STEDMAN'S MEDICAL DICTIONARY 1401 (5th unabridged lawyer's ed. 1982).

57. Kemna, *supra* note 42, at 112. Such side effects are common. *Id.* The most common extrapyramidal symptom is akathisia, which is characterized by constant restlessness and agitation. R. SHADER & A. DI MASCIO, EXTRAPYRAMIDAL EFFECTS IN PSYCHOTROPIC DRUG SIDE EFFECTS 92-94 (1970). Other extrapyramidal side effects are called Parkinsonian reactions, which include akinesia and tremor. The symptoms of akinesia include muscle stiffness and rigidity, mask-like face, and stooped posture. Tremor is the rhythmic oscillation of the hands and fingers. *Id.* at 93. The most dramatic extrapyramidal symptom is the dystonic reaction. *Id.* The two types of dystonic reactions are dystonia and dyskinesia. *Id.* at 93-94. Dystonia is characterized by prolonged abnormal muscle spasms in the face, eyes, throat, lips, and tongue. *Id.* at 93-94; *see also* Kemna, *supra* note 42, at 112. Dyskinesia results in the most serious side effects because it is an irreversible neurological disorder. Kemna, *supra* note 42, at 113. Tardive dyskinesia results in repetitive, involuntary, grotesque movements concentrated in the face and mouth. Note, *supra* note 44, at 462. These purposeless movements include licking, lip smacking, sucking, and chewing. Tardive dyskinesia can also cause muscle contractions in the arms, hands, and trunk. *Id.*

58. "[A] group of neurologic complications which may result from the administration of neuroleptic drugs . . . marked especially by . . . extrapyramidal symptoms including rigidity and often involuntary movements, particularly facial dyskinesia. Recovery depends on discontinuance of the drugs. Continued use can result in permanent impairment of brain function or death." 3 INTERNATIONAL DICTIONARY OF MEDICINE AND BIOLOGY 2809 (1986).

59. Amicus Curiae Brief of the American Psychological Association in the Support of the Respondent at 7, Washington v. Harper, 110 S. Ct. 1028 (1990) (No. 88-599); P. BREGGIN, *supra* note 46, at 71.

60. Brooks, *supra* note 55, at 186-87.

61. *Id.* at 187.

62. Washington v. Harper, 110 S. Ct. 1028, 1032 (1990).

sychotic drugs.[63] In November of 1982, Harper refused further medication, and his physicians had to obtain approval pursuant to Special Offender Center (SOC) policy 600.30 to medicate him against his will.[64]

Regulation 600.30 allows a psychiatrist to medicate an inmate forcibly only if the inmate suffers from a mental disorder, is gravely disabled, or is likely seriously to harm himself, others, or their property.[65] This regulation also provides that, before obtaining approval to medicate forcibly, a hearing in front of a committee must be held.[66]

The regulation gives the inmate the right to attend this hearing, to present evidence and witnesses, and to cross-examine staff witnesses.[67] The inmate also has the right to assistance of an independent lay advisor who understands the psychiatric issues involved.[68] The inmate may appeal the committee's finding to the center superintendent,[69] and the inmate may pursue judicial review in state court by means of an extraordinary writ or a personal restraint petition.[70]

The committee held the required hearing,[71] and approved the forced administration of antipsychotic drugs, finding that Harper's

63. Harper was given Trialafon, Hadol, Prolixin, Taractan, Loxitane, Mellaril, and Navane. Harper v. State, 110 Wash. 2d 873, 876 n.3, 759 P.2d 358, 361 n.3 (1988), *rev'd*, 110 S. Ct. 1028 (1990).

64. *Harper*, 110 S. Ct. at 1033.

65. *Id.*

66. *Id.* The committee was composed of a psychiatrist, psychologist, and the center's associate superintendent. None of the committee members were involved in the diagnosis or treatment of the inmate. Before forcing the administration of antipsychotic drugs on an inmate, a majority of the committee, including the psychiatrist, must have voted that the inmate was gravely disabled and suffered from a mental disorder. *Id.*

67. *Id.* The regulation also required that prior to the hearing, an inmate must be given 24-hours notice that a hearing regarding medication will be held. Prison officials may not medicate the inmate during this 24-hour period. Further, during the hearing, the minutes must be recorded and the inmate must receive a copy. *Id.* at 1034.

68. *Id.* at 1033-34. Harper's advisor for the initial hearing was a nurse from the Washington State Reformatory. *Id.* at 1055 n.30 (Stevens, J., dissenting). Harper's advisors for the periodic reviews were SOC staff members. *Id.* (Stevens, J. dissenting).

69. *Id.* at 1033-34. The appeal must be made within 24 hours and the superintendent must rule on the appeal within 24 hours. *Id.*

70. *Id.* According to SOC policy, the decision of involuntary medication is subject to periodic review. After the first refusal of medication, a committee is required to review the case after the first seven days of treatment. After the review, treatment can continue if re-approved. The treating psychiatrist is required to review the case and prepare a report every 14 days. The report is sent to the Department of Corrections medical director. *Id.*

71. *Id.*

mental disease or disorder made him dangerous to others.[72] On appeal, the superintendent upheld the committee's finding.[73] On November 23, 1982 Harper was medicated against his will.[74] This forced drugging persisted periodically until 1986.[75]

In 1985, Harper filed suit in state court pursuant to 42 U.S.C. § 1983.[76] He alleged that the forced medication violated his due process, equal protection, and free speech rights under both the United States and Washington Constitutions.[77] The trial court held that Harper had a fundamental liberty interest in refusing the forced administration of antipsychotic medication.[78] Additionally, the court determined that under the standards established in *Vitek*, the SOC regulation provided adequate procedural protections against indiscriminate forced administration of antipsychotic medication.[79]

The Washington Supreme Court reversed.[80] That court held that the highly intrusive nature of antipsychotic drugs made

72. *Id.* Harper was originally diagnosed as suffering from a manic-depressive disorder. *Id.* at 1033. He currently is diagnosed as schizophrenic. *Id.* at 1033 n.2.

73. *Id.* at 1034.

74. *Id.*

75. *Id.* Harper received periodic reviews by committees until November 1983, when he was transferred from the SOC to the Washington State Reformatory. After one month, officials transferred Harper back to SOC because his condition had deteriorated without the medication. Another hearing convened and the medication committee determined that Harper suffered from a mental disorder and was considered a danger to others. Brief for the American Psychiatric Association and the Washington State Psychiatric Association as Amici Curiae at 5, Washington v. Harper, 110 S. Ct. 1028 (1990) (No. 88-599). The committee and Harper's treating psychiatrist recommended that he be treated with antipsychotic drugs. *Harper*, 110 S. Ct. at 1034. Once again, Harper received antipsychotic drugs against his will. During this period, Harper complained of symptoms of involuntary spasms (acute dystonia) and restlessness (akathesia), but he never exhibited any symptoms of tardive dyskinesia. Brief for the American Psychiatric Association and the Washington State Psychiatric Association as Amici Curiae at 5, Washington v. Harper, 110 S. Ct. 1028 (1990) (No. 88-599). Harper received such medication with periodic review until June 1986, when he was transferred to the Washington State Penitentiary. *Harper*, 110 S. Ct. at 1034.

76. *Harper*, 110 S. Ct. at 1034.

77. *Id.* Harper also alleged a violation of state tort law. The Washington State Supreme Court decided the case on due process grounds; therefore, the United States Supreme Court did not address Harper's free speech and equal protection claims. *Id.* at 1035 n.5.

78. Harper v. State, 110 Wash. 2d 873, 876, 756 P.2d 358, 361 (1988), *rev'd*, 110 S. Ct. 1028 (1990; *see also* Brief for the American Psychiatric Association and the Washington State Psychiatric Association as Amici Curiae at 6, Washington v. Harper, 110 S. Ct. 1028 (1990) (No. 88-599).

79. *Harper*, 110 Wash. 2d at 879-80, 759 P.2d at 362-63. The trial court cited Vitek v Jones, 445 U.S. 480 (1976), but did not explain why the case controlled. For a full discussion of *Vitek*, see *supra* notes 26-31 and accompanying text.

80. *Harper*, 110 Wash. 2d at 886, 759 P.2d at 366.

greater procedural safeguards necessary.[81] According to the Washington Supreme Court, the state must demonstrate the necessity of forced administration of drugs, its effectiveness, and its role in furthering a compelling state interest.[82] Additionally, the court found that these elements had to be proved at a judicial hearing by clear and cogent evidence.[83]

The United States Supreme Court granted certiorari to determine whether the Washington regulation denied Walter Harper due process.[84]

B. Opinion of the Supreme Court

The Court,[85] in a six-to-three decision, held that SOC policy 600.30 was reasonably related to a legitimate penological end.[86] The Court further held that the procedures in the policy comported with due process, and, therefore, SOC officials could administer drugs to Harper against his will without a judicial hearing.[87]

1. Substantive Issue

After determining that Harper's claim was not moot,[88] the Court considered whether Harper had a liberty interest.[89] Relying on *Hewitt v. Helms*,[90] the Court determined that the prison regulation created a right to be free from the arbitrary administration of an-

81. *Id.* at 880-81, 759 P.2d at 363. The Washington State Supreme Court distinguished *Vitek* and explained that Harper needed additional procedures to protect his liberty interest. Harper faced the forced administration of mind altering drugs, which deserved greater protection than the prisoner in *Vitek* who faced the stigmatization from a transfer to a mental hospital. *Id.*

82. *Id.* at 883-84, 759 P.2d at 364-65.

83. *Id.* "It is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings." *Id.* at 881, 759 P.2d 363 (quoting Vitek v. Jones, 445 U.S. 480, 495 (1976)).

84. *Harper*, 110 S. Ct. at 1035.

85. *Id.* at 1032. Justice Kennedy wrote the majority opinion, in which Chief Justice Rehnquist, and Justices White, Blackmun, O'Connor, and Scalia joined. *Id.*

86. *Id.* at 1035-40. Justice Blackmun concurred, but added that it would be a much easier decision if the inmate were formally committed. *Id.* at 1044 (Blackmun, J., concurring).

87. *Id.* at 1040.

88. *Id.* at 1035. The Court held that even though the state had discontinued nonconsensual administration of antipsychotic drugs, a case or controversy still existed. Harper remained in the Washington prison system serving out his sentence, and he could be transferred to SOC at any time. If he were transferred, SOC officials most probably would attempt to administer antipsychotic drugs to Harper pursuant to policy 600.30. But for the decision of the Washington Supreme Court, Harper would incur the same alleged injury. *Id.*

89. *Id.* at 1035-40.

90. 459 U.S. 460 (1983), discussed *supra* note 4.

tipsychotic medication as a matter of state law.[91] The policy's mandatory language entitled Harper to the expectation that medication would be administered only if he suffered from mental illness or a grave disability, or posed a danger.[92]

The Court also found that the fourteenth amendment's due process clause afforded Harper protection against forcible administration of antipsychotic drugs.[93] The Court concluded that the minimum standards[94] of the due process clause did not confer greater substantive due process rights on Harper than those granted by the state regulation.[95]

Relying on *Turner v. Safley*[96] and *O'Lone v. Estate of Shabazz*,[97] the Court determined the proper standard of review for the prison regulation. The Court stated that the policy did not violate the due process clause because it was "reasonably related to [a] legitimate penological interest."[98] Applying this standard, the Court concluded that the state had a legitimate interest in security and that the policy was reasonably related to that interest because of its exclusive application to mentally ill inmates.[99] The Court determined that the proposed alternatives were unacceptable substitutes for antipsychotic medication or were unresponsive to the State's legitimate interests.[100]

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91. *Harper*, 110 S. Ct. at 1036.

92. *Id.*

93. *Id.*; *see also* Vitek v. Jones, 445 U.S. 481, 492 (1980) (historically, the due process clause has protected an individual's right to be free from unjustified intrusions on personal security).

94. The state regulation required the committee to find that an inmate had an existing mental disorder that would likely result in harm if treatment were not given. *Harper*, 110 S. Ct. at 1037. Further, the policy required that the antipsychotic medication be prescribed by a psychiatrist and approved by a reviewing psychiatrist. The Court reasoned that this regulation complied with due process because this standard considered the inmate's medical interests and the state's interests. *Id.*

95. *Id.* at 1036-37.

96. 482 U.S. 78 (1987), discussed *supra* notes 9-19 and accompanying text.

97. 482 U.S. 342 (1987), discussed *supra* notes 20-24 and accompanying text.

98. *Harper*, 110 S. Ct. at 1037. The Court differed from the Washington Supreme Court, which had required the state to prove by clear and cogent evidence that it had a compelling interest in administering the drug and that such forcible administration was both necessary and effective to further that interest. *Id.* at 1035-36. The Supreme Court stated that the Washington Supreme Court erred by not applying the reasonableness standard. *Id.* at 1037.

99. *Id.* at 1038.

100. *Id.* at 1039. The Court stated that physical restraints are not a reasonable alternative to antipsychotic drugs because they are only effective in the short term and can result in serious physical side effects. Furthermore, the staff may be at risk of injury. The Court was not satisfied that Harper proved that physical restraints or seclusion were adequate alternatives to the drugs. *Id.*

2. Procedural Issue

The Court next considered the Washington Supreme Court's holding that Harper was entitled to a full judicial hearing prior to receiving involuntary administration of antipsychotic drugs.[101] To guide its decision, the Court turned to the balancing test it developed in *Mathews v. Eldridge*.[102] That test required the Court to balance Harper's liberty interest, in light of the procedural safeguards of that interest, against the state's penological interest in administering antipsychotic medication.[103]

The Court recognized the dangers of antipsychotic drugs and Harper's substantial interest in avoiding unwarranted administration of these drugs.[104] This interest, however, carried less weight in the Court's balancing scheme because the Court determined that the administrative hearing provided by the SOC policy[105] adequately protected Harper's liberty interest.[106] The Court then viewed Harper's interest, in light of the protections set up to prevent abuse of that interest, against the state's penological interest in prison safety and security.[107] Accordingly, the Court held that, given the adequate procedural safeguards and the strong state interests, the state could force Harper to take antipsychotic medication.

The Court rejected the argument that leaving the decision to medicate to a medical professional rather than a judge violated Harper's procedural due process rights.[108] The Court reasoned that this system conserved scarce prison resources and that a medical professional's determination of this matter adequately, if not better, served Harper's interests.[109] Further the Court found no

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101. *Id.* at 1040.

102. 424 U.S. 319 (1976), discussed *supra* notes 35-37 and accompanying text.

103. *Harper*, 110 S. Ct. at 1041. The Court determined that, although Harper's interest in avoiding antipsychotic drugs was great, the procedures provided adequately protected his rights. *Id.* at 1041-42.

104. *Id.* at 1041-42.

105. The policy provided that a psychiatrist rather than a judge should make the ultimate decision to medicate. *Id.* at 1042.

106. *Id.* at 1040-42.

107. *Id.* at 1037.

108. *Id.* at 1042.

109. *Id.* For support, the Court relied on Parham v. J.R., 442 U.S. 584 (1979). The Court cited *Parham* for the proposition that the due process clause is not violated if a medical professional makes the decision to force medication. *Harper*, 110 S. Ct. at 1042. In *Parham*, the Court held that when deciding whether to institutionalize a child, due process is satisfied if a neutral fact finder makes some kind of inquiry to determine whether the admission requirements are met. *Parham*, 442 U.S. at 606. The Court further explained that due process does not require the fact finder to be trained in the law,

institutional biases[110] and found that medical professionals could make independent decisions.[111] The Court further held that the regulation's provision for a lay advisor adequately protected the inmate; therefore, representation by counsel was not required.[112]

C. *The Dissent*

The dissenting justices[113] found three errors in the majority opinion.[114] First, the dissent argued that the majority undervalued Harper's liberty interests.[115] The administration of antipsychotic drugs against Harper's will, the dissent argued, created "a substantial risk of permanent injury and premature death."[116] The dissent noted Harper's strong opposition to the drugs and the high risk of harmful and permanent side effects.[117] Adopting the reasoning of the Washington State Supreme Court, the dissent equated the intrusiveness of the administration of drugs to electroconvulsive therapy,[118] which alters the chemical balance in the inmate's brain.[119]

Second, the dissent argued that the majority of the Court misread the SOC policy and misapplied the *Turner* decision.[120] Ac-

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nor does it require a formal or quasi-formal hearing. *Id.* at 607. In fact, the Court found that a psychiatrist was the most qualified fact finder in that situation. *Id.*

The *Harper* Court also relied on Youngberg v. Romeo, 457 U.S. 307 (1982). In *Youngberg*, the Supreme Court determined that an involuntarily committed mental patient has constitutionally protected liberty interests in reasonably safe conditions, reasonable training, and freedom from unreasonable bodily restraints. *Id.* at 314-25. The Court explained that when determining reasonableness, it would show deference to qualified professionals' judgments. *Id.* at 322.

110. The Court stated that the trial court made specific findings that Harper had a history of assaultive behavior and that the procedures required by policy 600.30 were followed. *Harper*, 110 S. Ct. at 1043.

111. *Id.*

112. *Id.* at 1044.

113. *Id.* at 1045 (Stevens, J., dissenting). Justice Stevens wrote the dissent, in which Justices Brennan and Marshall joined.

114. *Id.* (Stevens, J., dissenting).

115. *Id.* (Stevens, J., dissenting).

116. *Id.* (Stevens, J., dissenting).

117. "Inmate Harper stated [that] he would rather die th[a]n take medication." *Id.* at 1046 (Stevens, J., dissenting).

118. Electroconvulsive therapy is "[a] form of shock therapy that is most effective in the treatment of depression, in which unconsciousness and/or convulsions are induced by the passage of an electric current through the brain." THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 724 (1987).

119. *Id.* at 1047 (Stevens, J., dissenting) (citing Harper v. State, 110 Wash. 2d 873, 878, 759 P.2d 358, 362 (1988), *rev'd*, 110 S. Ct. 1028 (1990). The dissent explained that drugs profoundly effect an individual's thought process and often result in permanent severe side effects. *Id.* (Stevens, J., dissenting).

120. *Id.* at 1045 (Stevens, J., dissenting).

cording to the dissent, three possible state interests existed: (1) punishment for Harper's crime; (2) cure for Harper's mental illness; and (3) a mechanism to maintain order.[121] The majority asserted that the drugs would only be administered against an inmate's will for treatment and in the interest of the inmate.[122] Although the dissent recognized the state's legitimate interest in prison security, it disagreed with the majority's determination that the State's interests in security and an inmate's medical interests established independent justifications for medicating inmates forcibly.[123] The dissent stated that the Court misapplied the *Turner* standard.[124] It argued that policy was an "exaggerated response" to the state security interests.[125] It compared this regulation to the similar Missouri prison regulation in *Turner v. Safley*,[126] which prohibited inmate marriages except in an emergency and for compelling reasons.

In turn, the dissent offered alternatives to the Court's finding that there were no cost-effective alternatives to forced medication.[127] The dissent declared that a more narrowly tailored policy would provide feasible alternatives at marginally increased costs.[128] Such a policy could permit withdrawal of the drugs from those who would actually refuse the antipsychotic medication and who

121. *Id.* at 1047 (Stevens, J., dissenting).

122. *Id.* at 1048 (Stevens, J., dissenting). The majority and dissent agreed that the forced administration of antipsychotic medication could not be used for punishment. The dissent cited Vitek v. Jones, 445 U.S. 480 (1980), in which it determined that an inmate retains a protectable liberty interest in not being transferred to a mental hospital without additional procedures. Such a transfer would be a consequence that qualitatively differed from the punishment an inmate normally suffered. *Harper*, 110 S. Ct. at 1047 (Stevens, J., dissenting).

123. *Id.* at 1049-51 (Stevens, J., dissenting).

124. *Id.* at 1049 (Stevens, J., dissenting).

125. *Id.* at 1050 (Stevens, J., dissenting). The policy essentially allows the long-term forced administration of antipsychotic drugs if the prison official found that the inmate posed a risk to himself, others, or even property. *Id.* at 1049 (Stevens, J., dissenting). Thus, according to the dissent, Policy 600.30 allows the sacrifice of an inmate's substantive right to avoid forced administration of antipsychotic drugs for the purpose of advancing institutional and administrative interests, without any consideration of the inmate's medical interests. *Id.* (Stevens, J., dissenting). The dissent characterized policy 600.30 as an exaggerated response because it was based on purely institutional concerns. *Id.* (Stevens, J., dissenting). The dissent also directed attention to another provision of policy 600.30, not in issue, which allowed for forced medication for 72 hours for an emergency that occurred when " 'an inmate [was] suffering from a mental disorder and as a result of that disorder present[ed] an *imminent* likelihood of *serious harm* to himself or others.' " *Id.* at 1050 (emphasis in original) (Stevens, J., dissenting) (quoting policy 600.30).

126. 482 U.S. 78 (1987), discussed *supra* notes 9-19 and accompanying text.

127. *Harper*, 110 S. Ct. at 1050-51 (Stevens, J., dissenting).

128. *Id.* (Stevens, J., dissenting).

did not pose an imminent danger to others.[129]

According to the dissent, the majority's most critical error in reading the SOC policy was holding that the administrative hearing provided therein afforded Harper adequate due process protection.[130] The dissent found the regulation inadequate because it failed to provide for an unbiased decision maker who would consider only Harper's best interests when determining Harper's proper drug treatments.[131] The regulation's decision makers, according to the dissent, possessed two conflicts of interest.[132] First, the hearing committee members reviewed their colleagues' work, who in turn reviewed their work.[133] Second, the committee members were not concerned only with the inmate's needs, but also with controlling the mentally disturbed inmate in the most convenient way.[134]

The dissent's third criticism of the policy was the absence of an effective mechanism for overruling an erroneous or arbitrary committee decision to medicate.[135] The dissent stated that an administrative hearing conducted by impartial professionals could meet the due process requirements, but because the policy failed to provide such protection, the Washington Supreme Court's decision should have been affirmed.[136]

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129. *Id.* at 1050 (Stevens, J., dissenting). The dissent stated that the evidence did not show that more than a marginal number of inmates would refuse the drugs under a voluntary program. *Id.* n.15 (Stevens, J., dissenting). Additionally, less dangerous tranquilizers could be substituted for the antipsychotic drugs. *Id.* at 1051 (Stevens, J., dissenting).

130. *Id.* at 1052 (Stevens, J., dissenting).

131. *Id.* (Stevens, J., dissenting).

132. *Id.* (Stevens, J., dissenting).

133. *Id.* (Stevens, J., dissenting). The dissent pointed out that this type of in-house system allows the members to be susceptible to pressures that can result in bias. *Id.* n.22. (Stevens, J., dissenting). Additionally, although the committee members who participated in the first hearing could not be involved in the inmate's current treatment, they could be involved in all subsequent decisions to continue medication. *Id.* at 1052-53. (Stevens, J., dissenting).

134. The committee members were employed by the prison; thus, their jobs demanded that they be concerned with controlling the inmate. *Id.* at 1053 (Stevens, J., dissenting).

135. *Id.* at 1055 (Stevens, J., dissenting). The dissent emphasized that the decision makers and the entire procedure are concerned with institutional control rather than the medical interests of the inmate; therefore, the procedures do not protect the liberty interests of the inmate. *Id.* (Stevens, J., dissenting).

136. *Id.* (Stevens, J., dissenting).

IV. ANALYSIS

A. Turner *and* O'Lone *Do Not Apply*

Upon conviction, inmates retain certain rights;[137] other rights are limited and even extinguished.[138] If prison officials seek to restrict those remaining rights, the officials must do so within the confines of due process.[139] In *Washington v. Harper*, all nine Justices agreed that under the due process clause and SOC policy 600.30, Harper possessed a liberty interest in remaining free from forced administration of antipsychotic drugs.[140] The Justices diverged, however, in their determination of how much procedural process was due to Harper before his interest could be subjugated to state interests.

The majority relied on *Turner v. Safley*[141] and *O'Lone v. Estate of Shabazz*[142] to support its decision allowing Harper's involuntary medication. In *Turner* and *O'Lone* respectively, the state deprived inmates of their right to communicate and their right to religious expression. In both of those cases, the Court recognized those rights as fundamental, but held that they succumbed to the state's interest in prison security.

The majority's reliance on those cases was misplaced because the right to be free from forced administration of antipsychotic drugs is unique.[143] Bodily intrusion by the antipsychotic drugs profoundly affects the thought process and will likely cause severe and

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137. Rights that remain include: the right to be free from unjustified intrusions on personal security, Youngberg v. Romeo, 457 U.S. 307 (1982); protection from deprivation of life, liberty, and property without due process of law, Haines v. Kerner, 404 U.S. 519 (1972); the right of access to the courts, Younger v. Gilmore, 404 U.S. 15 (1971); and protection from invidious discrimination based on race, Lee v. Washington, 390 U.S. 333 (1968).

138. The right to marry is substantially restricted. *See* Turner v. Safley, 482 U.S. 78, 95 (1987). The right to be free from confinement is extinguished. *See* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979).

139. *See, e.g.*, Hewitt v. Helms, 459 U.S. 460, 491-94 (1983); Youngberg v. Romeo, 457 U.S. 307, 316 (1982); Parham v. J.R., 442 U.S. 584, 600-01 (1979).

140. *See Harper*, 110 S. Ct. at 1036.

141. 482 U.S. 78 (1987), discussed *supra* notes 9-19 and accompanying text.

142. 482 U.S. 342 (1987), discussed *supra* notes 20-24 and accompanying text.

143. Harper v. State, 110 Wash. 2d 873, 833 n.9, 759 P.2d 358, 364 n.9 (1988), *rev'd*, 110 S. Ct. 1028 (1990). The intrusiveness of antipsychotic drugs parallels electroconvulsive therapy. *See supra* note 42. In the past, courts allowed unwilling patients a judicial hearing prior to forced electroconvulsive therapy. Amicus Curiae Brief of the American Psychological Association in Support of Respondent at 16 n.40, Washington v. Harper, 110 S. Ct. 1028 (199) (No. 88-599) (citing Riese v. St. Mary's Hosp., 196 Cal. App. 3d 1388, 243 Cal. Rptr. 241, *modified*, 209 Cal. App. 3d 1303, 271 Cal. Rptr. 199 (1987); People v. Medina, 705 P.2d 961, 967 (Colo. 1985); Gundy v. Pauley, 619 S.W.2d 730, 731-32 (Ky. 1981)).

permanent disabling side effects.[144] Harper experienced both physically and mentally adverse side effects, including insomnia, blurred vision, dry mouth, muscle spasms, hallucinations, and a tendency toward committing suicide.[145] The seriousness of the intrusion upon Harper's mind and the potentially gruesome side effects vividly attest to Harper's heightened need for procedural protection before the prison compelled him to take mind and body altering drugs.

Another distinguishing factor that amplifies the Court's misplaced reliance on *Turner* and *O'Lone* is that in both cases, the Court justified the infringement on communication and religious rights by explaining that the inmates did not suffer a total deprivation of those rights.[146] In contrast, unlike the inmates in *Turner* and *O'Lone*, Harper suffered a total deprivation of his right to remain free from bodily intrusions the moment the first drug entered his bloodstream. Thus, *Harper* differs from *Turner* and *O'Lone* in this crucial respect, and the Court erroneously ignored this difference in relying on those cases to Harper's detriment.

The drugs will continue to alter Harper's thought process for the duration of his treatment, and even if the medication is discontinued, the resulting disabling side effects may be permanent. Considering the complete destruction of Harper's fundamental right to be free from unjustified bodily intrusions, Harper deserves greater procedural due process protections than those afforded in *Turner* and *O'Lone*.

B. Transfer and Change in Confinement Terms Require Additional Protections

Both the majority and the dissent failed to discuss the implications of Harper's transfer from the penitentiary to the SOC. The Court in *Vitek* held that a transfer from a prison to a mental hospital without a prior hearing deprived the inmate of a liberty interest protected by the due process clause.[147] The inmate's transfer constituted a "grievous loss" by exceeding the range of expected pun-

144. *See supra* notes 41-61 and accompanying text.

145. Complaint for Declaratory Injunctive Relief and Monetary Damages at 6, Harper v. State, No. 85-2-00394-1 (Wash. Sup. Ct. filed Feb. 1, 1985).

146. Turner v. Safely, 482 U.S. 78, 92 (1987). The regulation did not deprive the inmates of all means of expression. *Id.*; *see also O'Lone*, 482 U.S. at 352 (regulation prohibiting inmates from attending certain congregational services did not constitute a free-exercise deprivation).

147. Vitek v. Jones, 445 U.S. 480, 488-89 (1980), discussed *supra* notes 26-31 and accompanying text.

ishments the inmate was sentenced to endure.[148] In *Washington v. Harper*, Harper was imprisoned for robbery, not for a mental illness or for failure to take antipsychotic medication.[149] Therefore, his expected punishment did not include a transfer to SOC nor the forced administration of antipsychotic medication. According to *Vitek*, the Court should have provided Harper with additional due process, including a hearing,[150] before the transfer and involuntary medication occurred.

Harper's transfer to a mental hospital triggered the need for additional due process protections, as did the substantial change in his confinement terms. The Supreme Court, in *Wolff v. McDonnell*,[151] held that a major change in confinement terms required procedural due process. Forced drugging clearly constitutes a major change in confinement that more significantly affects an inmate than a transfer from a prison to a mental hospital.[152] A change in facilities may improve the care of the inmate and is always reversible. On the other hand, forced medication of antipsychotic drugs can result in adverse side effects and potentially irreversible disabilities.[153] It is precisely the threat of these dangers that dictates greater procedural protections than policy 600.30 provides.

C. Policy 600.30 Is Procedurally Defective

At a minimum, due process requires notice and an opportunity to be heard within a meaningful time and in a meaningful manner.[154] Policy 600.30, on its face, appears to supply inmates with adequate procedural due process. In reality, however, these purported protections are meaningless. The policy provides inmates with twenty-four hours advance notice of the hearing in which the committee will decide whether to medicate the inmate forcibly. During the twenty-four hour period prior to the hearing, no medi-

148. *Id.* at 492. The inmate's conviction extinguished his right to freedom from confinement, but did not include the right to classify him as mentally ill and allow forcible psychotropic treatment without further procedural due process protections. *Id.* at 493-94.

149. Washington v. Harper, 110 S. Ct. 1028, 1032 (1990).

150. *Vitek*, 445 U.S. at 495-96 (hearing required for inmate prior to transfer to mental institution).

151. 418 U.S. 539 (1974), discussed *supra* notes 38-30 and accompanying text.

152. Such a transfer triggers due process. *Vitek*, 445 U.S. at 493.

153. Amicus Curiae Brief of the American Psychological Association in Support of Respondent at 17, Washington v. Harper, 110 S. Ct. 1028 (1990) (No. 88-599).

154. Mathews v. Eldridge, 424 U.S. 319, 333 (1976), discussed *supra* notes 35-37 and accompanying text.

cation may be administered.[155] This brief period fails to satisfy the notice requirement because psychotropic drugs can affect patients for months.[156]

Additionally, policy 600.30 falls short in its attempt to provide inmates with an adequate opportunity to be heard. Although the policy affords inmates the opportunity to cross-examine witnesses and present evidence, these rights are meaningless for two reasons. First, if the drugs continually influence the inmate, the inmate's abilities to exercise these rights will be inhibited. Second, the policy fails to provide the inmate with representation by counsel. A drugged inmate or one suffering from mental illness is not capable of presenting evidence or conducting a cross-examination. As the Court stated in dicta in *Vitek*, the need for legal assistance is greater when an inmate is thought to be suffering from a mental disease that requires involuntary treatment.[157] In that situation, the inmate will be less likely to understand or be able to exercise his rights.[158]

Furthermore, a potential bias taints the hearings provided by policy 600.30.[159] Initially, a committee that has not diagnosed or treated the inmate makes the decision to medicate.[160] On the other hand, periodic reviews held to decide whether an inmate requires continued medication do not require disinterested committee members.[161] Thus, these reviews risk continuing medication based on the inherent bias of the committee.[162]

Considering the shortcomings of policy 600.30, the United States Supreme Court should compel the Washington prison system to confer additional procedural protections on inmates faced

155. *Harper*, 110 S. Ct. at 1055 (Stevens, J., dissenting).

156. *Id.* n.29 (Stevens, J., dissenting).

157. Vitek v. Jones, 445 U.S. 480, 496-97 (1980).

158. *Id.*

159. *Harper*, 110 S. Ct. at 1052-56 (Stevens, J., dissenting). Even though doctors may be the best individuals to diagnose illness and prescribe treatments, they are not necessarily the best individuals to determine whether the inmate is entitled to refuse such treatment. Doctors are concerned with treating a medical condition and not with the liberty interests violated by such treatment. *Id.* at 1053 (Stevens, J., dissenting). Furthermore, policy 600.30 clearly permits forced medication based on security and other non-treatment concerns. *Id.* at 1048-49 (Stevens, J., dissenting).

160. *Id.* at 1052 (Stevens, J., dissenting).

161. *Id.* at 1052-53 (Stevens, J., dissenting).

162. *Id.* at 1052 n.22 (Stevens, J., dissenting). The dissent presented data from New Jersey mental institutions. In 1980, external reviews by independent psychiatrists resulted in discontinuation or reduction of 59% of dosages. When the review policy was changed from an external to an internal peer review system, the percentage dropped to 2.5%. *Id.* (Stevens, J., dissenting).

with the prospect of forced medication. When prison officials and treating psychiatrists recommend forced medication, the Court should require a judicial hearing prior to actual medication. "It is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings."[163]

V. CONCLUSION

The Supreme Court in *Washington v. Harper* unfairly narrowed an inmate's due proces rights. Although the Court found that prison inmates possess a substantive due process right to refuse antipsychotic medication, the Court substantially undervalued that liberty interest. Additionally, the Court failed to provide adequate procedural due process protections. When one reflects upon the potentially permanent and disabling side effects of the drugs, the need for a formal judicial hearing is unquestionable. Without the benefit of adequate counsel, the procedural protections provided by the regulation, such as the right to cross-examine witnesses and present evidence, are meaningless. Furthermore, the Supreme Court's inability to recognize the potentially inherent bias in the regulation's decision-making body deprives the inmate of a truly impartial procedure.

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163. Vitek v. Jones, 445 U.S. 480, 495 (1980), discussed *supra* notes 26-31 and accompanying text.