Journal of Contemporary Health Law & Policy (1985-2015)

Volume 29 | Issue 1 Article 9

2012

The Captive Mind: Antipsychotics as Chemical Restraint in Juvenile Detention

Ashley A. Norton

THE CAPTIVE MIND: ANTIPSYCHOTICS AS CHEMICAL RESTRAINT IN JUVENILE DETENTION

Ashley A. Norton[*]

It is June of 2008. A woman is found slumped in her car, passed out in a sea of narcotics.[1] *An investigation reveals that she is the mother of a six year old, Gabriel Myers.*[2] *Removed from his mother's care, Gabriel is tossed from one relative's home to another before being thrown into the Florida foster care system.*[3] *Merely a month later, Gabriel is molested by a fourteen-year old.*[4] *Later, most likely as the result of the trauma he suffered, Gabriel begins acting out sexually towards other children he comes into contact with.*[5] *Suffering from severe mood swings, Gabriel is moved to a different foster home after he began making threats towards his then foster father and his foster parents' baby.*[6] *In his final foster home, less than one year after the day his mother is discovered in the car, Gabriel doesn't feel*

---

[*] Ashley Norton is a J.D. Candidate of the class of 2013 at The Catholic University of America, Columbus School of Law and received her B.A. in Political Science and Legal Studies from The State University of New York at Buffalo in 2009. She would like to thank her family, specifically her parents and siblings, Rachel and Ryan, and friends for their support and encouragement in academic and personal pursuits. She would also like to specifically thank George Bochenek for his guidance and support. A warm and personal thank you to her Expert Reader, Judge Paul Buchanan, Judge at the Erie County Family Court in Buffalo, New York. Finally, she would like to thank all the editors and staff members of *The Journal of Contemporary Health Law and Policy* for all their edits, feedback, and guidance in the completion of this note.

1. Carol Marbin Miller, *Suicide Case of 7-year-old Gabriel Myers Reopened*, PALM BEACH POST, April 24, 2011, http://www.palmbeachpost.com/news/news/state-regional/suicide-case-of-7-year-old-gabriel-myers-reopened/nLrrk/.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

well, and stays home from school.[7] *Gabriel becomes frustrated and angry while in the care of his foster parent's teenage son, and in a tantrum so illustrative of his young age, throws his soup in the garbage.*[8] *As punishment, his foster brother sends him to his room.*[9] *But Gabriel disobeys this directive, instead locking himself in the bathroom.*[10] *There, Gabriel's actions no longer mirror those of a normal and emotionally healthy child and escalate to far more than a childlike tantrum.*[11] *Alone, standing on the cold tile of the bathroom, Gabriel hangs himself with a detachable shower hose.*[12]

This desperate act of an emotionally disturbed or mentally ill child became a tragic call to action for policymakers and leaders. At only seven years old, Gabriel Myers was on at least three different antipsychotic drugs the day of his suicide. Gabriel had been prescribed a variety of drugs for his violent mood swings, including psychotropic drugs that are known to have an increased risk of suicide.[13] Using this story as an illustration of the need for change, Florida lawmakers and advocates launched investigations into antipsychotic drugs.[14] At issue in Gabriel's story was both the efficacy and appropriateness in light of his age and the pervasive existence of the use of these drugs for those in state custody.

While Gabriel's story sheds light on the plight of foster children, the term "state custody" also encompasses another set of children: juveniles in detention. These juveniles are just as, if not more, susceptible to the pervasive manipulation of being overmedicated with antipsychotic drugs. While the use of these powerful drugs in children is questionable and many of the drugs are not approved for use in children, another controversy is the

---

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

purpose of such usage.[15] Gabriel's story is one example of what many advocates fear has become commonplace treatment of children in state custody: the use of antipsychotics as a means to restrain children and to correct behavioral issues that are not linked to the mental illness for which the drugs were originally created to address. Examining Gabriel's story and looking to lawmakers' focus on helping those in foster care provides both arguments and a path for advocates of children in juvenile detention.

This Note will examine the issue of chemical restraint of inmates in juvenile detention, (hereinafter referred to as "juveniles"), specifically focusing on their use in Florida. Much discussion and investigation has been focused on this issue in Florida. The focus in Florida began because of the death of Gabriel Myers and continued due to an exposé from the Palm Beach Post that revealed the prevalence of this practice of overusing antipsychotics as a means of chemical restraint within juvenile detention centers in Florida.[16] Juvenile rights advocates have voiced concerns about the medical, ethical, and legal implications and questions raised by this practice.[17] The necessity and importance of this discussion is illustrated by Gabriel Myers' story. The tragic end to his young life may serve as a cautionary tale to those in positions of power who work with lost and troubled children whose pleas for help are silenced by drugs that sedate rather than improve mental health.

This Note will also focus on the efficacy and safety of antipsychotics and psychotropic drugs in general as well as special concerns that arise when these drugs are prescribed to children. Additionally, this Note will explore

---

15. *See* Michael Laforgia, *Drugging Juveniles: Doctors Hired to Evaluate Kids in State Custody Have Taken Payments from Drug Companies,* PALM BEACH POST, May 24, 2011, http://www.palmbeachpost.com/news/news/dosed-in-juvie-jail-drug-firms-pay-state-hired-doc/nLsb8/; *see also* Mai Szalavitz, *Drugging the Vulnerable: Atypical Antipsychotics in Children and the Elderly,* TIME, May 26, 2011, http://healthland.time.com/2011/05/26/why-children-and-the-elderly-are-so-drugged-up-on-antipsychotics/ (discussing children who are prescribed these medications without the underlying conditions that the medications were designed to treat).

16. Laforgia, *supra* note 15.

17. *See, e.g.*, April Hunt, *Concern Over High Medication Rate Among Foster Kids: Review of Kids' Psych Drugs Urged,* ATLANTA JOURNAL-CONSTITUTION, Feb. 20, 2011, http://gabrielmyers.wordpress.com; *see also* Bob Jacobs, *Legal Strategies to Challenge Chemical Restraint of Children in Foster Care, A Resource for Child Advocates in Florida,* ADVOC. CTR. FOR PERS. WITH DISABILITIES, http://www.guardianadlitem.org (search "Resources" for "Legal Strategies to Challenge Chemical Restraint of Children in Foster Care" then follow link to PDF file).

the use of these drugs to restrain and sedate in order to avoid poor behavior. This Note will examine these issues in light of medical research, potential legal claims, and consistency with the underlying goals and objectives of the juvenile justice system, in Florida and nationwide.

Since the entire purpose of the juvenile justice system is to rehabilitate rather than simply punish and remove individuals from society, Section I of this Note discusses the creation, history, and trends in the purposes behind the juvenile justice system. As mentioned above, recent events have shed light on this issue in Florida with both foster care and juvenile detention, and thus a portion of Section I discusses the juvenile system of Florida specifically. Section II discusses the evolution and danger of the use of antipsychotics, noting specific concerns within the medical community with regard to their use in children. Section II also discusses the prevalence of the usage of such drugs in juvenile detention and the problems inherent in this practice. Section III defines and discusses the idea of "chemical restraint," followed by an examination of Florida's use and judicial interpretation of the practice. Finally, Section IV discusses the arguments that advocates can effectively use to discourage and eliminate this practice.

I. JUVENILE JUSTICE SYSTEM: A BRIEF HISTORY

To understand why the use of chemical restraints is counterproductive to the objective of the juvenile justice system, it is crucial to examine the juvenile justice system's establishment, subsequent development, and current trends and focuses.

A. National Juvenile Justice System & Trends

The juvenile justice system has evolved in its objectives and justifications, as evidenced in three distinct movements.[18] Preceded by a growing public consensus that the common law system failed to address the unique characteristics of the juvenile offender, the first movement included the creation of a juvenile system, separate from the adult system. Today, a separate juvenile justice system exists in every state.[19] This first movement drew distinctions between juvenile and adult offenders, endorsing the view that juveniles have increased malleability and decreased culpability.[20] It centered on the belief that these qualities of juveniles increased the

18. Thomas L. Hafemeister, *Parameters and Implementation of a Right to Mental Health Treatment for Juvenile Offenders*, 12 VA. J. SOC. POL'Y & L. 61, 72-82 (2009).

19. *Id.* at 80.

20. *Id.* at 74.

likelihood for rehabilitation.[21] The national trend for the state separation of juvenile offenders was codified in the Federal Juvenile Delinquency Act of 1938, which created a procedural framework whereby juveniles are adjudicated separately from adults, except under certain circumstances.[22]

This first movement evolved from the belief that the current system was not adequately equipped to provide the intended objective of rehabilitation.[23] The driving force of the second movement was the Supreme Court's extension of many procedural protections and formalities to the juvenile court system.[24] Prior to the Supreme Court's extension of these protections, the procedural safeguards within the juvenile system had been informal and based upon the rehabilitative needs of a juvenile rather than on their actual guilt or innocence.[25] Yet, even as confidence in the ability of the system to rehabilitate waned slightly, juveniles were still viewed as less culpable and therefore subject to a different level of punishment, with a focus on guiding them to better behaviors and decision-making.[26]

The third and current movement of this system's evolution occurred when the public perceived that juveniles were becoming more violent and assumed that juveniles were responsible for increased crime rates.[27] The increase in violence and crime was attributed to the failure of the system to prevent, deter, rehabilitate, or punish juveniles.[28] Rather than focusing on rehabilitation, the objectives shifted to the need to punish juvenile

---

21. *Id.* at 74.

22. Meghan Lewis, *Lessening the Rehabilitative Focus of the Federal Juvenile Delinquency At: A Trend towards Punitive Juvenile Dispositions?,* 74 MO. L. REV. 193, 195 (2009).

23. Hafemeister, *supra* note 18, at 73-74.

24. *See generally In re* Gault, 387 U.S. 1 (1967); *see generally* Kent v. U.S., 383 U.S. 541 (1966) (giving juveniles the right to the advice of an attorney for the determination to transfer juvenile to adult system occurs, the right to a hearing on such a matter, and the right to the same information that the court uses to make its decision).

25. Hafemeister, *supra* note 18, at 73-74.

26. *Id.* at 76.

27. *Id.* at 76-77.

28. *Id.*

wrongdoers and protect the community.[29] As a result, there was an expansion of the categories of circumstances that allow for the transfer of juveniles to the adult justice system.[30]

While the trend for rehabilitation of juveniles began declining in the 1970s,[31] the growing interest of the courts and legislatures to focus on the varying punishment needs for juvenile offenders demonstrates the continuing perception that juvenile offenders fundamentally differ from adult offenders.[32] Since courts have considered information developed from neuroscience and psychology to demonstrate the differences and vulnerabilities inherent in juveniles as a result of brain chemistry and development, juvenile advocates can also use this in arguing against the constitutionality of certain punishments.[33] In deciding that life without parole was an unconstitutional sentence for a juvenile convicted of a non-homicide crime,[34] the Supreme Court examined national attitudes, case law, and legislative history and objectives behind the view that juveniles and adults do not warrant the same punishment.[35] The Supreme Court's reasoning specifically pointed to the "lessened culpability" and susceptibility

---

29. *Id.*

30. *Id.* at 77.

31. Samantha Schad, *Adolescent Decision Making: Reduced Culpability in the Criminal Justice System and Recognition of Capability in Other Legal Contexts, Journal of Health Care Law and Policy*, 14 J. HEALTH CARE L. & POL'Y 375, 384 (2011).

32. *See generally* Schad, *supra* note 31.

33. *See* Graham v. Florida, 130 S.Ct. 2011, 2020 (2010) (holding that a sentence of life without parole for a juvenile convicted of a non-homicide crime was unconstitutional); Roper v. Simmons, 543 U.S. 551, 568-69 (2005) (holding that the death penalty for a juvenile was unconstitutional); Miller v. Alabama, No. 10-9646, slip op. at 2 (U.S. June 25, 2012) (holding that a statute that provides for mandatory sentences of life without parole for juveniles violates the Eighth Amendment prohibition against cruel and unusual punishment); Schad, *supra* note 31 (discussing these decisions and the impact that neuroscience and psychological studies have had on the court's consideration of issues on juvenile offender's culpability).

34. *See* Graham v. Florida, 130 S. Ct. 2011, 2020 (2010).

35. *Id.* at 2026.

to pressures that underlie the conclusion that a juvenile's criminal conduct is "not as morally reprehensible as that of an adult."[36]

B. Florida's Juvenile Justice System

In Florida, juveniles who find themselves involved in criminal activity interact with the Florida Department of Juvenile Justice (DJJ)."[37] The DJJ is responsible for all aspects of monitoring youth crime; including prevention, detention, treatment, and working with the legislature to adequately reflect the objectives of the juvenile justice system.[38]

A juvenile's involvement in the justice process begins with intake at the DJJ, followed by formal adjudication in juvenile court.[39] Initial intake involves an assessment by the DJJ case management team of the risks and needs of the individual juvenile offender, with a focus on determining the "most appropriate dispositional services in the least restrictive available setting."[40] After the assessment, DJJ puts together a predisposition report (PDR) that is given to the juvenile court as a recommended disposition.[41] The Florida Supreme Court, in identifying the standard that a juvenile court must show in order to successfully depart from a decision of the DJJ,[42] noted that Florida's legislatively-created juvenile process has complementary goals of protecting the public from delinquent acts and rehabilitating juveniles through a consideration of "the child's individual rehabilitative needs...and treatment plan."[43] In 2009 the Florida Supreme Court held that in order for a

---

36. *Id.*

37. *See Florida Department of Juvenile Justice Mission Statement,* FLA. DEP'T OF JUVENILE JUSTICE, http://www.djj.state.fl.us/AboutDJJ (last visited Oct. 18, 2012).

38. *See generally Report of the Blueprint Commission*, FLA. DEP'T OF JUVENILE JUSTICE (2008), http://www.campaignforyouthjustice.org/documents/Report_of_the_Blueprint_Commision.pdf (last visited Oct. 16, 2012); *see also Florida Department of Juvenile Justice: Juvenile Justice Process*, FLA. DEP'T OF JUVENILE JUSTICE, http://www.djj.state.fl.us/AboutDJJ (last visited Oct. 17, 2012).

39. FLA. STAT. ANN. § 985.03 (West 2011).

40. *Id.* § 985.03(21).

41. *Id.* § 985.433(6).

42. E.A.R. v. State, 4 So. 3d 614, 637 (2009).

43. *Id.* at 618.

juvenile court to depart from the DJJ's recommended disposition, it must provide specific reasons that address and explain why such a departure is necessary to provide the juvenile with the "most appropriate" services conducted in the "least restrictive setting."[44]

Advocates for juveniles should use the distinct policy and societal goals of the juvenile court system, as compared to the goals of the adult court system, in making arguments regarding rights and quality of treatment in juvenile detention centers. The objectives of a specific juvenile system have significant impact on the rights of juvenile offenders given and the deference afforded to focusing on rehabilitation as a goal of punishment.[45]

II. ANTIPSYCHOTICS & JUVENILES

A. Antipsychotics in General

Antipsychotic drugs are within the larger classification of psychotropic medications.[46] For the purposes of this Note, they are defined as "any chemical substance prescribed with the intent to treat psychiatric disorders or other medical illness, with the effect of altering brain chemistry."[47] These are powerful drugs for which prescription should not be taken lightly. Not only is there a lack of data and information on how antipsychotics affect brain development during teen years,[48] but the drugs also have a number of extreme side effects[49] that may not be outweighed by the questionable

---

44. *Id.* at 637.

45. *See* Hafemeister, *supra* note 18, at 83.

46. Kimber E. Strawbridge, *The Children are Crying: The Need for Change in Florida's Management of Psychotropic Medication to Foster Children*, 15 U.C. DAVIS J. JUV. L. & POL'Y 247, 257 (2011).

47. *Id.* at 257.

48. Mai Szalavitz, *Drugging the Vulnerable: Atypical Antipsychotics in Children and the Elderly,* TIME, May 26, 2011, http://healthland.time.com/2011/05/26/why-children-and-the-elderly-are-so-drugged-up-on-antipsychotics/.

49. Szalavitz, *supra* note 48 (side effects include tics, increased heart rate and blood pressure, vomiting, increased appetite and weight gain, sleepiness, an effect on the body's regulation of temperature, and being linked to the presence of suicidal thoughts and attempts. Other side effects include akathisia (motor restlessness, desire to remain in constant motion), acute dystonia (spasms of upper body, face, tongue and eyes), neuroleptic malignant syndrome (rare but potentially fatal, it is characterized by muscular

efficiency of the medication.[50] While these side effects occur with the drug's use in general, some argue that children are especially vulnerable.[51] Because there has not been enough research conducted on the use in children, it is impossible to know the full effects of such powerful drugs on children.[52] The medications are known to increase risks for diabetes, heart defects, weight gain, and cause sedation.[53] Dr. Richard A. Friedman recently cautioned that even though these drugs can be safe and effective, their use should be limited to a serious mental illness for which they were created.[54]

Despite their powerful results and unknown effects in children, the use of these drugs has increased significantly in the past decade.[55] Due to the characterization by some experts that these drugs "[bathe] the brains of growing children . . . [and] threaten the normal development of the brain,"[56] best practices dictate that psychotropic drugs should be used only as a "last resort" and never as the sole approach to addressing a child's mental health needs.[57] One mother whose eighteen-month old was placed on

---

rigidity and altered consciousness), and tardive dyskinesia (involuntary movements of various body parts, which can be irreversible)).

50. *Id.*

51. *Id.*

52. Alina Selyukh, *U.S. Advisors Urge FDA to Address Antipsychotics in Kids,* REUTERS, Sept. 22, 2011, http://www.reuters.com/article/2011/09/23/us-usa-fda-antipsychotic-idUSTRE78L77L20110923.

53. *See* Duff Wilson, *Child's Ordeal Shows Risks of Psychosis Drugs for Young,* N.Y. TIMES, Sept. 1, 2010, http://www.nytimes.com/2010/09/02/business/02kids.html?pagewanted=all.

54. Richard A. Friedman, M.D., *A Call for Caution on Antipsychotic Drugs,* N.Y. TIMES, Sept. 24, 2012, http://www.nytimes.com/2012/09/25/health/a-call-for-caution-in-the-use-of-antipsychotic-drugs.html?_r=0.

55. Leigh Donaldson, *Psychiatric Drugging of American Children is Cause for Alarm*, PORTLAND PRESS HERALD, May 3, 2010, http://www.pressherald.com/opinion/psychiatric-drugging-of-american-children-is-cause-for-alarm_2010-05-03.html.

56. Donaldson, *supra* note 55.

57. *Id.*

antipsychotics described the experience: "I didn't have my son. It's like, you'd look into his eyes and you would just see just blankness."[58]

Yet, the use of these drugs continues to increase significantly.[59] The initial increase, during a period sometimes coined the "Decade of the Brain,"[60] began in the 1990s and marked a shift in the classification of mental illnesses as brain diseases treatable with pharmacological solutions.[61] This viewpoint, which was endorsed by the U.S. Government,[62] contributed to the shift in pharmacological treatment as related to pediatric mental illness treatment.[63] One study found that prescriptions for antipsychotics for children between the ages of two and eighteen increased five-fold between 1995 and 2002.[64] Of these prescriptions, over fifty percent were prescribed for uses that the effectiveness of the drugs have not been completely researched or tested, such as behavioral problems.[65]

Pediatric psychiatrists and medical professionals caution the FDA from approving antipsychotics for use in children and urge for more studies to determine their long-term effects.[66] A former president of the International

---

58. Wilson, *supra* note 53.

59. Olivia Burton, *"They Use it Like Candy": How the Prescription of Psychotropic Drugs to State-Involved Children Violates International Law*, 35 BROOK. J. INT'L L. 453, 471-472 (2010).

60. *Id.* at 472.

61. *Id.*

62. *See* Burton, *supra* note 59, at 478 (discussing George W. Bush's official statement that "millions of Americans are affected each year by disorders of the brain" as an example of the U.S. Government's endorsement of the biological view of mental illnesses as well as an increase in funding for drug research).

63. *Id.* at 480 (quoting sociologist Dr. Peter Conrad, "The 1990s may become known as the decade of psychotropic medication use in children" and the significant increase in prescription of psychotropic drugs to children).

64. W.O. Cooper et al., *Trends in Prescribing of Antipsychotic Medication for U.S. Children*, 6 AMBULATORY PEDIATRICS 79, 82 (2006).

65. *Id.* at 82.

66. *See* Joseph Shapiro, *FDA Debates Safety of Antipsychotic Drugs in Kids*, NPR.COM, June 9, 2009, http://www.npr.org/templates/story/story.php?storyId=105133174 (discussing the pediatric health advisor's urging the FDA to

Narcotics Control Board (INCB) holds the belief that such prescribing is an example of "medicalising something that is often not a medical condition."[67] The American Psychological Association noted that using these medications in children touched upon unique risks[68] and concluded that there was a need for more research on the efficacy and safety balance of these medications in children.[69]

B. Antipsychotics and Juvenile Detention

Juveniles in detention are especially vulnerable to overmedication in light of their age, their decreased control over their surroundings, and their lack of power to determine their own medical treatment.[70] The rate of these prescription drugs is significantly higher for children who are involved with the state, either in foster care or juvenile detention.[71] While, in general, only 8-10% of children under the age of eighteen are prescribed mental health medications, this number is dramatically higher in the population of children under eighteen and in state-custody:[72] an estimated 50% of children under eighteen who are within state custody receive medication meant to address

---

adequately warn of the dangers of these drugs in children with labels and in continuing to closely monitor the level of prescriptions and risks of these medications in children).

67. Burton, *supra* note 59, at 497-98.

68. Working Group on Psychoactive Medications for Children and Adolescents, *Report of the Working Group On Psychoactive Medications for Children and Adolescents: Psychopharmalogical, Psychosocial, and Combined Interventions for Childhood Disorders: Evidence Base, Contextual Factors, and Future Direction*, AM. PSYCHOLOGICAL ASS'N, 15 (Aug. 2006), http://www.apa.org/pi/families/resources/child-medications.pdf (noting that absorption, metabolism, and distribution differ amongst children and that the rates tend to evolve with the child's age and development as well as the lessened ability of children to note changes and reactions to the medication differing over time).

69. *Id.*

70. *See* Szalavitz, *supra* note 48 (discussing how many people shy away from taking such medications, in contrast to the ability of juvenile offenders and their lessened ability to refuse).

71. Burton, *supra* note 59, at 457.

72. *See* Burton, *supra* note 59, at 457. For the purposes of this Note, "state-custody" includes both children in foster care and juvenile detention.

mental health issues.[73] Antipsychotics were among the top drugs purchased and used to treat problems for which they were not approved.[74] While it varies by state, nation-wide studies of state facilities reveal stunningly high numbers of psychotropic medication dispensed.[75]

While the sheer number of prescriptions written is troubling, the controversy centers on three issues: whether the amount of prescriptions written accurately corresponds to the actual necessity of these drugs being administered to juvenile offenders, the method under which the diagnoses and prescriptions are made, and the safety of the use of these drugs on juveniles in general.[76] Associate Professor Burton asserts that there is a nationwide "practice of serious departures from sound medical practice in the use of psychotropic drugs" among juveniles in state detention centers.[77]

The use of a medication for a purpose other than that specified on the label is known as "off label" use[78] and is acceptable so long as there is adequate consent of the patient involved.[79] However, such drugs have not necessarily been FDA approved for this "off label" use, as they have not undergone the testing necessary to be approved for that particular use.[80] The increased danger of combining different types of these powerful antipsychotic drugs enhances the likelihood of negative reactions when drugs are used "off label."[81]

---

73. Burton, *supra* note 59, at 457.

74. Szalavitz, *supra* note 48.

75. *See* Burton, *supra* note 59, at 475 (72% of the girls in Oregon's juvenile correctional facilities are taking psychotropic medications, 40-50% of children in some of Pennsylvania's juvenile prisons, and 10-50% of children in NJ correctional facilities).

76. *See generally* Burton, *supra* note 59.

77. *Id.* at 512.

78. Strawbridge, *supra* note 46, at 261 (citing *Treatment of Children with Mental Disorders,* PSYCHCENTRAL (Sept. 2000), *available at* http://psychcentral.com/disorders/childtreatment.htm).

79. Strawbridge, *supra* note 46, at 261; Burton, *supra* note 59, at 462.

80. Strawbridge, *supra* note 46, at 262-63.

81. Carol Hoy, *Polypharmacy in Children on the Rise in the U.S.*, MED. NEWS TODAY, Aug. 2, 2005, http://www.medicalnewstoday.com/medicalnews.php?newsid=28500.

It is often difficult to ascertain whether a sufficient amount of consent exists to warrant such usage when prescribing to children.[82] This problem is more complicated where the juvenile is in state custody, such as in juvenile detention, rather than in the custody of a parent or guardian.[83] Some studies suggest that the failure to gain informed consent for treatment with psychotropic drugs is pervasive in juvenile detention.[84] Though there is some guidance from the Supreme Court on juveniles and consent,[85] consent parameters vary by state.[86]

Florida statute allows consent to "medical treatment" for a juvenile in DJJ to be obtained from the caseworker, probation officer, or administrator of a detention facility in certain circumstances.[87] This consent may be obtained when the party that is otherwise authorized by law to give consent (i.e., parent or legal guardian) cannot be contacted[88] (after reasonable attempts to do so have been made) and where that party has not expressly objected to consent.[89]

However, the prescription of psychotropic medication is specifically excluded from the term "medical treatment" as used in the statute.[90] Thus, the DJJ is authorized to do a medical screening of the juvenile without

---

82. Strawbridge, *supra* note 46, at 261.

83. *Id.* at 267-68.

84. Burton, *supra* note 59, at 510 (citing letters from a DOJ investigation where procedures and methods were not formal or consistent in obtaining consent for such treatments).

85. *See* Hafemeister, *supra* note 18, at 129-30 (discussing the Supreme Court's holding that a juvenile's constitutional right to make medical decisions is limited at best; as well as the Court's general endorsement of the rule that to treat juveniles, parental or legal guardian consent is required to be obtained).

86. *Id.* at 129-30.

87. FLA. STAT. ANN. § 743.0645(1)(b) (West 2011).

88. *Id.* § 743.0645(3) (requires that reasonable efforts to contact such person must be made).

89. *Id.* § 743.0645(3).

90. *Id.* § 743.0645(1)(b).

consent.[91] If medical treatment is determined to be necessary, the physician is required to either get consent from a parent or legal guardian or obtain a court order authorizing the treatment.[92] For psychotropic medication, the physician must attempt to obtain express and informed consent from the parent or legal guardian unless there is an emergency need for the medication, parental rights have been terminated, the location of the parent is unknown and cannot be reasonably ascertained, or the parent or legal guardian declines to consent.[93] If the juvenile falls into one of the exceptions from informed consent listed above, the physician and DJJ can request a hearing to have a court order.[94]

Informed consent as defined by Florida law[95] requires certain information be given to the guardian or parent of the minor.[96] If DJJ is the legal guardian, a court hearing shall be held to determine the medical necessity of the treatment.[97] There is a preference for parents of minors in the system to be involved in the decision for treatment if the parent is available.[98]

---

91. *Id.* (defining medical care and treatment as including ordinary and necessary medical and dental examination and treatment, including blood testing, preventive care including ordinary immunizations, tuberculin testing, and well-child care, but does not include surgery, general anesthesia, provision of psychotropic medications, or other extraordinary procedures for which a separate court order, power of attorney, or informed consent as provided by law is required).

92. *Id.* § 39.407.

93. *Id.*

94. *Id.*

95. *See id.* § 394.455(9) ("Express and informed consent" means consent voluntarily given in writing, by a competent person, after sufficient explanation and disclosure of the subject matter involved to enable the person to make a knowing and willful decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion).

96. *See id.* § 39.407 (reason and purpose for the treatment, risks benefits and side effects, specific dosages and length of treatment, alternatives, difficulties of stopping treatment, and the fact that consent for the treatment can be withdrawn at any time).

97. *See id.*§ 39.407.

98. *See id.*

III. ANTIPSYCHOTICS & "CHEMICAL RESTRAINT": DEFINING AND IDENTIFYING CRITICISM

According to the American Association of Child and Adolescent Psychiatry (AACAP), "chemical restraint" of a child is the use of a drug without a therapeutic purpose and with the sole purpose of sedating and immobilizing the child.[99] Other scholars refer to chemical restraint as "forcible or indiscriminate use of powerful psychotropic drugs in the absence of appropriate medical justification."[100] Studies suggest that juveniles in detention are prescribed these drugs not for the purpose of treating legitimate medical conditions or mental health problems, but rather as a way to control "aggressive, unruly, or otherwise problematic" children,[101] or even to punish, restrain, or sedate children for merely annoying behavior.[102] Poor behavior and acting out by juveniles is often caused by a variety of risk factors, including family background. Simply medicating such behavior is not always likely to be helpful or efficient, and can actually mask the real issues.[103]

Use of chemical restraint is further criticized in light of safer alternatives. Instead of using such powerful drugs, there are other methods available to resolve the emotional and behavior problems of state-involved children.[104] Among the suggestions for safer treatment are psychosocial treatments involving both the family and the juvenile, which may be more effective with regard to addressing the problems that drive the behavior of many juvenile offenders.[105] In light of an expressed preference for the "safest treatment with demonstrated efficacy,"[106] the American Psychological Association (APA) concluded in 2006 that psychosocial treatments are safer

---

99. Burton, *supra* note 59, at 492.

100. Kathleen Auerhahn & Elizabeth Dermody Leonard, *Docile Bodies? Chemical Restraint and the Female Inmate,* 90 J. OF CRIM. L. & CRIMINOLOGY 599, 604 (2000).

101. Burton, *supra* note 59, at 493.

102. *Id.*

103. *Id.* at 495.

104. *Id.* at 493.

105. *Id.* at 506.

106. Working Group, *supra* note 68, at 15.

than psychotropic drugs and recommended that, in most cases, psychosocial treatment be used with children.[107]

Some critics argue that advertising by drug companies and gift-giving by physicians creates a conflict of interest for the psychiatrists prescribing these medications. [108] For example, in Florida, approximately one-third of the psychiatrists hired by the state to work with incarcerated juveniles are receiving pharmaceutical company incentives.[109] That same one-third of state-employed Florida physicians is responsible for over half of the antipsychotic prescriptions to juveniles in detention facilities.[110] This causes serious doubt on whether the medications are being prescribed because they are necessary or whether the writing of prescriptions is influenced by other motivations.[111] Dr. Bruce Perry, a senior fellow at the Child Trauma Academy in Houston, suggests that if doctors would begin prescribing antipsychotics "reasonably and cautiously," the rate of prescriptions written would drop by ninety percent.[112]

Furthermore, critics argue that not only is the safety of using these drugs in children uncertain, but their efficiency and necessity to solve the problems for which they are being prescribed is also unclear.[113] The argument is that these drugs are being used not as medically necessary, but as a means to control social or behavioral problems. In other words, these drugs are a "chemical sledgehammer" to make state-involved children "easier to manage."[114]

An expert who investigated a juvenile detention facility in Puerto Rico revealed information that shows that the administration and distribution of psychotropic drugs was done in a manner inconsistent with standard and best

---

107. *Id.* at 16.

108. *See generally* Szalavitz, *supra* note 48.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Burton, *supra* note 59, at 454.

practices.[115] The expert concluded that the psychiatric care given through those facilities was not adequate, noting that the prescribing of psychotropic drugs seemed "behaviorally driven" rather than diagnosis-driven. This means that specific doctors were more likely to prescribe certain types of drugs based upon their preference rather than on the need of the individual patient.[116] Additionally, based upon the doses, the expert concluded that these medications were likely used as sedatives.[117] The expert's investigation also led her to conclude that given the history of trauma that most of the minors experienced, weekly sessions of psychosocial treatment would have been necessary but impossible given the number of psychologists employed.[118]

A. Specific examination of Florida & chemical restraint issues

While juvenile offenders are one part of the term "state-involved children," it also includes another large and vulnerable population: foster children.[119] In order to examine the issue within the context of juvenile detention centers, it is helpful to look at how experts and advocates in Florida have reacted to this issue within the population of foster children.

Like children in juvenile detention, children in Florida's foster-care system receive a higher number of prescriptions: such children are three times as likely to be prescribed psychotropic drugs as the national average.[120] One expert examining this issue reviewed a number of reasons that this population may be subject to overmedication, including a flawed system of consent, administrative errors, poor oversight, and pharmaceutical companies providing incentives which may be causing an increased number of physicians writing prescriptions for these drugs.[121]

---

115. *Id.*

116. *Id.*

117. *Id.* (finding doses of 50 mg nightly as being most likely used for sedatives).

118. Declaration of Expert Witness Laura Davies, M.D., U.S. v. Commonwealth of P.R., No. 94-2080, 2007 WL 4221948 (P.R. 2007).

119. *See generally* Strawbridge, *supra* note 46.

120. *Id.* at 251-52.

121. *See generally id.* at 263-64.

Since there is no clear and decisive test to determine whether mental illness is at the heart of the problem, it is difficult to draw the distinction between behavioral problems that often plague foster children and an actual mental illness that requires the serious medication of antipsychotics.[122] Aware of this reality, some critics of this system have recommended that Florida have medical advocates involved to help ensure that the decision to medicate is unbiased and based upon a true need for such medication, rather than an effort by frustrated foster parents and schools to sedate or chemically restrain children.[123]

However, previous reform of Florida's system has recognized both the seriousness of giving psychotropic drugs to children and the importance of a child's right to consent to medication, or, in the alternative, to have a responsible and cautious adult make that decision for them.[124] Although the system is flawed, overworked, and subject to human and administrative error, Florida is one of only ten states that has such a rigorous consent procedure to ensure that psychotropic drugs are administered with the consent of responsible adults when biological parents are unavailable.[125]

B. Courts on Chemical Restraint

Though the Supreme Court of the United States has not yet addressed the issue of antipsychotic drugs used as chemical restraint, it has previously addressed issues of psychotropic drugs. These decisions may shed light on the attitude likely to be shared by courts facing this issue. For example, in *Washington v. Harper*,[126] the Supreme Court examined whether adult inmates could refuse medication or treatment, and at what burden the state could override that refusal.[127] The Court upheld the right to refuse medication, but held that the state must "reasonably relate"[128] the medication

122. *Id.* at 267-68.

123. *See id.* at 297.

124. *Id.* at 291.

125. *Id.*

126. *See generally* Washington v. Harper, 110 S. Ct. 1028 (1989).

127. Auerhahn, *supra* note 100, at 603.

128. *Id.*

to "penological interests."[129] The Court's dicta may suggest that it may be interested in the purpose for which the medication is prescribed.

In *Harper*, the Court noted that because a psychiatrist had prescribed medication to an inmate, the medication was in the inmates "medical interest," thus lessening the state's burden.[130] This suggests that the Court upheld the medicating of an inmate because if a physician prescribes certain medication, it is presumably based upon the medical interests of that inmate. Therefore, the Court may find prescribed medication in a juvenile's medical interest regardless if the medications are antipsychotics prescribed to sedate rather than for a medically necessary purpose. However, this conclusion rests solely on the fact that the medication was prescribed by a psychiatrist and does not consider the best interest of the child, the reasons for prescription, or the doctor's care in prescribing such medication.

IV. ARGUMENTS AGAINST CHEMICAL RESTRAINT

A. Inconsistency with Public Policy and the Purpose of the Juvenile Justice System

As mentioned in Part I, examining a state's juvenile justice system objectives is important for determining the scope of a juvenile's rights within that state.[131] The model to which a particular state adheres will have an effect on the judge's or society's examination and interpretation of juveniles' right to treatment.[132] An examination of documents put forth by the DJJ clearly suggests that Florida subscribes to a rehabilitative approach to the juvenile system.[133] At the 2007 announcement of a coalition to reform Florida's juvenile justice system, Governor Christ reminded the public and decision-makers to "...always remember that we can never give up on our young people."[134] In a released report on the DJJ's strategy to

---

129. *Id.*

130. *Id.*

131. *See* Hafemeister, *supra* note 18, at 83.

132. *See generally id.* at 72-82.

133. *See* FLA. DEP'T OF JUVENILE JUSTICE, A FOUR YEAR STRATEGIC PLAN 2008-09 THROUGH 2011-12 (2008), *available at* http://www.djj.state.fl.us/docs/about-us/2008-09-strategic-plan.pdf?sfvrsn=2.

134. *Id.* at 8.

reform the juvenile system between 2008 and 2012, the committee noted its objective to keep children from entering the DJJ system by acknowledging that once a child enters the system, there is limited power to rehabilitate the juvenile.[135]

The focus on the limited success of rehabilitation indicates that rehabilitation is an important goal of this system. Additionally, the DJJ specifically noted the poor performance of mental health services in juvenile detention, pointing to limited health service providers and the lack of an organized holistic approach to the individual's needs as causes of such failure.[136] Furthermore, the DJJ's Strategic Plan suggests that its drafters were unimpressed with a "correctional or retribution-based philosophy,"[137] and desire to limit the situations in which a juvenile can be transferred to the adult system.[138] The Commission emphasized a core focus on preventing juveniles from turning to crime and highlighted seven core values that formed the bedrock of the reform, which included a recognition of the distinctions between juvenile and adult offenders and community responsibility to empower and support their youth.[139]

As mentioned in the introduction, the story of Gabriel Myers illustrates why this topic concerns advocates of juveniles and children.[140] Florida is experiencing controversy around the issues of overmedication and prescribing of antipsychotics to children in foster homes, and also the use of these medications in juvenile facilities as chemical restraint. The underlying policy issues are similar: should prescribing children antipsychotic drugs be a first and only solution, or should systems such as juvenile detention and foster care systems take a holistic and individualized approach instead? To answer that question, it is important to look at what goals and policies exist in these systems, specifically the juvenile justice system in Florida. The foster care system is relevant because it sheds light on how Florida has dealt with this issue in that context.

---

135. *Id.* at 13.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 17.

140. Edecio Martinez, *After 7 year old Gabriel Myers' Suicide, Fla. Bill Looks to Tighten Access to Psychiatric Drug,* CBS, Mar. 17, 2010, http://www.cbsnews.com/8301-504083_162-20000546-504083.html?tag=mncol;1st;2.

Florida's juvenile justice system, while still serving to punish juvenile offenders, focuses on rehabilitation. Leaders have expressed frustration in the past when the system has proven ineffective in working towards rehabilitation rather than punishment.[141] The goal of an individualized approach to treating mental health problems and rehabilitating individuals[142] is not likely to be achieved if chemical restraint by antipsychotics is used, because chemical restraint often masks the underlying problem and is only a quick-fix solution.[143]

Furthermore, since the poor behavior often associated with children involved with the state (either as juvenile delinquents or foster children) is usually caused by a variety of factors and often attributable to problems in the child's past experiences, medication alone is usually not enough to fully solve the issue.[144] Gabriel Myers' story provides an example of this principle as well. While Gabriel eventually received therapy and mental health assessments after a series of traumatic life events, his original treatment was centered on a variety of psychotropic medications.[145]

Juvenile offenders and foster children are wards of the state, and Florida's objective is to "never give up on our young people."[146] However, a report by the Gabriel Myers Work Group, which investigated the death of Gabriel Myers, concluded that Gabriel was indeed "no one's child."[147] Despite his numerous interactions with members in the system in the ten months that he was in the foster care system, it was apparent that he had no "champion" to ensure his individual needs were met.[148] The report examined antipsychotic drug prescriptions in both the foster-care and juvenile detention systems and issued a finding that the system failed Gabriel in that it was inconsistent,

---

141. FLA. DEP'T OF JUVENILE JUSTICE, *supra* note 133.

142. *Id.*

143. Burton, *supra* note 59, at 494-95.

144. *Id.*

145. FLA. S. COMM. ON CHILD., FAMS., AND ELDER AFF., REPORT OF GABRIEL MYERS WORK GROUP 3 (Oct. 18, 2011), http://flsenate.gov/PublishedContent/Committees/2010-2012/CF/MeetingRecords/CF10182011.pdf.

146. FLA. DEP'T OF JUVENILE JUSTICE, *supra* note 133, at 8.

147. FLA. S. COMM. ON CHILD., FAMS., AND ELDER AFF., *supra* note 145.

148. FLA. DEP'T OF JUVENILE JUSTICE, *supra* note 134, at 4.

unorganized, and full of missed opportunities to correct problems.[149] Similar concerns have been voiced about the prescription of these powerful drugs in a juvenile detention context, because records of amounts, patterns, and reevaluation of the necessity of the drugs for particular individuals are not being well-kept.

In short, the purpose of having a separate juvenile system is to focus on rehabilitation and endorsement of the belief that juveniles, more than adults, should be given a second-chance and a better opportunity to turn their lives around.[150] The objectives of the juvenile system, especially in light of the specific public statements and policy considerations in Florida, is to not "give up"[151] on youth and to "champion"[152] their needs. There is recognition that more time and individualized approaches should be taken with individuals because of the heightened belief in their ability to be rehabilitated. In light of this objective, prescribing antipsychotic drugs to juvenile offenders would only be consistent when there is a medical need, when that necessity is outweighed by the risks, and where the individual plan for that juvenile is complemented by the prescription of such powerful drugs.

B. Other Potential Legal Implications

1. Criminal Prosecution

In response to the news stories revealing that Florida's Department of Juvenile Justice was prescribing antipsychotics without medical necessity, local juvenile Public Defender Howard Finkelstein commented: "If kids are being given these drugs without proper diagnosis, and it is being used as a 'chemical restraint,' I would characterize it as a crime. A battery – a battery of the brain each and every time it is given."[153] To establish a battery, one must show that there is an actual or intentional touching of a person against their will or intentionally causing bodily harm to another.[154]

---

149. *Id.* at 4-5.

150. *See generally* Graham v. Florida, 130 S. Ct. 2011, 2020 (2010).

151. FLA. DEP'T OF JUVENILE JUSTICE, *supra* note 133, at 6.

152. FLA. S. COMM. ON CHILD., FAMS., AND ELDER AFF., *supra* note 145, at 30.

153. Laforgia, *supra* note 15.

154. FLA. STAT. ANN. § 784.03 (West 2011).

As the Public Defender's statement above may indicate, courts may be receptive to an argument that prescribing antipsychotics to juveniles in detention constitutes a battery if the purpose of prescription is chemical restraint rather than medical need.[155] That argument would posit that the administration of psychotropic drugs to a juvenile in detention constitutes intentional and actual touching of that juvenile. Of course, as a defense, the physician or defendant would likely point to whatever form of consent was obtained as required by statute.[156] Thus, such an argument would need to also address consent invalidly obtained or a complete lack of consent. Since there is no current law or court decision in Florida that addresses pursuing battery in this fact pattern, it is not clear whether the Florida courts would find this argument persuasive, but it may be worth examination by state juvenile advocates.

However, there is some case law in other jurisdictions that contain a discussion of compulsory medical treatment and the tort of battery, which may shed light on the way courts view medical treatment and battery.[157] In *Davis v. Hubbard*, the United States District Court discussed the history and case law of the tort of battery in the context of compulsory medical treatment.[158] In its opinion, the court emphasized that the purpose of the tort of battery was to allow a person to "be free from unwarranted personal contact."[159] The court explained that unwanted medical treatment could constitute a violation of bodily integrity and personal dignity.[160] A Colorado Supreme Court decision discussing forcible administration of antipsychotics noted that antipsychotics pose a "significant intrusion."[161] Using this case law and the statutory language for battery, advocates for juveniles could argue that the use of antipsychotics as chemical restraint is a criminal battery.

---

155. Laforgia, *supra* note 15.

156. *See* FLA. STAT. ANN. § 743.0645 (West 2011).

157. *See* Davis v. Hubbard, 506 F. Supp. 915, 930-32 (N.D. Ohio 1980); *see also* People v. Medina, 705 P.2d 961, 968-69 (1985).

158. *See generally Davis*, 506 F. Supp. 915.

159. *Id.* at 930.

160. *Id.* at 930.

161. *Medina*, 705 P.2d at 969.

2. Civil Litigation

Developing arguments for how juveniles in detention could litigate these issues in civil court add an extra layer of deterrence for state juvenile justice departments. These arguments also deter individual psychiatrists who are prescribing these medications with possibly no medical need. In general, a claim would arise when a medical professional subject to a medical malpractice suit had deviated from the professional standard of care.[162] The test for medical malpractice brought under state law is established by showing a failure to meet the professional standard of care.[163] In Florida, the standard is whether the alleged actions of the psychiatrist prescribing the antipsychotics represented a breach of prevailing professional standard of care for psychiatrists.[164] In this instance, it would likely be a claim of affirmative action, arguing that prescribing antipsychotics was not necessary. The claimant would need to show that the damages that occurred were not "necessary and foreseeable results" of that medicinal procedure, and that the procedure was not done within the professional standard of care.[165]

Yet, Florida provisions dictating the standard of care against which healthcare professionals are to be judged are applicable only when there has been informed consent before the procedure was undertaken.[166] Informed consent is a doctrine that mandates a doctor to inform the patient of the things a reasonably prudent medical specialist would disclose to a person of ordinary understanding relating to the serious risks and possibility of serious harm that may occur from a supposed course of treatment.[167] Informed consent is meant to ensure the patient is able to make an informed and intelligent decision on whether to proceed with the course of treatment

162. Hafemeister, *supra* note 18, at 104.

163. *Id.* (discussing how this is easier to meet than the constitutional standard as defined by the Fourth Circuit of "substantial departure" from accepted professional judgment).

164. FLA. STAT. ANN. § 766.102(1) (West 2011).

165. *Id.* § 766.102(2)(a).

166. *Id.* § 766.102(2)(b).

167. Stephen Lease, *Comparative Negligence; Informed Consent*, 36 FLA. JUR. 2D MEDICAL MALPRACTICE § 53 (Nov. 2011).

recommended.[168] As discussed previously, the presence or absence of informed consent is an especially challenging issue in the context of juvenile offenders and those within state custody.

One significant consideration is against whom the suit will be brought, as judicial and sovereign immunity will likely play a role in the choice.[169] Most judges will have judicial immunity, and the employees or staff of the agency will most likely be immune from suit, although the agency itself, depending on the law of the state, may be subject to suit.[170] A tort claim may be brought under two circumstances that would not necessarily be covered by immunity. The plaintiff could allege more than simple negligence, or, on the other hand, could allege simple negligence against a healthcare worker who is considered to be an "independent contractor."[171] Yet, even if the juvenile can show damages and defeat the defenses of consent and immunity, the claim will be difficult to pursue if the physician was acting pursuant to a court order.[172]

3. Detainees' Rights- Right to Treatment and Right to Rehabilitation

Another way in which an advocate can assert juvenile rights is through arguments involving prisoners' constitutional rights,[173] specifically constitutional rights afforded to juveniles and viewed in light of the purposes of a juvenile justice system. Courts have recognized but have not thoroughly addressed juveniles' rights to treatment when in state detention.[174] While there are arguments that this right exists, commentators

---

168. *See id.* (stating that patient's decision should be based upon sufficient knowledge to enable the patient to balance possible risks against possible benefits).

169. Hafemeister, *supra* note 18, at 104 (identifying several parties as potential subjects for a suit: judge who ordered placement, agency with custody, and staff at the facility).

170. *Id.* at 105.

171. *Id.* at 107.

172. *Id.* at 104.

173. *See generally id.* at 72-82.

174. *See id.* at 94; *see generally* Andrew D. Roth, *An Examination of Whether Incarcerated Juveniles are Entitled by the Constitution to Rehabilitative Treatment*, 84 MICH. L. REV. 286 (1985).

assert that such a right is broad.[175] The purpose of the right is to ensure that those the state takes into custody are being given *proper* mental health and medical treatment.[176] The constitutional basis for asserting a right to treatment comes from two possible places: the Fourteenth Amendment's Due Process Clause or the Eighth Amendment's prohibition against cruel and unusual punishment.[177]

A key issue for defining the "right to treatment" of juvenile detainees is determining the scope of the word "treatment." Thomas Hafemeister notes that a narrow definition would include only medical treatment for diagnosed diseases and medical illnesses, whereas a more broadly defined "treatment" would include treatment for those juveniles with behavior problems that indicate dysfunctional psychological response to underlying issues.[178] Challenges to inadequate mental health services and treatment have been examined under a "broad scope" of the definition of treatment.[179] Hafemeister describes it as so broad that it may be more properly labeled as a "right to rehabilitation."[180] This expert also suggests that this "right to treatment" appears to be gaining some momentum, most likely in response to an increased awareness of the dangers and seriousness of mental illness.[181] Although courts have asserted the existence of this right, they have been reluctant to define it and certainly to second-guess the decisions of the health care providers in juvenile detentions in administering treatment.[182]

Courts have given the administration of antipsychotics special attention because antipsychotics are a pervasive method of mental health treatment within juvenile detention.[183] The requirements focus on mandating the

175. *See* Hafemeister, *supra* note 18, at 110-16.

176. *See generally id.*

177. *See generally* Roth, *supra* note 174.

178. Hafemeister, *supra* note 18, at 64.

179. *Id.* at 83.

180. *Id.*

181. *Id.* at 84.

182. *Id.* at 110.

183. *Id.* at 114.

administration of antipsychotics when medically necessary, making sure juveniles who need those drugs receive them.[184] While that is an important focus, there should also be a limitation to that statement: that the administration of such drugs should occur *only* when medically necessary, and certainly not to control unruly or annoying behavior that could be better solved by other means. Additionally, due to this right, requirements emphasize the importance of trained personnel monitoring and assessing the effects of those drugs on juveniles for whom they are prescribed, and ensure that there is an ongoing review of the efficacy of the drugs in treating a particular individual, and the revision of prescriptions and doses when warranted.[185]

There is also discussion of other treatment options, including psychotherapeutic services, and an assertion that the lack of availability of these services could constitute a violation of the right to treatment owed to juveniles.[186] This suggests that if a juvenile's behavior or illness would be better served by therapeutic services but the juvenile is given drug therapy instead, it could constitute a violation of adequate medical treatment.

a. The Fourteenth Amendment: Due Process Clause & the Right to Treatment

The Fourteenth Amendment dictates protection for juveniles in a variety of ways. The first protection guarantees that when juveniles are confined in part for rehabilitative purposes, medical and mental health treatment will be provided.[187] The opposition's argument to this is that while a state may issue statements of interest in rehabilitating juveniles (as Florida has certainly done), those statements do not create constitutional safeguards for juveniles.[188] Such opposition may argue that due process creates a right to rehabilitation only when rehabilitation is the sole purpose of incarceration.[189]

---

184. *Id.*

185. *Id.*

186. *Id.*

187. Roth, *supra* note 174, at 294.

188. *Id.* at 296.

189. *Id.* at 291.

The second due process argument is a *quid pro quo* argument that in lessening the procedural protections for juveniles, the Supreme Court envisioned a system that includes rehabilitative rights for juveniles.[190] Some, including the First Circuit,[191] have argued that the Supreme Court balanced the needs of juveniles and the juvenile justice system when they held that lesser procedural protections were necessary for juveniles, thus absolving the states of any additional affirmative duties to juveniles.[192] Proponents of the *quid pro quo* argument respond that the Supreme Court allowed lessened procedural rights because they expected the states to pursue the rehabilitative aims of the juvenile justice system.[193] It would follow that adequately treating a juvenile inmate's mental health problems and behavioral issues is within that system and right, and a failure to do so safely and fairly would prohibit a juvenile from being rehabilitated.

While these arguments have merit, some have concluded that if the state has deprived a juvenile of his or her rights under the state police power (protecting society from a juvenile who has engaged in criminal behavior), and the juvenile has been given the procedural safeguards that are granted to juveniles, the Constitution is silent as to whether the right to treatment exists.[194] Courts, although they have asserted such rights, have insufficiently addressed the definition or depth of such rights and have been very reluctant to second-guess the decisions of those who make treatment decisions in juvenile detention.[195] Others have suggested that these rights have grown in importance along with an increased interest in juvenile mental health needs being met in detention.[196] Thus, courts may be more willing to consider[197] the plight of children in state custody, like Gabriel Myers. If courts are receptive to a right to treatment, then the issue this Note addresses should also be covered within that argument – that medical treatments should be effective and actually be medically necessary in order to treat

190. *Id.*

191. Santana v. Collazo, 714 F.2d 1172, 1177 (1st Cir. 1983).

192. *Id.*

193. Roth, *supra* note 174, at 291.

194. *Id.* at 307.

195. Hafemeister, *supra* note 18, at 86.

196. *Id* at 139.

197. *Id.*

whatever needs the juvenile has. If drugs are not adequately achieving that aim, other methods should be administered.

b. The Eighth Amendment's Prohibition on Cruel and Unusual Punishment

In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that once "a State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[198] In *Estelle v. Gamble*, the Court held that adults must receive adequate care for "serious" medical needs and that juveniles are afforded at least the same protections as adults.[199] Serious medical needs have been defined to be either that which a layperson would know was necessary or that which, in the absence of treatment, would cause a life-long handicap.[200] The Supreme Court has not recognized rehabilitation as a serious medical need for adults,[201] but courts have recognized psychological and psychiatric care as "serious."[202]

A violation of the Eighth Amendment exists if there has been deliberate indifference to a prisoner's serious illness or injury.[203] The Supreme Court has defined deliberate indifference as requiring more than a lack of ordinary care for a prisoner's interests and safety, but less than acts or omissions for the purpose of causing harm or done with the knowledge that harm will result.[204] Though the Supreme Court has not spoken to the specific question of chemical restraint being cruel and unusual punishment, lower courts have issued opinions on this issue. In 1974, the Seventh Circuit held that the use of tranquilizing drugs to control "excited behavior" of juveniles rather than as part of a psychotherapeutic program and without medical direction or

198. *Id.* at 88 (quoting DeShaney v.Winnebago Cty. Dep't. of Soc. Servs., 489 U.S. 189, 199 (1989)).

199. *Id.* at 94 (citing Estelle v. Gamble, 429 U.S. 97 (1976)).

200. *Id.* at 90.

201. *Id.*

202. *Id.* (citing Bowring v. Godwin, 551 F.2d 44 (1977)).

203. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

204. *See* Hafemeister, *supra* note 18, at 90; *see also* Roth, *supra* note 174, at 307.

endorsement constituted cruel and unusual punishment.[205] When reaching their decision, the court considered the interests of the state in controlling and maintaining order while reforming juveniles, but ultimately concluded that these interests were not so compelling that they overrode the interests of the juveniles in light of the potential danger of these substances.[206] Likewise, the Southern District of New York also concluded that the use of tranquilizers as "medical restraint"[207] and not therapeutic purposes constituted a violation of the Eighth Amendment.[208]

c. Additional Fourteenth Amendment Arguments

Another argument for advocates is to attack the violation of an individual's liberty interest in being free from bodily restraint that is guaranteed under the Due Process Clause of the Fourteenth Amendment.[209] The United States District Court for the Eastern District of Pennsylvania held that this liberty interest included the right to be free from chemical restraints and that the use of antipsychotic drugs as a chemical restraint violates that liberty interest.[210] The court's decision classified these drugs as having an even more "pernicious effect"[211] than physical restraints and held that this interest was so fundamental that officials could not use qualified immunity as a defense.[212]

V. CONCLUSION

This Note examined a current controversial issue. But an examination of the history and prevalence of this issue reveals that the overmedication of

---

205. Nelson v. Heyne, 491 F.2d 352, 356 (7th Cir. 1974).

206. *Id.*

207. Pena v. N.Y. Div. of Youth, 419 F. Supp. 203, 207 (S.D.N.Y. 1976) (discussing medical restraint as the use of tranquilizing drugs to control excited behavior of the juveniles rather than for a therapeutic purpose).

208. *Id.*

209. Sabo v. O'Bannon, 586 F. Supp. 1132, 1140 (E.D. Pa. 1984).

210. *Id.*

211. *Id.*

212. *Id.*

the vulnerable members of society is not a current development. For the past few decades, there have been articles discussing the prevalence and dangers of this practice with adults, women, foster children, and juvenile offenders.[213] In 2010, an article by Associate Professor Angela Burton concluded that these practices with the United States violated provisions of international law. Yet, not until May 2011 did this issue receive large media attention. This issue still has yet to be significantly addressed by the courts. The unfortunate plights of the overwhelming amount of children in state custody, who are made vulnerable by their tragic circumstances, like Gabriel Myers, demand the attention of courts and legislatures to correct this problem. Advocates, courts, and legislatures must recognize the gap that exists between the objective and the reality of the juvenile justice system. As shown by judicial opinions and legislative and local government statements, the goal of the juvenile justice system is rehabilitation. Thus, we must rehabilitate our youth.

Merriam-Webster's dictionary defines "rehabilitate" as "to restore or bring to a condition of health or useful and constructive activity."[214] Using medication to subdue and control vulnerable youth does not solve the myriad of issues they face. Not only is it the wrong solution simply in light of the dangers that those powerful drugs could pose to developing brains, but it also in no way helps to right the wrongs in the lives of these young individuals, nor does it provide a way for them to constructively solve their issues in order to allow them to re-enter society.

---

213. *See generally* John D. Burrow & Rhys Hester, *Dazed and Confused: Judiciary's Role in Sell-ing Psychotropic Drugs to Inmates and Detainees*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (2010); Stacey A. Tovino, *Psychiatric Restraint and Seclusion: Resisting Legislative Solution*, 47 SANTA CLARA L. REV. 511 (2007); Auerhahn, *supra* note 100.

214. *Rehabilitate Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/rehabilitate (last visited Dec. 16, 2012).