

to be utilized in similar cases: objectively, whether the alleged deprivation was sufficiently serious and, subjectively, whether prison officials were deliberately indifferent to the inmate's health.

Ultimately, the *Porter* decision lessened inmates' burden in satisfying the objective prong by requiring that substantial risk of injury, not proof of actual injury, is demonstrated. Given that the legal, scientific, and medical literature are replete with information regarding the psychological and physical harms associated with prolonged solitary confinement, meeting that burden is easily within reach of similarly situated inmates. Accordingly, expert testimony may not be needed in such matters. Depending on the circumstances, it may be a more difficult task to satisfy the subjective prong in establishing the presence of deliberate indifference to an inmate's health, where proof that officials had knowledge of the risk of harm, but failed to curtail that risk, is required. Accordingly, expert testimony may be sought to establish whether prison officials recognized the risk of harm but failed to provide adequate treatment to reduce that risk.

Treatment Over Objection of an Inmate

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Involuntary Treatment of an Inmate Requires Both a Determination of Dangerousness and Incompetence to Refuse

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Key words: civil commitment; prisoners rights; right to refuse treatment

In *Winnebago County v. C.S. (In re C.S.)*, 940 N. W.2d 875 (Wis. 2020), the Wisconsin Supreme Court held that the Wis. Stat. § 51.61(1)(g)(3) (2015–2016) was facially unconstitutional because it allowed inmates who are involuntarily committed under Wis. Stat. § 51.20(1)(ar) (2013–2014) to be

treated over objection without a determination of dangerousness solely on the basis of incompetence to refuse medication.

Facts of the Case

In 2005, C.S. was convicted of an attack on another with the intent to disable or disfigure that resulted in great bodily harm (Mayhem, a Class C Felony). C.S. was sentenced to 10 years of incarceration followed by 10 years of extended supervision. Seven years into his incarceration, C.S. was given a diagnosis of schizophrenia. Winnebago County sought to commit C.S. to the Wisconsin Resource Center and medicate C.S. under the Wisconsin law that governs the involuntary commitment of an inmate, Wis. Stat. § 51.20(1)(ar) (2013–2014).

In 2014, C.S. challenged the constitutionality of the Wis. Stat. § 51.20(1)(ar), arguing that the commitment statute was facially unconstitutional because it allowed for involuntary commitment without a finding of dangerousness. This was rejected by the court because commitment serves a legitimate state interest. The circuit court extended both the commitment and involuntary treatment orders. C.S. appealed this decision to the Wisconsin Supreme Court.

Later in 2015, C.S. was released from prison. Although C.S. was no longer under commitment and involuntary treatment orders, the Wisconsin Supreme Court determined that the matter was not moot because other inmates could find themselves in similar circumstances. In January 2016, the Wisconsin Supreme Court upheld the circuit court's ruling that the Wisconsin Statute governing the involuntary commitment of an inmate did not violate an inmate's substantive due process rights and upheld the lower court decision.

C.S. also filed a motion in the Wisconsin Court of Appeals District II challenging the Wisconsin Statute governing the involuntary medicating of an inmate under § 51.61(1)(g) (2015–2016), claiming that the statute was unconstitutional and violated the Due Process Clause of the Fourteenth Amendment. In 2019, the court ruled that C.S. had not met the required burden of proof to find the statute facially unconstitutional. The court went on to rule that the state, under the *parens patriae* doctrine, had an interest of caring for inmates and a determination of dangerousness was not required for the administration of involuntary treatment to them. C.S. appealed to the Wisconsin Supreme Court.

Ruling and Reasoning

The Wisconsin Supreme Court found the Wisconsin statute governing the involuntary medicating of an inmate (§ 51.61(1)(g)(3) (2015–2016)) facially unconstitutional. It reversed the Wisconsin Court of Appeals decision and remanded the case to the circuit court with an order to vacate C.S.’s involuntary treatment.

The court reasoned that the Wisconsin statute that permitted involuntary medicating of an inmate without determination of dangerousness violated an inmate’s substantive due process rights. In its reasoning, the court referenced a quotation from *Washington v. Harper*, 494 U.S. 210, 221 (1990), which stated that individuals have a “significant liberty interest in avoiding the unwanted administration of antipsychotic drugs” and only a significant state interest can override that right. A finding of incompetence alone does not demonstrate a compelling state interest.

The Wisconsin Supreme Court also concluded that the state’s *parens patriae* power is not without its limits. It can be invoked when inmates are found mentally ill, incompetent to refuse treatment, and also dangerous to themselves or others. In a 2016 decision, the lower court had upheld the Wisconsin Statute regarding involuntary commitment of inmates under § 51.20(1)(ar) (2013–2014), but the 2020 Wisconsin Supreme Court decision found the Wisconsin Statute regarding involuntary treatment of inmates under § 51.61(1)(g)(3)(2015–2016) to be facially unconstitutional. The court explained, “Involuntary commitment is not involuntary medications What justified one does not automatically justify the other” (*In re C.S.*, p 889), underscoring the fact that the court viewed treatment over objection to be more invasive than involuntary commitment.

Dissent

The dissent said that the concept of substantive due process invoked by the majority in its reasoning was not articulated in the Constitution of the United States and can be abused by judges to assert personal opinions. The dissent quoted Justice Clarence Thomas from *McDonald v. City of Chicago*, 561 U.S. 742 (2010): “All this is legal fiction. The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words” (*McDonald*, p 811)

The dissent went on to write:

Rather than ensuring a fair process before being deprived of these rights, the Due Process Clause has been transformed into a storehouse for seemingly unlimited supply of judicially created substantive protections The judiciary is, at best, treading on the thinnest of authority when striking down an act of the legislature on the grounds of substantive due process (*In re C.S.*, p 901).

The dissent, addressing the *parens patriae* doctrine, said that the government has a responsibility to care for individuals who are unable to do it for themselves, especially inmates who are in custody: “[This responsibility] is not just an interest [of the State], it’s an obligation” (*In re C.S.*, p 908, citing *Harper*, p 225).

Discussion

In *In re C.S.*, C.S. alleged that the Wisconsin statute that allowed inmates to be treated over objection without a determination of dangerousness was facially unconstitutional, i.e., always unconstitutional. The majority of the justices concurred, and the law was struck down. When a statute is challenged as facially unconstitutional, the burden of proof falls on the party that is challenging the statute.

In its decision, the Wisconsin Supreme Court referenced three U.S. Supreme Court decisions that relied on the concept of substantive due process. In *Harper*, the Court upheld the involuntary treatment of an inmate because the state had a procedure for review and had demonstrated that Mr. Harper had a serious mental illness, the medication was appropriate, and Mr. Harper was a danger to himself and others. In doing so, the state had established a compelling state interest in overriding Mr. Harper’s liberty interests. In *Riggins v. Nevada*, 504 U.S. 127 (1992), the Court ruled that the state had failed to prove that involuntary administration of medication to Mr. Riggins was required to further an essential state interest, i.e., bringing an accused to trial. In *Sell v. United States*, 539 U.S.166 (2003), the Court outlined specific criteria the state had to prove to meet an essential state interest to justify the involuntary administration of antipsychotic medication for the purpose of competency restoration. The Court has ruled that inmates (*Harper*) or defendants (*Riggins*, *Sell*) have substantive due process rights to avoid involuntary administration of antipsychotic medication absent proof of an overriding state interest.

In *In re C.S.*, the substantive due process doctrine played a significant role in arriving at the outcome of this case. Due process rights are articulated in the

Fifth and Fourteenth Amendments. Citizens may not be deprived of life, liberty, or property without due process of law. Procedural due process protects citizens by ensuring appropriate legal procedures take place such as a notice, a hearing, and an impartial decision maker. The concept of substantive due process is not found in the U.S. Constitution but is inferred. It protects individuals by requiring the state to demonstrate a sufficient substantive justification or a good enough reason to take away individuals' rights.

The concept of substantive due process has played an important role in many landmark mental health cases, including *Harper*, *Riggins*, and *Sell*. Those critical of decisions on the basis of substantive due process assert that there is no textual basis in the U.S. Constitution for such protections and that such matters should remain the purview of the more politically accountable branches of government, namely the legislature (White GE: *The Constitution and the New Deal*. Cambridge, MA: Harvard University Press, 2000). The substantive due process concept is likely to be revisited in future U.S. Supreme Court decisions, and perhaps recently appointed justices will join Justice Thomas in rejecting this concept. This may have an impact on future U.S. Supreme Court decisions involving psychiatry and psychiatric patients.

Evidentiary Burden and Application of *Sell v. United States*

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A *Sell* Hearing Requires Clear and Convincing Evidence to Involuntarily Medicate a Defendant

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In *United States v. James*, 938 F.3d 719 (5th Cir. 2019), the U.S. Court of Appeals for the Fifth

Circuit reviewed a district court's order to medicate a defendant involuntarily per *Sell v. United States*, 539 U.S. 166 (2003), and determined that the district court must meet the standard of clear and convincing evidence. On subsequent appeal in *United States v. James*, 959 F.3d 660 (5th Cir. 2020), the Fifth Circuit found that the *Sell* standard was applied correctly and affirmed the district court's decision to involuntarily medicate the defendant.

Facts of the Case

Susan Kirchoff James was arrested and indicted for emailing death threats to her aunt and uncle, in violation of 18 U.S.C. § 875(c) (1994). The district court held a hearing to determine if Ms. James was competent to stand trial as she believed that everyone involved in the proceedings, including her defense attorney, were conspiring against her. Dr. Tennille Warren-Phillips, a licensed psychologist at the Bureau of Prisons federal detention center in Houston, Texas, performed a court-ordered evaluation of Ms. James. Dr. Warren-Phillips delivered a diagnosis of "general personality disorder" and obsessive-compulsive disorder and opined that Ms. James was competent to stand trial. The defense disagreed and hired a forensic psychiatrist, Dr. Loretta Sonnier, to provide a second opinion regarding Ms. James's competency. Dr. Sonnier diagnosed schizoaffective disorder, bipolar type, and opined that Ms. James was incompetent to stand trial due to "fixed false beliefs" that "affect her judgment." In her report dated December 21, 2017, Dr. Sonnier wrote that antipsychotic medication would be "substantially likely" to restore Ms. James's competency to stand trial. Ms. James was found incompetent to stand trial by the district court on February 7, 2018, and was committed for restoration of competence to the Carswell Federal Medical Center in Fort Worth, Texas.

Ms. James refused medications while hospitalized. Dr. Hayley Blackwood, a forensic psychologist, delivered a diagnosis of delusional disorder, persecutory type, and reported to the district court that Ms. James would require medication to be restored to competency. After evaluating Ms. James, Dr. Gary Etter, a Bureau of Prisons psychiatrist, proposed a treatment plan that included a long-acting antipsychotic medication, risperidone. Dr. Jose Silvas, another Bureau of Prisons psychiatrist who independently evaluated Ms. James, agreed with the plan.