NOTE

Presumed Dangerous: California's Selective Policy of Forcibly Medicating State Prisoners with Antipsychotic Drugs

David E. Gross[*]

TABLE OF CONTENTS

[*] Executive Editor, U.C. Davis Law Review. J.D. Candidate, U.C. Davis School of Law, 2002. M.A. Comparative Literature, University of Arkansas, 1996; B.A. English, Westminster College, Fulton, MO, 1993. I would like to dedicate this article to my parents, with thanks for all their love and support over the years.

INTRODUCTION

Antipsychotic drugs[1] are used for the treatment of severe mental disorders such as schizophrenia.[2] While helpful to many patients in reducing the symptoms of acute psychosis, these drugs also have severe and debilitating side effects.[3] The side effects of antipsychotic drugs range from extreme listlessness and apathy to painful irritation and a persistent desire to move.[4] Some of the more severe side effects have even been linked to suicidal and homicidal behavior.[5] The overall effect of these drugs undermines the individual will and autonomy, rendering patients very susceptible to custodial control.[6] Because of the severity of these side effects, the right of mentally ill patients to refuse treatment is crucial.[7]

---

[1] These are also known as psychotropic or neuroleptic drugs. *See* Riese v. St. Mary's Hosp. & Med. Ctr., 209 Cal. App. 3d 1303, 1310, 271 Cal. Rptr. 199, 202 (1987) (defining antipsychotic drugs).

[2] *See* Keyhea v. Rushen, 178 Cal. App. 3d 526, 531, 223 Cal. Rptr. 746, 747-48 (1986) (describing benefits and side effects of antipsychotic drugs); Dennis E. Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 LA. L. REV. 283, 291 (1992) (observing that psychotropic drugs are effective in treating schizophrenia); Sheldon Gelman, *Mental Hospital Drugs, Professionalism, and the Constitution*, 72 GEO. L. J. 1725, 1741 (1984) (describing beneficial aspects of psychotropic drugs, including their capacity to minimize or eliminate psychotic symptoms).

[3] *See* Cichon, *supra* note 2, at 297-99 (discussing side effects of psychotropic drugs); Steven T. Johnson, *Pros and Cons of Antipsychotics*, RN, Aug. 3, 1997, at 45 (describing neurological complications of psychotropic drugs, including muscle spasms, parkinsonism, and seizures); Jay Siwek, *Consultation: Psychiatric Drugs May Cause Permanent Side Effects*, WASH. POST, Mar. 7, 2000, at Z27 (describing tardive dyskinesia as abnormal movement of face, arms, and legs).

[4] *See* Cichon, *supra* note 2, at 301-302 (describing side effects); Jami Floyd, Comment, *The Administration of Psychotropic Drugs to Prisoners: State of the Law and Beyond*, 78 CAL. L. REV. 1243, 1249-50 (1990) (describing side effects, including parkinsonism, muscle spasms, and tardive dyskinesia) [hereinafter Floyd, *State of the Law*].

[5] One common side effect is akathisia, characterized by a persistent desire to move. *See* Cichon, *supra* note 2, at 301-02 (describing symptoms of akathisia and noting reports of homicidal and suicidal tendencies). In severe cases, it culminates in extreme agitation and panic, with the patient completely unable to be still. *Id.*

[6] *See* Floyd, *State of the Law*, *supra* note 4, at 1249 (observing effectiveness of psychotropic drugs); Gelman, *supra* note 2, at 1741 (describing effectiveness of psychotropic drugs in controlling behavior).

[7] *See* Woodland v. Angus, 820 F. Supp. 1497, 1513 (D. Utah 1993) (characterizing psychotropic drugs as substantial intrusion on liberty interest and bodily integrity); Keyhea v. Rushen, 178 Cal. App. 3d at 542, 223 Cal. Rptr. at 756 (finding that state should allow forced drugging only after adhering to stringent safeguards); William M. Brooks, *Reevaluating Substantive Due Process as a Source of Protection for Psychiatric Patients to Refuse Drugs*, 31 IND. L. REV. 937, 937 (1998) (observing that right of hospitalized psychiatric patients to refuse drugs is arguably most important subject in field of mental health law).

The law protects the mentally ill by allowing them to refuse intrusive treatment of this kind, even when the state may consider such treatment to be in their best interest.[8] Generally, the Due Process Clause of the Fourteenth Amendment protects individual privacy interests from unwanted state intrusion.[9] In the context of antipsychotic drugs, this protection is especially important because the treatment may have side effects that are irreversible and potentially fatal.[10]

Underlying this right to refuse unwanted medical treatment is the common law doctrine of informed consent.[11] The doctrine of informed consent imposes a duty on physicians to inform patients of the risks associated with a particular course of treatment.[12] This disclosure allows a patient to make a reasonable decision whether to undergo or to refuse treatment by balancing probable risks against probable benefits.[13]

---

[8] These protections exist in the common law rights to personal autonomy and informed consent. *See* Mills v. Rogers, 457 U.S. 291, 294 n.4, 299 n.16 (1982) (recognizing common law battery for unauthorized touchings by physician and assuming involuntary administration of psychotropic drugs implicates liberty interests); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (arguing that right to be left alone is most comprehensive and most valued by civilized society); Foy v. Greenblott, 141 Cal. App. 3d 1, 11, 190 Cal. Rptr. 84, 91 (1983) (recognizing right to informed consent in California constitution and common law).

[9] *See* Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J. concurring) (noting Fourteenth Amendment protects freedom to care for one's health and person); Roe v. Wade, 410 U.S. 113, 152-53 (1973) (holding that woman's right to privacy is fundamental right under Fourteenth Amendment); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (noting that privacy means right of individual to be free from unwarranted government intrusion); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that Bill of Rights establishes zone of privacy which protects individuals from governmental intrusion).

[10] *See* Washington v. Harper, 494 U.S. 210, 229-30 (1990) (observing that forcible injection of drugs is substantial interference with individual liberty); Youngberg v. Romeo, 457 U.S. 307, 316 (1982) (finding that prisonershave significant liberty interest in avoiding unwanted administration of antipsychotic drugs under due process clause of fourteenth amendment); Parham v. J. R., 442 U.S. 584, 600-601 (1979) (recognizing liberty interest in not being committed to mental institution).

[11] *See* United States v. Stanley, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part) (arguing that due process standard guarantees principle that voluntary consent is morally, ethically, and legally essential; Stanley v. Georgia, 394 U.S. 557, 565 (1969) (observing that giving government power over citizen's minds contravenes our constitutional heritage).

[12] *See* CAL. WELF. & INST. CODE § 5326.2 (West 1998) (codifying doctrine of informed consent for purposes of LPS Act); Cobbs v. Grant, 8 Cal. 3d 229, 242-45, 502 P.2d 1, 9-12 (1972) (defining informed consent); Zebarth v. Swedish Hosp. Med. Ctr., 499 P.2d 1, 8 (Wash. 1972) (defining doctrine of informed consent); Cichon, *supra* note 2, at 315 (stating that valid informed consent doctrine requires patient's consent be competent, knowing, and voluntary).

[13] *Zebarth*, 499 P.2d 1 at 8.

The specific right to refuse antipsychotic drug treatment varies depending on the jurisdiction.[14] In California, the right to refuse such treatment is statutory. Patients must receive a judicial hearing to determine their competency to refuse treatment before the state may forcibly medicate them.[15] California has also extended this right of judicial determination of competency to state prisoners who refuse antipsychotic medication.[16]

Recently, the California Court of Appeal considered whether Penal Code section 2600 grants this right to prisoners who are detained on a verdict of not guilty by reason of insanity ("NGI").[17] Despite the established statutory right of prisoners to refuse treatment, *In re Locks* held that NGI prisoners do not have a right to a judicial hearing when they refuse antipsychotic medication.[18] The *Locks* court found that NGI status constitutes a determination of dangerousness, and this status precludes the right to a judicial hearing.[19]

---

[14] The traditional federal approach defers to the decisions of medical professionals. Other jurisdictions refuse to defer to professional judgment and require judicial determinations of competency before the state may administer medication. *Compare Youngberg*, 457 U.S. at 323 (holding that professional decision is presumptively valid, and professionals are liable only when decision substantially departs from accepted professional judgment, practice, or standards), *and* Rennie v. Klein, 720 F.2d 266, 269 (3d Cir. 1983) (holding that decision of mental health professional is presumptively valid unless it substantially departs from accepted judgment, practice, or standards), *with* Rogers v. Comm'r of Dep't of Mental Health, 458 N.E.2d 308, 314 (Mass. 1983) (holding that judicial hearing is necessary before state may override patient's right to make treatment decisions), *and* Goedecke v. State Dep't of Ins., 603 P.2d 123, 125 (Colo. 1979) (holding that patients have right to refuse medical treatment absent judicial hearing determining they are incompetent to do so).

[15] *See* CAL. PENAL CODE § 2600 (West 2000) (prohibiting administration of psychotropic drugs in absence of judicial hearing); CAL. WELF. & INST. CODE § 5332(b) (West 1998) (providing for judicial hearing to determine patient's incapacity to refuse treatment and mandating consideration of alternatives), *amended by* 2001 Cal. Legis. Serv. Ch. 506 (A.B. 1424) (West).

[16] *See* CAL. PENAL CODE § 2600 (allowing state to deprive prisoners of certain rights, but expressly prohibiting forcible administration of psychotropic drugs in absence of judicial hearing on competency); Keyhea v. Rushen, 178 Cal. App. 3d 526, 542, 223 Cal. Rptr. 746, 755-56 (1986) (holding that state may not forcibly administer psychotropic medication to prisoners without judicial determination of their competency to refuse treatment).

[17] *See In re* Locks, 79 Cal. App. 4th 890, 892, 94 Cal. Rptr. 2d 495, 496 (2000) (considering whether state affords judicial hearing to insanity acquittee).

[18] *Id.* at 897, 94 Cal. Rptr. 2d at 500 (holding that petitioner for habeas corpus relief was not entitled to judicial hearing to determine his competence to refuse antipsychotic medication).

[19] *Id.* at 897, 94 Cal. Rptr. 2d at 500 (distinguishing petitioner from other patients on ground that petitioner presumed dangerous during confinement).

This Note argues that the *Locks* decision was incorrect. Part I summarizes the law prior to *Locks*, including constitutional and common law bases for the right to refuse medication. Part II discusses the facts and holding of *Locks*. Part III argues that *Locks* contravenes California's Lanterman Petris Short Act ("LPS Act"), the California Penal Code, and undermines the public policy objectives of safeguarding individual autonomy and promoting a fair application of the law.

I. THE LAW PRIOR TO *LOCKS*

The right of mentally ill detainees to remain free from unwanted medical procedures has evolved under the First, Eighth, and Fourteenth Amendments.[20] This right is especially important in the context of the administration of antipsychotic drugs.[21] However, the state has a strong countervailing interest in protecting the general welfare and safety of its citizens.[22] California has balanced these interests by recognizing the right of mentally ill patients to receive a judicial hearing before the state can forcibly administer antipsychotic medication.[23]

---

[20] *See* Cichon, *supra* note 2, at 315 (discussing constitutional bases for right to refuse psychotropic medication).

[21] *See* Woodland v. Angus, 820 F. Supp. 1497, 1513 (D. Utah 1993) (finding that forcible administration of psychotropic drugs is substantial intrusion on liberty interest and extensive encroachment on bodily integrity); *Keyhea*, 178 Cal. App. 3d at 542, 223 Cal. Rptr. at 756 (finding that state should allow forced drugging only after adhering to stringent substantive and procedural safeguards); Cichon, *supra* note 2, at 313-15 (discussing widespread abuses in prescribing psychotropic drugs and importance of legal rights to refuse treatment); Floyd, *State of the Law*, *supra* note 4, at 1254 (noting potentially serious effects of psychotropic drugs as grounds for right to refuse medication).

[22] *See* Addington v. Texas, 441 U.S. 418, 426 (1979) (noting that state has legitimate interest under its police power to protect community from mentally ill persons); Cichon, *supra* note 2, at 336-37 (discussing state's police power as justification for treatment with psychotropic drugs).

[23] *See* CAL. PENAL CODE § 2600 (West 2000) (requiring judicial hearing established in *Keyhea v. Rushen* before state may administer psychotropic drugs to prisoners); CAL. WELF. & INST. CODE § 5332(b) (West 1998) (requiring hearing to determine competency before administration of psychotropic drugs), *amended by* 2001 Cal. Legis. Serv. Ch. 506 (A.B. 1424) (West); Riese v. St. Mary's Hosp. & Med. Ctr., 209 Cal. App. 3d 1303, 1320, 271 Cal. Rptr. 199, 210 (1987) (holding that state may not administer antipsychotic drugs to involuntarily committed mental patients without informed consent); *Keyhea*, 178 Cal. App. 3d at 542, 223 Cal. Rptr. at 755-56 (holding that prisoners must have judicial determination of competency to refuse treatment before state may forcibly subject them to long-term psychotropic medication).

A. Legal Bases for the Right to Refuse Treatment

Historically, society has exercised broad discretion in removing mentally disordered individuals from the community.[24] When this occurs, two important and competing interests collide.[25] The state has interests in providing health care to the individual, and in protecting both the mentally ill individual and society in general from harm.[26] In contrast, patients have an interest in personal autonomy, specifically in their right to be free from unwanted medical procedures.[27]

As part of advancing the state's interest in treating and protecting the mentally ill and in protecting society from them, institutions began to administer antipsychotic drugs to patients in the 1950s.[28] These drugs are most useful in alleviating the symptoms associated with schizophrenia.[29] While antipsychotic drugs are no doubt beneficial and serve a valuable function in treating the mentally ill, they can also cause severely debilitating and sometimes fatal side effects.[30] The neurological

---

[24] *See* Thomas L. Hafemeister, *Legal Aspects of the Treatment of Offenders with Mental Disorders, in* TREATMENT OF OFFENDERS WITH MENTAL DISORDERS 44, 45 (Robert M. Wettstein, ed., 1998) (discussing evolution of treatment of mentally disordered offenders); Thomas L. Hafemeister & John Petrila, *Treating the Mentally Disordered Offender: Society's Uncertain, Conflicted, and Changing Views*, 21 FLA. ST. U. L. REV. 731, 732-33 (1994) (discussing historical treatment of mentally disordered offenders).

[25] *See* Cichon, *supra* note 2, at 284-85 (discussing conflict between individual and state interests); Hafemeister, *supra* note 24, at 52 (noting that need to protect public safety justifies temporary deprivations of individual liberty).

[26] *See* Floyd, *State of the Law*, *supra* note 4, at 1256-57 (discussing due process balancing test between individual's interest in refusing medication and state's interest in treatment and public safety).

[27] *See* CAL. CONST. art. I, § 1 (West 2000) (guaranteeing right to privacy); Cobbs v. Grant, 8 Cal. 3d 229, 243, 502 P.2d 1, 10 (1972) (holding that physicians have duty to reasonably disclose alternatives to proposed therapy and dangers involved); Foy v. Greenblott, 141 Cal. App. 3d 1, 15, 190 Cal. Rptr. 84, 91 (1983) (observing that every person has common law and state constitutional right to give or withhold informed consent with respect to proposed medical treatment); *see also* Cichon, *supra* note 2, at 326 (noting various bases for individual rights, including privacy, freedom from restraint, personal security, and bodily integrity); Floyd, *State of the Law*, *supra* note 4, at 1255-56 (basing right to refuse medication in rights to privacy, bodily integrity, and unimpaired mental processes); Hafemeister, *supra* note 24, at 63 (observing that right to refuse treatment generally extends to procedures that are intrusive, onerous, or irreversible).

[28] *See* Cichon, *supra* note 2, at 289 (discussing history of psychotropic drugs); Floyd, *State of the Law*, *supra* note 4, at 1246 (discussing proliferation of psychotropic drugs since 1950s).

[29] Schizophrenia is a mental disorder which results in an imbalance between emotional reactions and the thought content associated with these reactions. *See* Cichon, *supra* note 2, at 292-97 (noting benefits of drugs in treating schizophrenia, but pointing out that extent of benefits is unclear, due in part to over-diagnosis); *see also* Floyd, *State of the Law*, *supra* note 4, at 1246-47 (pointing out effectiveness of drugs in treating psychoses and other disorders).

[30] Among the numerous non-neurological side effects are drowsiness, fatigue,

side effects of the drugs affect the body's nonvoluntary nervous system which controls muscle coordination.[31] These side effects include akinesia, a condition characterized by a decrease in spontaneous mobility and speech along with a general feeling of listlessness and apathy.[32] Another particularly debilitating side effect is akathisia, a condition characterized by a painful irritability and a persistent desire to move.[33] This condition has been linked to both suicidal and homicidal behavior.[34] In severe cases, akathisia culminates in extreme agitation and panic, with the patient being unable to remain motionless for more than any length of time.[35] Other side effects include dystonic reactions, which result in acute and very painful spasms of muscle groups, and diskinesia, characterized by chronic, repetitive, involuntary movements and tremors.[36] One of the most serious side effects is tardive dyskinesia ("TD"), a syndrome involving uncontrollable facial movements, which is usually irreversible if not detected early.[37]

With the advent of the civil rights movement in the 1960s and 70s, the law began to acknowledge the need to protect patients from the effects of these intrusive therapies.[38] Eventually, courts began to recognize and enforce the individual's right to be free from the administration of antipsychotic drugs on a variety of constitutional bases.[39] One basis was

---

impotence, decreased libido, priapism, and various blood disorders. *See* Cichon, *supra* note 2, at 297-99 (discussing side effects and defining priapism as constant, painful erection). *See generally* Washington v. Harper, 494 U.S. 210, 229-30 (1990) (discussing side effects of psychotropic drugs); Keyhea v. Rushen, 178 Cal. App. 3d 526, 531, 223 Cal. Rptr. 746, 748 (1986) (describing side effects of psychotropic drugs); Floyd, *State of the Law*, *supra*, note 4, 1249-50 (describing side effects of psychotropic drugs).

[31] *See* Cichon, *supra* note 2, at 300.

[32] *See id.* at 300-01.

[33] *Id.* at 301.

[34] *Id.* at 302

[35] *Id.* at 301

[36] *Id.* at 303.

[37] TD involves uncontrollable repetitive movements mainly affecting the face, tongue, mouth, trunk (including respiratory muscles), upper and lower extremities, neck, shoulders, and pelvis. *See* Cichon, *supra* note 2, at 304-06 (describing effects of TD and citing study which estimated TD affliction rate of ten to twenty percent in individuals exposed to antipsychotics for more than one year). In more pronounced cases, patients may have difficulty in swallowing, talking, and breathing. This condition not only presents serious health problems, but even slight cases can be socially disabling and embarrassing. *See id.*; Floyd, *State of the Law*, *supra* note 4, at 1250 (describing effects of TD and noting its irreversible nature and significant physical impairment); Siwek, *supra* note 3 (describing effects of TD).

[38] *See* Hafemeister, *supra* note 24, at 45-47 (discussing evolution of law in protecting offenders with mental disorders); Hafemeister & Petrila, *supra* note 24, at 734-42 (noting gradual shift in which individual rights of mentally ill detainees gained greater attention).

[39] *See* Washington v. Harper, 494 U.S. 210, 221-22 (1990) (finding Fourteenth

the enforcement of the Eighth Amendment, which prohibits cruel and unusual punishment.[40] Applying the Eighth Amendment, courts began to scrutinize the justification for administering the drugs.[41] If the facilities used drugs for punitive or disciplinary purposes, courts would find that this was a violation of the Eight Amendment.[42]

Another constitutional basis for judicial protection of an individual's right to be free from unwanted medication is the First Amendment.[43]

Amendment liberty interest in right to refuse psychotropic medication); Bee v. Greaves, 744 F.2d 1387, 1394 (10th Cir. 1984) (recognizing First Amendment concerns in involuntary administration of psychotropic drugs); Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973) (applying Eighth Amendment to experimental use of drugs on fully conscious prisoners); Cichon, *supra* note 2, at 315-331 (stating that courts have argued for patient's right to refuse drugs on First, Fifth, Eighth, and Fourteenth Amendment grounds); Floyd, *State of the Law*, *supra* note 4, at 1255-56 (observing that legal challenges to forced medication are based on constitutional rights of privacy, bodily integrity, and freedom from intrusion into mental processes).

[40] *See* U.S. CONST. amend. VIII (prohibiting cruel and unusual punishments); Nelson v. Heyne, 491 F.2d 352, 357 (7th Cir. 1974) (finding Eighth Amendment violation in use of tranquilizing drugs); Knecht v. Gillman, 488 F.2d 1136, 1140 (8th Cir. 1973) (finding Eighth Amendment violation in use of morphine-based drug that induced extended periods of vomiting); *Mackey*, 477 F.2d at 878 (holding that prisoner's complaint regarding forcible drug administration could constitute cruel and unusual punishment); Cichon, *supra* note 2, at 316-17 (discussing Eighth Amendment cases); Floyd, *State of the Law*, *supra* note 4, at 1274-79 (discussing courts' handling of medical treatment as punishment under Eighth Amendment).

[41] *See* Robinson v. California, 370 U.S. 660, 666-67 (1962) (ruling state statute criminalizing drug addiction violated Eighth and Fourteenth Amendments); *Nelson*, 491 F.2d at 356-57 (relying on Eighth Amendment in enjoining use of antipsychotic drugs in juvenile correctional facility); *Mackey*, 477 F.2d at 878 (applying Eighth Amendment to experimental use of drugs on fully conscious prisoners); Cichon, *supra* note 2, at 317 (discussing Eighth Amendment cases involving punishment and discipline); Floyd, *State of the Law*, *supra* note 4, at 1272-76 (discussing Eighth Amendment case law's distinction between treatment and punishment).

[42] *See Knecht*, 488 F.2d at 1138-40 (finding cruel and unusual punishment and noting unproven nature of drug and its painful and debilitating effects); *Mackey*, 477 F.2d at 878 (applying Eighth Amendment in reversing dismissal of complaint and emphasizing that experimental use of drugs on fully conscious prisoners was inappropriate); Pena v. N.Y. State Div. for Youth, 419 F. Supp. 203, 211 (S.D.N.Y. 1976) (finding Eighth Amendment violation when state facility administered drugs for punitive and not therapeutic reasons); *see also* Vann v. Scott, 467 F.2d 1235, 1240 (7th Cir. 1972) (noting that state may not escape Eighth Amendment liability by simply labeling conduct as treatment).

[43] *See Bee*, 744 F.2d at 1394 (finding that drugs can affect ability to think and communicate and recognizing First Amendment protected right to refuse medication); *Mackey*, 477 F.2d at 878 (finding that prisoner's forcible drugging complaint raised serious First Amendment questions of impermissible tinkering with mental processes); Davis v. Hubbard, 506 F. Supp. 915, 929 (N.D. Ohio 1980) (favorably citing First Amendment cases in finding constitutional right to refuse antipsychotic medication, but basing holding on liberty guarantee of Fourteenth Amendment); Rogers v. Okin, 478 F. Supp. 1342, 1366-67 (D. Mass. 1979), *aff'd in part and rev'd in part on other grounds*, 634 F.2d 650 (1st Cir. 1980) (finding First Amendment basis for right to refuse drugs), *vacated and remanded sub nom.*, Mills v. Rogers, 457 U.S. 291, 296 (1982); Kaimowitz v. Mich. Dep't of Mental Health, Civ.

Some courts have interpreted the First Amendment to protect a freedom of the mind, or the freedom to think.[44] This right is especially suspect to the dangers and side effects of psychotropic drugs because the drugs can be mind altering or thought controlling.[45] Thus, some courts have concluded that the side effects of the drugs may infringe on protected First Amendment rights.[46]

The most successful constitutional basis for judicial protection against forced medication is the Due Process clause of the Fourteenth Amendment.[47] Under the Fourteenth Amendment, no state may deprive any person of life, liberty, or property without due process of law.[48] The

---

No. 73-19434-AW (Wayne County [Mich.] Cir. Ct., July 10, 1973), *reprinted in* THE LEGAL RIGHTS OF HANDICAPPED PERSONS at 808, 822 (Robert Burgdorf ed., 1980)[hereinafter *Kaimowitz*] (holding that First Amendment protects creation and free flow of ideas from unwarranted intrusion). *See generally* Cichon, *supra* note 2, at 319 (noting First Amendment as basis for right to refuse medication); Floyd, *State of the Law*, *supra* note 4, at 1268-71 (discussing First Amendment as basis for right to refuse psychotropic medication); Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 MIAMI U. L. REV. 1, 9, 60-63 (1989) (citing First Amendment case law and arguing that courts should examine forcible administration of psychotropic drugs under traditional First Amendment standards).

[44] *See Kaimowitz*, *supra* note 43, at 822 (finding that First Amendment protects private thoughts); *see also* Winick, *supra* note 43, at 27-29 (arguing that First Amendment protects private thoughts). The California state constitution has expanded the more traditional protections of the First Amendment by explicitly including a right to privacy. *See* CAL. CONST. art. I, § 1 (West 2000) (providing right to privacy); Long Beach City Employees Ass'n v. City of Long Beach, 41 Cal. 3d 937, 943, 719 P.2d 660, 663 (1986) (finding that constitutional right to privacy protects thoughts).

[45] *See Bee*, 744 F.2d at 1394 (recognizing First Amendment concerns in involuntary administration of psychotropic drugs); Scott v. Plante, 532 F.2d 939, 946 (3d Cir. 1976), (noting that forced drugging could implicate First Amendment by infringing on mental processes), *vacated on other grounds and remanded*, 458 U.S. 1101 (1982); *Mackey*, 477 F.2d at 878 (recognizing First Amendment protects individuals from tinkering with mental processes); *Kaimowitz*, *supra* note 43, at 918-19 (recognizing First Amendment protection in free flow of mental processes).

[46] *See Bee*, 744 F.2d at 1394; Davis, 506 F. Supp. at 929 (citing with favor First Amendment cases in finding constitutional right to refuse antipsychotic medication, but ultimately ruling on Fourteenth Amendment grounds); *Mackey*, 477 F.2d at 878 (finding serious constitutional questions in forcible drugging of prisoners).

[47] *See* U.S. CONST. amend. XIV, § 1 (providing that no state shall deprive persons of life, liberty, or property without due process of law); Washington v. Harper, 494 U.S. 210, 221-22 (1990) (finding liberty interest in right to refuse psychotropic medication); Youngberg v. Romeo, 457 U.S. 307, 316 (1982) (holding that involuntarily committed mentally retarded person retains liberty interest in freedom from unreasonable bodily restraint); Vitek v. Jones, 445 U.S. 480, 492-93 (1980) (holding that transfer of prisoner to mental hospital implicated due process right to be free from unjustified intrusions on personal security); United States v. Brandon, 158 F.3d 947, 953-56 (6th Cir. 1998) (granting judicial hearing to assess inmate's right to refuse psychotropic drugs on Fourteenth Amendment due process grounds).

[48] U.S. CONST. amend. XIV, § 1.

U.S. Supreme Court has recognized a liberty interest in the right to refuse the administration of antipsychotic drugs.[49] Because this right to refuse is a protected liberty interest, a state may infringe upon it only if its interests outweigh the individual's interests.[50] Thus, courts must balance the individual's interest in refusing treatment against the state's interests in providing for the safety and general welfare of its citizens.[51] Applying this balancing test, the U.S. Supreme Court has held that states may forcibly medicate individuals as long as fair procedural mechanisms are in place.[52] Although the Supreme Court refused to require a judicial hearing as a fair procedural mechanism,[53] California and other states require judicial review before the state may forcibly medicate citizens with antipsychotic drugs.[54]

B. The State's Power to Forcibly Medicate

When forcibly medicating involuntarily committed persons, the state may base its actions on one of two separate powers: its police power or its parens patriae power.[55] In exercising its police power, the state's

---

[49] *See Harper*, 494 U.S. at 221-22 (finding liberty interest in right to refuse psychotropic medication).

[50] *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (formulating three part balancing test to determine what procedural protections are due under Fourteenth Amendment).

[51] *See id.* at 334-35; Jurasek v. Utah State Hosp., 158 F.3d 506, 510 (10th Cir. 1998) (noting well-settled principle that court must balance individual interests against institutional interests in preventing individuals from harming themselves or others who reside or work in institution).

[52] *See Harper*, 494 U.S. at 229-31 (applying *Mathews* balancing test and finding that Constitution does not prohibit state from allowing forced medication under fair procedural mechanisms).

[53] *See id.* at 228 (holding that Washington's existing administrative procedures provided sufficient due process and judicial hearing is not required prior to forcible administration of antipsychotic drugs)

[54] *See, e.g.*, CAL. WELF. & INST. CODE § 5332(b) (West 1998) (requiring judicial determination of competency prior to forcible administration of antipsychotic drugs), *amended by* 2001 Cal. Legis. Serv. Ch. 506 (A.B. 1424) (West); Jarvis v. Levine, 418 N.W.2d 139, 148-49 (Minn. 1988) (requiring judicial hearing); Rivers v. Katz, 495 N.E.2d 337, 343-44 (N.Y. 1986) (requiring judicial review of patient's competency to refuse antipsychotic medication where state's police power is not implicated).

[55] *See* O'Connor v. Donaldson, 422 U.S. 563, 582-83 (1975) (discussing traditional authority of state to confine and treat mentally ill on basis of *parens patriae* and police powers); Project Release v. Prevost, 722 F.2d 960, 971 (2d Cir. 1982) (acknowledging state's *parens patriae* and police power as justifications for treating mentally ill); United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931, 936 n.5 (7th Cir. 1975) (noting that state may commit mentally ill individual under either *parens patriae* or police power); Cichon, *supra* note 2, at 337-44 (citing *parens patriae* and police power as justifications for forced medication); Floyd, *State of the Law*, *supra* note 4, at 1257-59 (discussing *parens patriae* and

interest is to protect the safety of its citizens.[56] Thus, the state may sometimes justifiably intrude on individual interests for the public good.[57]

In such cases, the state often justifies the forcible medication of prisoners on the basis of an emergency or a dangerousness standard.[58] Courts define an emergency situation as one in which there is an imminent threat of harm.[59] The standard for dangerousness is less clear.[60] Some courts leave the determination to the discretion of the institution officials, while others employ a more restrictive standard.[61]

---

police power as justifications for state's interest in forced medication).

[56] *See* Allen v. Illinois, 478 U.S. 364, 373 (1986) (finding state police power justification for providing psychiatric treatment); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962) (defining police power as conceptual limit of public encroachment upon private interests and requiring that public interference be reasonably necessary and not unduly oppressive); Burch v. Appalachee Cmty. Mental Health Servs., 840 F.2d 797, 800 (11th Cir. 1988) (acknowledging state's police power in protecting community from dangerous tendencies of mentally ill); Roy E. Pardee III, Note, *Fear and Loathing in Louisiana: Confining the Sane Dangerous Insanity Acquittee*, 36 ARIZ. L. REV. 223, 225 (1994) (observing that state's authority to criminally confine citizens derives from its police power to protect health, safety, and morals of its citizens).

[57] *See Goldblatt*, 369 U.S. at 594-95 (recognizing state's power to encroach on individual interests to preserve public safety); Floyd, *State of the Law*, *supra* note 4, at 1258-59 (discussing cases in which state's police power interest in preventing harm outweighs individual's interest in refusing medication).

[58] *See* Cochran v. Dysart, 965 F.2d 649, 650 (8th Cir. 1992) (acknowledging dangerousness as criterion for forced medication); Jurasek v. Payne, 959 F. Supp. 1441, 1460-61 (D. Utah 1997) (upholding state policy of forced medication upon showing of dangerousness or emergency); Anderson v. State, 663 P.2d 570, 573 (Ariz. Ct. App. 1982) (recognizing dangerousness and emergency standards for forced medication); *Keyhea* injunction, *infra* note 109, § III(F)(b) (authorizing forced medication if prisoner is danger to self or others); *see also* Cichon, *supra* note 2, at 337-38 (explaining difference between emergency and dangerousness standards); Floyd, *State of the Law*, *supra* note 4, at 1259 n.122 (citing cases which justify forced medication on basis of need to prevent violence and protect others from violence).

[59] *See* Rogers v. Comm'r of Dep't of Mental Health, 458 N.E.2d 308, 321 (Mass. 1983) (defining emergency, in context of administration of psychotropic drugs, as unforeseen circumstances calling for immediate action); Opinion of the Justices, 465 A.2d 484, 489-90 (N.H. 1983) (defining emergency situations as calling for immediate and urgent treatment); *Anderson*, 663 P.2d at 573 (defining emergency as immediate threat of physical injury).

[60] *See* Cichon, *supra* note 2, at 338 (noting different interpretations of dangerousness among courts).

[61] *See also In re* Mental Commitment of M.P., 510 N.E.2d 645, 647 (Ind. 1987) (holding that propensity for dangerousness is not sufficient to overcome patient's liberty interest in being free from unreasonable intrusions into body and mind); *Rogers*, 458 N.E.2d at 310 (holding that no state interest justifies use of antipsychotic drugs in non-emergency situation without patient's consent). *Compare* Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984) (holding that determination of dangerousness is within discretion of state medical authorities), *and* Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980) (deferring to professional judgment in medication determinations based on police power grounds), *vacated sub nom.*, Mills v. Rogers, 457 U.S. 291 (1982), *with* People v. Medina, 705 P.2d 961, 972-73 (Colo. 1985)

Another source of state power used to justify forced medication is the parens patriae power.[62] Under this power, the state cares for those who cannot care for themselves.[63] In the context of treatment with psychotropic medication, the state invokes its parens patriae power when individuals are incapable of assessing their own need for psychiatric treatment.[64] Thus, under its parens patriae power, the state may forcibly medicate those persons who are incompetent to make their own decisions.[65]

(requiring judicial finding of dangerousness before state may forcibly medicate), *and* Davis v. Hubbard, 506 F. Supp. 915, 934 (N.D. Ohio 1980) (requiring finding of sufficiently grave and imminent danger to justify forced medication).

[62] Literally, "parent of the country." *See* Addington v. Texas, 441 U.S. 418, 426 (1979) (recognizing state's *parens patriae* interest in caring for those who cannot care for themselves); *In re* C.E., 641 N.E.2d 345, 353 (Ill. 1994) (observing that state has legitimate *parens patriae* interest in treating mentally ill); People v. Floyd, 655 N.E.2d 10, 17 (Ill. App. Ct. 1995) (acknowledging state's *parens patriae* interest in treating mentally ill); *see also* Cichon, *supra* note 2, at 344-45 (noting that states invoke *parens patriae* power to justify forced treatment of mentally ill); Floyd, *State of the Law*, *supra* note 4, at 1257 (discussing *parens patriae* interest as justification for forced administration of drugs to incompetent mental patients).

[63] *See Addington*, 441 U.S. at 426 (defining *parens patriae* interest as caring for those who cannot care for themselves); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971) (defining *parens patriae* power as state caring for those who cannot care for themselves); Hoefers v. Jones, 672 A.2d 1299, 1308 (N.J. Super. Ct. Ch. Div. 1994) (defining *parens patriae* as prerogative of sovereign, originating in English common law, to protect those with legal disability to protect themselves); Pardee, *supra* note 56, at 228-29 (noting that under *parens patriae* power, state acts in bests interests of patients who are unable to act for themselves); Floyd, *State of the Law*, *supra* note 4, at 1257 (acknowledging traditional rationale for *parens patriae* power as caring for those who are unable to care for themselves).

[64] *See* Project Release v. Prevost, 722 F.2d 960, 978 (2d Cir. 1983) (noting that individual's incapacity to make decisions is *sine qua non* for forced medication under *parens patriae* interest); *In re C.E.*, 641 N.E.2d at 353 (observing that state has legitimate *parens patriae* interest in treating mentally ill to justify forced medication with psychotropic drugs when patient is incompetent); *Floyd*, 655 N.E.2d at 17 (acknowledging state's *parens patriae* interest in treating mentally ill); Cichon, *supra* note 2, at 344 (explaining that *parens patriae* power allows state to forcibly medicate mentally ill).

[65] *See Addington*, 441 U.S. at 426 (holding that incompetency is prerequisite for forced medication under *parens patriae* power); *Project Release*, 722 F.2d at 978 (requiring finding of incompetence for forced drugging under *parens patriae* power); Winters v. Miller, 446 F.2d 65, 71 (2d Cir. 1971) (finding that state may treat mentally ill under *parens patriae* interest only after it determines patient is incompetent); Riese v. St. Mary's Hosp. & Med. Ctr., 209 Cal. App. 3d 1303, 1320, 271 Cal. Rptr. 199, 210 (1987) (requiring judicial determination of incompetence before forcibly medicating patients); Medina, 705 P.2d at 973 (holding that judicial determination of incompetence required before forced medication); Jarvis v. Levine, 418 N.W.2d 139, 148-49 (Minn. 1988) (requiring separate judicial finding of incompetence before state may forcibly medicate patients); *see also* Cichon, *supra* note 2, at 344, 350 (observing that justification for *parens patriae* power would be lacking without finding of incompetence); Floyd, *State of the Law*, *supra* note 4, at 1257 (noting that *parens patriae* power, by definition, may only justify forced treatment of incompetent persons).

In cases of forced administration of psychotropic drugs, the government acts under both of these powers.[66] The state may medicate gravely disabled persons under its parens patriae power.[67] It may also forcibly medicate persons who are a danger to themselves or others under its police power.[68] However, because individuals have a liberty interest in being free from unwanted treatment, the constitution requires that the state provide procedural protections before acting under either of these powers.[69] California provides these procedural protections by statute.

C. The Right to Refuse Treatment in California

The right to refuse treatment in California has evolved through the courts' interpretation of the LPS Act. The purpose of the LPS Act is to end the inappropriate, involuntary, and indefinite commitment of mentally disordered persons.[70] One of the main principles of the LPS Act is that the state may not presume persons to be incompetent based solely on their hospitalization.[71] This principle applies regardless of whether a person receives treatment voluntarily or involuntarily.[72]

In a landmark decision, the California Court of Appeal extended these basic protections to mentally incompetent patients who refuse

---

[66] *See, e.g., Keyhea* injunction, *infra* note 109, § III(F) (authorizing involuntary medication of persons who are either gravely disabled or dangerous as a result of mental illness).

[67] *See supra* notes 52-55 and accompanying text.

[68] *See supra* notes 46-51 and accompanying text.

[69] *See* Washington v. Harper, 494 U.S. 210, 229-30 (1990) (applying *Mathews* balancing test and finding that Constitution does not prohibit state from allowing forced medication under fair procedural mechanisms); Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (formulating balancing test to determine Fourteenth Amendment procedural protections); Jurasek v. Utah State Hosp., 158 F.3d 506, 510 (10th Cir. 1998) (noting well-settled principle that court must balance individual liberties against interests of institution in preventing individuals from harming themselves or others).

[70] *See* CAL. WELF. & INST. CODE § 5001(a),(d) (West 1998) (describing purpose of legislation).

[71] *See* CAL. WELF & INST. CODE § 5331 (West 1998) (prohibiting state from presuming individual is incompetent based solely on individual's evaluation or treatment for mental disorder); Riese v. St. Mary's Hosp. & Med. Ctr., 209 Cal. App. 3d 1303, 1314, 271 Cal. Rptr. 199, 206 (1987) (noting that cardinal principle of LPS Act is to presume competence to refuse treatment despite hospitalization).

[72] CAL. WELF. & INST. CODE § 5331 (presuming competence regardless of whether treatment or evaluation is voluntary). California Welfare and Institutions Code section 5326.5(d) reiterates the basic idea that the state shall not consider the mentally ill incapable of refusing therapy solely because of their confinement or the fact that they are mentally ill. *See* CAL. WELF. & INST. CODE § 5326.5(d) (West 1998).

antipsychotic drugs.[73] In *Riese v. St. Mary's Hospital and Medical Center*, the issue before the court was whether the state may force patients to take antipsychotic drugs in non-emergency situations.[74] The court held that patients have a right to refuse treatment absent a judicial determination that they are incompetent to do so.[75]

Riese was a class action suit filed on behalf of institutionalized patients who objected to their medication with psychotropic drugs.[76] Riese had a history of chronic schizophrenia and was first hospitalized in 1968 at age twenty-five.[77] In 1969, an internist prescribed the antipsychotic drug Mellaril for her.[78] After taking this drug, Riese showed immediate improvement, moved into her own apartment, and was not hospitalized for 11 years.[79] However, in 1985, the hospital readmitted her as a voluntary patient for an acute exacerbation of chronic schizophrenia.[80] Upon admission, Riese signed a consent form for antipsychotic medication, including Mellaril and Cogentin.[81]

The hospital later changed Riese's medication without her consent.[82] When she complained of side effects and eventually refused the new medication, the hospital forcibly injected her with the drugs.[83] The hospital then made Riese an involuntary patient because she refused medication, became violent, and was actively psychotic.[84] Thereafter, the hospital gave her medication intramuscularly when she refused to ingest it orally.[85]

Riese brought a petition for a writ of mandate seeking a determination that the state could only administer the drugs after obtaining patients' informed consent.[86] The trial court denied their petition.[87] However, the appellate court reversed, holding that hospitals must have the informed consent of involuntarily committed patients to administer antipsychotic

---

[73] *Riese*, 209 Cal. App. 3d at 1308, 271 Cal. Rptr. at 201 (considering whether state may force antipsychotic drugs on individuals against their will).

[74] *Id.* at 1308, 271 Cal. Rptr. at 201.

[75] *Id.* at 1320, 271 Cal. Rptr. at 210.

[76] *Id.* at 1308, 271 Cal. Rptr. at 201.

[77] *Id.* at 1308, 271 Cal. Rptr. at 201.

[78] *Id.* at 1308, 271 Cal. Rptr. at 201.

[79] *Id.* at 1308, 271 Cal. Rptr. at 201.

[80] *Id.* at 1309, 271 Cal. Rptr. at 202.

[81] *Id.* at 1309, 271 Cal. Rptr. at 202.

[82] *Id.* at 1309, 271 Cal. Rptr. at 202.

[83] *Id.* at 1309, 271 Cal. Rptr. at 202.

[84] *Id.* at 1309, 271 Cal. Rptr. at 202.

[85] *Id.* at 1309, 271 Cal. Rptr. at 202.

[86] *Id.* at 1308, 271 Cal. Rptr. at 201.

[87] *Id.* at 1308, 271 Cal. Rptr. at 201.

drugs in non-emergency situations.[88] The court found that this right applies, unless the court makes a determination that the patient is incapable of making treatment decisions.[89]

The court based its holding on sections 5331 and 5326.5 of the LPS Act, which prohibit a presumption of incompetence solely because of mental illness.[90] The court also noted that mental patients retain the same rights and responsibilities guaranteed to all other persons by the United States Constitution and the laws of California.[91] Finally, the court observed that mental patients shall retain all rights not specifically denied to them under the LPS Act.[92] The California legislature later codified *Riese* in California Welfare and Institutions Code sections 5332 through 5337.[93] These provisions mandate a judicial hearing to determine a mental patient's capacity to refuse medication.[94]

In another landmark case, the California Court of Appeals extended the protections of the LPS Act further when it confronted the question of prisoners' right to refuse treatment.[95] In *Keyhea v. Rushen*, the Court of Appeals considered whether the state's interest in prison security denied prisoners the right to refuse psychotropic drugs.[96] This class action suit arose from California Medical Facility's ("CMF") practice of forced

---

[88] *See id.* at 1320, 271 Cal. Rptr. at 210 (holding that absent judicial determination of incompetence, state may not administer antipsychotic drugs to patients in non-emergency situations without patient's informed consent).

[89] *Id.* at 1320, 271 Cal. Rptr. at 210.

[90] *See id.* at 1316, 271 Cal. Rptr. at 206; *see also* CAL. WELF. & INST. CODE §§ 5331 (West 1998) (prohibiting state from presuming incompetence solely because it has evaluated or treated someone with mental disorder), 5326.5 (West 1998) (prohibiting state from deeming persons incapable of refusing therapy solely because they are mentally ill, disordered, abnormal, or mentally defective person).

[91] *See* CAL. WELF. & INST. CODE § 5325.1 (West 1998) (stating persons with mental illnesses have same rights guaranteed all other persons under U.S. Constitution and California law); *Riese*, 209 Cal. App. 3d at 1316, 271 Cal. Rptr. at 207 (citing section 5325.1).

[92] *See* CAL. WELF. & INST. CODE § 5327 (West 1998) (stating that LPS detainees retain all rights not specifically denied them under LPS Act); *Riese*, 209 Cal. App. 3d at 1316, 271 Cal. Rptr. at 207 (recognizing right to refuse medication despite no express grant of this right in legislation).

[93] CAL. WELF. & INST. CODE § 5332-5337 (West 1998 & Supp. 2000) (requiring informed consent or judicial determination of incompetence before psychotropic drugs can be administered to mental patients).

[94] *See* CAL. WELF. & INST. CODE § 5332(b) (West 1998) (requiring judicial hearing before state may forcibly administer drugs without patient's consent).

[95] *See* Keyhea v. Rushen, 178 Cal. App. 3d 526, 532, 223 Cal. Rptr. 746, 748 (1986) (stating issue as whether state may involuntarily medicate psychiatric prisoners).

[96] *See id.*, 223 Cal. Rptr. at 748 (explaining that Penal Code section 2600 allows deprivation of rights only when necessary to provide for reasonable security of institution or reasonable protection of public).

psychiatric drugging.[97] CMF's policy for long term[98] forcible drug treatment consisted of a psychiatrist's order to medicate and an internal review every ninety days.[99] The prisoners had no right to judicial review.[100]

The plaintiffs alleged that CMF's policy of forcible medication without judicial review violated their federal and state constitutional rights and Penal Code section 2600.[101] The trial court held that the state violated section 2600 by subjecting prisoners to long term forced medication without judicial review or right to counsel.[102] Under section 2600, the state may only deprive prisoners of rights when the deprivation is reasonably related to legitimate penological interests.[103] Because the LPS Act guarantees certain rights[104] to all involuntarily detained persons, the trial court found that section 2600 protects these rights in the prison context.[105] Specifically, the trial court found that prisoners have rights to a judicial determination of competency, the assistance of counsel, and personal appearance.[106] The court further found that the State violated section 2600 by unnecessarily depriving prisoners of these rights.[107] Consequently, the court enjoined the State from subjecting prisoners to long term involuntary medication without adhering to the procedural requirements contained in the LPS Act and the Probate Code.[108] The trial court's injunction then set out detailed procedures which the State must

---

[97] The case originated in 1977 as a combined individual action by two taxpayers and class action by prisoner Canal Keyhea. *Id.*, 223 Cal. Rptr. at 748. The suit arose from CMF's practice of forced psychiatric drugging and Keyhea's transfer from CMF to a state mental health facility. *Id.*, 223 Cal. Rptr. at 748. In a 1979 unpublished opinion, the court affirmed the dismissal of Keyhea's class action, but held that the taxpayers had standing to proceed with the remainder of the action. *Id.* at 532 n.4, 223 Cal. Rptr. at 748 n.4.

[98] The parties stipulated to interpret long-term medication as medication in excess of ten days. *Id.* at 531 n.3, 223 Cal. Rptr. at 748 n.3.

[99] *Id.* at 531, 223 Cal. Rptr. at 748.

[100] *Id.*, 223 Cal. Rptr. at 748.

[101] *Id.* at 533, 223 Cal. Rptr. at 749.

[102] *Id.*, 223 Cal. Rptr. at 749.

[103] *See id.* at 532, 223 Cal. Rptr. at 748; *see also* CAL. PENAL CODE § 2600 (West 2000) (stating that state may deprive prisoners of such rights, and only such rights, as are reasonably related to legitimate penological interests). The 1994 amendments to section 2600 codified the *Keyhea* decision, mandating a judicial hearing for the involuntary administration of psychotropic drugs. *See* CAL. PENAL CODE § 2600.

[104] *See supra* notes 81-85 and accompanying text.

[105] *See Keyhea*, 178 Cal. App. 3d at 533, 223 Cal. Rptr. at 749 (1986) (reasoning that Penal Code section 2600 covers statutory and constitutional rights, meaning all statutory rights except those necessary for prison security).

[106] *Id.* at 531, 223 Cal. Rptr. at 748.

[107] *Id.* at 532-33, 223 Cal. Rptr. at 749.

[108] *Id.*, 223 Cal. Rptr. at 749.

follow before administering psychotropic drugs to state prisoners.[109]

The appellate court subsequently affirmed the trial court's holding.[110] It held that state prisoners have a right to a judicial determination of competency before the State could administer psychotropic medication.[111] Because a denial of this right was unnecessary to maintain prison security, the court reasoned that prisoners retain this right under section 2600.[112] Furthermore, the appellate court approved of the procedural protections the trial court mandated in the *Keyhea* injunction.[113]

---

[109] *See* CAL. PENAL CODE § 2600 (West 2000) (mandating adherence to procedure set out in *Keyhea* before involuntary administration of psychotropic drugs); *see also* ABOUT KEYHEA HEARINGS, STATE OF CALIFORNIA DEPARTMENT GENERAL SERVICES, OFFICE OF ADMINISTRATIVE HEARINGS, http://www.oah.dgs.ca.gov/laws/keyhea.asp, (last visited on Nov. 2, 2001) (describing *Keyhea* decision and procedure for administration of court hearings pursuant to that decision). The term "*Keyhea* injunction" refers to the October 31, 1986, Permanent Injunction in Case No. 67432 in the Superior Court of Solano County, affirmed by *Keyhea v. Rushen*, available at http://www.oah.dgs.ca.gov/laws/keyhea.asp (last visited on Nov. 2, 2001) [hereinafter "*Keyhea* injunction"]. The *Keyhea* injunction prohibits involuntary medication at three levels. *See id.* § II-III. The state may not involuntarily medicate persons for more than three days without a certification procedure. *Id.* § II(A)-(G). This procedure requires a notice of certification, signed by the professional physician in charge of the medical facility and the physician participating in the evaluation. *Id.* § II(C). Within five days, the prison must personally deliver the certification notice to the prisoner or the prisoner's attorney. *Id.* § II(D). The prison must also inform prisoners of their right to a certification review hearing, the right to habeas corpus, and the right to counsel. *Id.* § II(F).

When the state administers involuntary medication for more than ten days, the injunction mandates an automatic certification review hearing. *Id.* § II(H). Prisoners have the right to be present, the right to counsel, the right to present evidence, and the right to question the opposition. *Id.* § II(J)-(L). If the hearing finds no probable cause to believe the prisoner is gravely disabled or dangerous, then the state may no longer involuntarily medicate the prisoner. *Id.* § II(M).

Before the state may involuntarily medicate a prisoner in excess of twenty-three days, it must follow the procedures for a judicial hearing set out in section III. *Id.* § III. Section § III(F) requires a court order authorizing involuntary medication in either of two instances. *Id.* § III(F). The court may find by clear and convincing evidence that the prisoner, as a result of mental disorder, is gravely disabled and incompetent to refuse medication. *Id.* § III(F)(a). Alternatively, the court may find, by clear and convincing evidence, that, as a result of mental disorder, the prisoner is a danger to self or others. *Id.* § III(F)(b). If either of these conditions are met, the court may authorize involuntary medication.

[110] *Keyhea*, 178 Cal. App. 3d at 543, 223 Cal. Rptr. at 756.

[111] *Id.* at 542, 223 Cal. Rptr. at 756.

[112] *Id.* at 532-33, 223 Cal. Rptr. at 749.

[113] These protections, specified in the LPS Act and the California Probate Code, granted non-prisoners certain protections, including the right to notice, a judicial hearing, personal appearance, and assistance of counsel. *See* CAL. PROB. CODE §§ 1471 (West 2000) (granting conservatees right to counsel), 1825 (West 2000) (providing conservatees with right to personal appearance); CAL. WELF. & INST. CODE §§ 5350 (West 2000) (granting conservatees right to jury trial on issue of grave disability), 5358.2 (West 2000) (providing rights to notice

The *Keyhea* injunction authorized long term involuntary medication in two circumstances.[114] The court may find, by clear and convincing evidence, that a prisoner is gravely disabled and incompetent to refuse medication.[115] Alternatively, the court may find, by clear and convincing evidence, that a prisoner is dangerous.[116] However, the State may not involuntarily medicate a gravely disabled incompetent prisoner for more than one year without a new petition and court order.[117] For dangerous prisoners, the State may not involuntarily medicate for more than 180 days without a new petition and a new court order.[118]

The injunction also provided for involuntary medication in emergency circumstances.[119] It defined an emergency as a sudden marked change in condition so that immediate action is necessary to prevent serious bodily harm to the prisoner or others.[120] If the State administers psychotropic medication in an emergency, it may only administer an amount necessary to treat the emergency condition.[121] It shall also provide the medication in ways that are least restrictive of a prisoner's personal liberty.[122] The injunction emphasized that these emergency procedures do not diminish the procedural protections otherwise provided for in the injunction.[123]

The California Legislature later codified the *Keyhea* injunction in the 1994 amendments to Penal Code section 2600. The amended statute requires an administrative law judge ("ALJ") to conduct the judicial hearing mandated in that injunction.[124] By referencing part III[125] of the injunction, the statute requires that the ALJ find by clear and convincing

---

and hearing prior to medical treatment); *see also Keyhea*, 178 Cal. App. 3d at 542 n.14, 223 Cal. Rptr. at 755 n.14 (noting that right to judicial determination of incompetency necessarily includes other procedural protections).

[114] *See Keyhea* injunction, *supra* note 109, § III(F).

[115] *Id.*

[116] *Id.*

[117] *Id.* § III (I)(1).

[118] *Id.* § III(I)(2).

[119] *Id.* § III(J).

[120] *Id.* § III(J)(1).

[121] *Id.*

[122] *Id.*

[123] *Id.* § III(J)(2).

[124] *See* CAL. PENAL CODE § 2600 (West 2000) (incorporating terms of *Keyhea* injunction into statute guaranteeing civil rights to prisoners). The California Department of General Services, Office of Administrative Hearings contracts with pro tempore ALJs and inmate counsel to hear these cases in the facility itself. *See* ABOUT KEYHEA HEARINGS, *supra* note 109.

[125] *See supra* notes 105-07 and accompanying text.

evidence that the prisoner is gravely disabled or dangerous.[126]

Riese and *Keyhea*, together with the statutory provisions of the LPS Act, ensured that mentally ill persons detained against their will had a right to refuse treatment.[127] Furthermore, the right to refuse treatment encompassed the right to refuse the administration of psychotropic medication, unless there is a judicial determination of capacity.[128] *Keyhea* reasoned that the State's interest in prison security was not sufficient to deny prisoners the right to a judicial hearing.[129] However, *In re Locks* limited this right by distinguishing insanity acquittees from the rest of the prison population.[130]

II. *IN RE LOCKS*

In re Locks confronted the issue of whether insanity acquittees are entitled to a judicial hearing to refuse the administration of psychotropic drugs.[131] *Locks* held that NGI prisoners are not entitled to a hearing to determine their capacity to consent to the administration of psychotropic drugs.[132] Thus, under *Locks*, insanity acquittees do not have the right to the procedural protections guaranteed to all prisoners in the *Keyhea* injunction.[133]

A. Facts

Petitioner Locks, while serving a life sentence for murder in Pelican Bay Prison, battered a prison guard.[134] Locks pled NGI, and the trial

---

[126] *See* CAL. PENAL CODE § 2600 (codifying *Keyhea* by requiring ALJ to carry out part III of *Keyhea* injunction).

[127] *See* CAL. WELF & INST. CODE §§ 5326.5 (West 1998) (granting right to informed consent), 5331 (West 1998) (presuming that mental patients are competent to make treatment decisions); Riese v. St. Mary's Hosp. & Med. Ctr., 209 Cal. App. 3d 1303, 1320, 271 Cal. Rptr. 199, 210 (1987) (holding that state may not administer antipsychotic drugs without informed consent); Keyhea v. Rushen, 178 Cal. App. 3d 526, 530, 223 Cal. Rptr. 746, 747 (1986) (holding that state prisoners have statutory right to refuse psychotropic drugs).

[128] *See Riese*, 209 Cal. App. 3d at 1320, 271 Cal. Rptr. at 210 (holding that, absent judicial determination of incompetency, state may not administer antipsychotic drugs without informed consent); *Keyhea*, 178 Cal. App. 3d at 530, 223 Cal. Rptr. at 747 (holding that state prisoners have statutory right to refuse psychotropic drugs).

[129] *See Keyhea*, 178 Cal. App. 3d at 542, 223 Cal. Rptr. at 755 (upholding trial court's finding that judicial hearings presented no threat to prison security).

[130] *In re* Locks, 79 Cal. App. 4th 890, 897, 94 Cal. Rptr. 2d 495, 500 (2000) (distinguishing Locks from prisoners in *Keyhea* and patients in *Riese* because Locks was insanity acquittee).

[131] *See id.* at 892, 94 Cal. Rptr. at 496 (observing that court found *Locks* NGI).

[132] *Id.*, 94 Cal. Rptr. at 496.

[133] *See id.* at 897, 94 Cal. Rptr. 2d at 500; *see also Keyhea* injunction, *supra* note 109, § III(F).

[134] *Id.*, 79 Cal. App. 4th at 892, 94 Cal. Rptr. 2d at 496.

court accepted his plea because it found that he suffered from schizophrenia.[135] As a result, the trial court committed him to Atascedero State Hospital ("ASH").[136]

While serving his sentence at ASH, the hospital treated Locks with psychotropic medications over his objection.[137] After two years the hospital discontinued treatment to determine whether he had recovered his sanity.[138] The examining psychiatrist reported that Locks was a paranoid schizophrenic who required continued hospitalization.[139] Thus, the prison psychiatrist resumed Locks's treatment with psychotropic medications.[140]

Locks again objected to this treatment and filed a writ of habeas corpus.[141] The trial court denied his petition.[142] It reasoned that Locks had no right to refuse medication because the court previously found him not guilty by reason of insanity on the battery charge.[143]

The California Court of Appeal summarily denied a subsequent petition.[144] Locks next petitioned the California Supreme Court for review.[145] The Supreme Court, citing the LPS Act, *Riese* and *Keyhea*, ordered the appellate court to vacate its denial and issue an order to show cause.[146] The Court of Appeal then denied Locks's habeas corpus petition and vacated the order to show cause.[147]

B. Holding and Rationale

The Court of Appeal held that Locks did not have a right to a judicial hearing before the State could administer psychotropic drugs.[148] It found that a finding of NGI presumes dangerousness.[149] Because Locks was presumed dangerous, the court reasoned that the State was not obligated

---

[135] *Id.*, 94 Cal. Rptr. 2d at 497.

[136] *Id.*, 94 Cal. Rptr. 2d at 497.

[137] *Id.*, 94 Cal. Rptr. 2d at 497.

[138] *Id.*, 94 Cal. Rptr. 2d at 497.

[139] *Id.* at 893, 94 Cal. Rptr. 2d at 497.

[140] *Id.*, 94 Cal. Rptr. 2d at 497. The medications were Haldol and Olanzapine. *Id.*, 94 Cal. Rptr. 2d at 497.

[141] *Id.*, 94 Cal. Rptr. 2d at 497.

[142] *Id.*, 94 Cal. Rptr. 2d at 497.

[143] *Id.*, 94 Cal. Rptr. 2d at 497.

[144] *Id.*, 94 Cal. Rptr. 2d at 497.

[145] *Id.*, 94 Cal. Rptr. 2d at 497.

[146] *Id.*, 94 Cal. Rptr. 2d at 497.

[147] *Id.*, 94 Cal. Rptr. 2d at 497.

[148] *Id.* at 897, 94 Cal. Rptr. 2d at 500.

[149] *Id.*, 94 Cal. Rptr. 2d at 500.

to give him a judicial hearing on the issue of competency.[150]

It found that an NGI plea required Locks to be confined in a mental hospital for treatment.[151] Therefore, the court considered him insane during confinement.[152] By implication, the court held that an NGI plea presumes he is a danger to others.[153] The court also considered the criminal act of battery, which gave rise to Locks's NGI plea, to be further evidence of his dangerousness.[154]

Because the court presumed Locks was dangerous, it reasoned that a *Keyhea* hearing was moot in this case.[155] The court noted that the *Keyhea* injunction provides for a judicial determination of competency only for those prisoners who are gravely disabled.[156] Because the court assumed Locks was committed to ASH on the basis of his dangerousness, a determination of competency was unnecessary.[157]

The court also noted that Locks had another remedy available.[158] After 180 days, he could petition the court for a hearing to re-examine the issue of sanity.[159] If he could show that he was no longer mentally ill or a danger to others, the court would release him from the mental hospital.[160]

The *Locks* court distinguished *Keyhea* by developing an exception to the procedural protections of the *Keyhea* injunction.[161] It observed that the *Keyhea* injunction does not require a judicial determination of incompetency to forcibly medicate dangerous prisoners.[162] It noted that NGI prisoners, unlike the prisoners in *Keyhea* or the mental patients in

---

[150] *See id.*, 94 Cal. Rptr. 2d at 500.

[151] *Id.*, 94 Cal. Rptr. 2d at 500.

[152] *Id.*, 94 Cal. Rptr. 2d at 500.

[153] *Id.*, 94 Cal. Rptr. 2d at 500.

[154] *Id.*, 94 Cal. Rptr. 2d at 500.

[155] *See id.*, 94 Cal. Rptr. 2d at 500 (reasoning that Locks already had hearing under Penal Code section 1026).

[156] *See id.* at 896, 94 Cal. Rptr. 2d at 499 (noting that *Keyhea* injunction distinguishes between gravely disabled prisoners and dangerous prisoners, and stating that competency only at issue for those who are gravely disabled). *But see Keyhea* injunction, *supra* note 109, § III(F) (requiring court order before state may authorize forced medication on basis of grave disability or dangerousness).

[157] *See Locks*, 79 Cal. App. 4th at 896-97, 94 Cal. Rptr. 2d at 499-500 (noting distinction in *Keyhea* injunction between gravely disabled and dangerous persons, and reasoning that under Penal Code section 1026.2 Locks is presumed dangerous).

[158] *Id.* at 897, 94 Cal. Rptr. 2d at 500.

[159] *Id.*, 94 Cal. Rptr. 2d at 500; *see also* CAL. PENAL CODE § 1026.2 (West 1999 & Supp. 2000) (providing for release after 180 days, pending determination of sanity).

[160] *See Locks*, 79 Cal. App. 4th at 897, 94 Cal. Rptr. 2d at 500.

[161] *See id.*, 94 Cal. Rptr. 2d at 500 (stating that Locks is unlike patients in *Riese* or prisoners in *Keyhea*).

[162] *See id.* at 896, 94 Cal. Rptr. 2d at 499 (noting that section III(F) of *Keyhea* injunction requires judicial determination of incompetency only for gravely disabled persons).

Riese, already had a hearing which presumed them dangerous.[163] Therefore, the court reasoned that the procedural protections of the injunction do not apply to dangerous prisoners.[164]

III. ANALYSIS

Although *Locks* found that NGI prisoners do not have a right to a judicial hearing to determine competency, the *Locks* court's reasoning is unpersuasive for three reasons. First, *Locks* substituted an NGI finding for a finding of dangerousness to justify the forced medication of insanity acquittees. Second, the *Locks* court improperly encroached on the power of the state legislature. Finally, the *Locks* court ignored the important public policy objectives of individual self-determination and fairness.

A. An NGI Finding Does not Establish Dangerousness

The *Locks* court reasoned that all NGI prisoners are presumed dangerous.[165] Therefore, *Locks* concluded that an independent *Keyhea* hearing on the issue of dangerousness was unnecessary.[166] However, the *Locks* court confuses the legal definition of insanity with a judicial hearing to determine dangerousness.[167] In doing so, the *Locks* court erroneously deprives NGI prisoners of statutory protections guaranteed by *Riese*, *Keyhea*, Penal Code § 2600, and the LPS Act.[168]

---

[163] *See id.* at 897, 94 Cal. Rptr. 2d at 500 (distinguishing Locks's case from those of patients in *Riese* or prisoners in *Keyhea*).

[164] *See id.*, 94 Cal. Rptr. 2d at 500 (stating that even if Locks had capacity to refuse treatment he was not entitled to habeas relief). *But see Keyhea* injunction, *supra* note 109, §§ II(F) (requiring notice of right to judicial review by habeas corpus), III(F) (requiring judicial finding, through clear and convincing evidence, that prisoner is dangerous).

[165] *See Locks*, 79 Cal. App. 4th at 897, 94 Cal. Rptr. 2d at 500 (stating that Penal Code section 1026.2 by implication presumes dangerousness).

[166] *See id.*, 94 Cal. Rptr. 2d at 500 (reasoning that because NGI finding presumes prisoner to be dangerous, *Keyhea* hearing is unnecessary).

[167] In the context of recommitment of insanity acquittees beyond their original term, courts require an independent hearing on dangerousness. *See In re* Franklin, 7 Cal. 3d 126, 148-49, 496 P.2d 465, 479-80 (1972) (holding that patient is entitled to full jury hearing on question of sanity and dangerousness); People v. Superior Court (Blakely), 60 Cal. App. 4th 202, 207-08, 217, 70 Cal. Rptr. 2d 388, 393, 399 (1997) (finding that test for recommitment to determine dangerousness is different from NGI test and ordering jury trial on that issue); People v. Wilder, 33 Cal. App. 4th 90, 98, 39 Cal. Rptr. 2d 247, 252 (1995) (noting that insanity acquittees are entitled to jury trial on issue of recommitment); People v. Buttes, 134 Cal. App. 3d 116, 126, 184 Cal. Rptr. 497, 502 (1982) (holding that prosecution must show beyond reasonable doubt that patient is mentally ill and physically dangerous to others in order to recommit patient).

[168] *See* CAL. PENAL CODE § 2600 (West 2000) (guaranteeing protections of process

Contrary to the *Locks* court's conclusion, an NGI finding and a hearing to determine competency are conceptually different.[169] An NGI verdict is a finding that defendants in a criminal action did not understand what they were doing, or did not know their actions were wrong.[170] Consequently, NGI defendants do not possess the necessary mental state to commit the crime.[171] In contrast, a *Keyhea* hearing authorizes involuntary medication if prisoners are gravely disabled and incompetent or are a danger to themselves or others.[172] Thus, an NGI finding and a determination of dangerousness in a *Keyhea* hearing serve different purposes.[173] An NGI verdict decides the issue of confinement, and a *Keyhea* hearing decides whether the State may forcibly medicate confined prisoners against their will.[174]

---

specified in *Keyhea* injunction); CAL. WELF. & INST. CODE § 5332(b) (West 1998) (stating that persons involuntarily detained under LPS Act are entitled to capacity hearing before state may forcibly administer psychotropic drugs), *amended by* 2001 Cal. Legis. Serv. Ch. 506 (A.B. 1424) (West); Riese v. St. Mary's Hosp. & Med. Ctr., 209 Cal. App. 3d 1303, 1308, 271 Cal. Rptr. 199, 201 (1987) (holding that patients have right to refuse treatment absent judicial determination that they are incompetent to do so); Keyhea v. Rushen, 178 Cal. App. 3d 526, 542, 223 Cal. Rptr. 746, 755-56 (1986) (holding that state prisoners presently have statutory right to refuse long-term treatment with psychotropic drugs, absent judicial determination of incompetence).

[169] *Compare* Dep't of Corr. v. Office of Admin. Hearings, 66 Cal. App. 4th 1100, 1104, 78 Cal. Rptr. 2d 473, 475 (1998) (noting that *Keyhea* injunction requires finding of dangerousness by clear and convincing evidence before state may authorize involuntary medication), *with* People v. Guitierrez, 180 Cal. App. 3d 1076, 1084, 225 Cal. Rptr. 885, 887 (1982) (stating that evidence of mental illness proves absence of specific intent and allows consideration of insanity as mitigating factor for sentencing purposes).

[170] *See* CAL. PENAL CODE § 25(b) (West 1999) (defining NGI defense as not knowing or understanding nature and quality of actions and inability to distinguish between right and wrong at time of offense); People v. Kelly, 1 Cal. 4th 495, 533, 822 P.2d 385, 405 (1992) (reaffirming that satisfaction of both prongs of insanity test under section 25(b) is necessary for NGI verdict).

[171] *See Guitierrez*, 180 Cal. App. 3d at 1084, 225 Cal. Rptr. at 889 (1982) (finding that evidence of mental illness may prove absence of specific intent).

[172] *See* CAL. PENAL CODE § 2600 (specifying that state must follow procedures of *Keyhea* injunction before forcibly medicating prisoners); *Dep't of Corr.*, 66 Cal. App. 4th at 1103-04, 78 Cal. Rptr. 2d at 474-75 (explaining terms of *Keyhea* injunction); *Keyhea* injunction, *supra* note 109, § III(F) (authorizing forced medication if court finds that prisoner is gravely disabled and incompetent to refuse medication or that prisoner is danger to self or others).

[173] *See* Cichon, *supra* note 2, at 419-20 (arguing that state cannot force drugs on prisoners on theory that committing crimes makes them dangerous). In the context of recommitment, courts have required a separate judicial determination of dangerousness. *See supra* note 158 and accompanying text.

[174] *Compare* CAL. PENAL CODE § 1026 (West 2000) (authorizing commitment to mental institution upon court's finding of NGI), *with Keyhea* injunction, *supra* note 109, § III(F) (authorizing long-term medication after judicial hearing determines incompetency or dangerousness).

Because the two proceedings serve different purposes, a finding of NGI should not forever brand prisoners so dangerous that the state is free to forcibly medicate them.[175] To do so would effectively eliminate the procedural protections of *Keyhea* and give the state free reign to medicate all prisoners it considers dangerous.[176] Insanity acquittees should not forfeit their rights because the state has committed them on the basis of dangerousness.[177] To justify the forced drugging of NGI prisoners, the state must make two showings.[178] First, the state must show that the prisoner is dangerous at the time of treatment.[179] Second, it must establish dangerousness within the institutional setting.[180]

The *Locks* case fails to make either showing. The court did not find that Locks was dangerous at the time of the requested treatment.[181] At least two years had passed between Locks's commitment to the state hospital and his refusal of the administration of psychotropic drugs.[182] Also, even though Locks committed battery on a prison guard, the record does not provide sufficient evidence of his present dangerousness.[183] The standard for dangerousness requires a showing that a prisoner is likely to inflict substantial physical harm upon others.[184] For the *Keyhea* protections to have any meaning at all, the state should

---

[175] *See* Felce v. Fiedler, 974 F.2d 1484, 1494 (7th Cir. 1992) (finding state's interest in forcibly medicating prisoners is not as great as in other situations because prison has alternative means to protect society from prisoners).

[176] *Compare* Keyhea v. Rushen, 178 Cal. App. 3d 526, 542, 223 Cal. Rptr. 746, 755-56 (1986) (holding that state prisoners have statutory right to refuse treatment with psychotropic drugs), *with In re* Locks, 79 Cal. App. 4th 890, 897, 94 Cal. Rptr. 2d 495, 500 (2000) (distinguishing Locks from *Keyhea* prisoners because Locks was insanity acquittee).

[177] *See* Enis v. Dep't of Health & Soc. Servs., 962 F. Supp. 1192, 1198-1200 (W. D. Wis. 1996) (holding that finding of dangerousness at commitment is not sufficient to warrant forcible medication).

[178] *See id.* at 1199 (holding that state must make finding of dangerousness at time of medication and must take into account particular circumstances of confinement).

[179] *See id.*

[180] *See id.*

[181] *See Locks*, 79 Cal. App. 4th at 892-93, 94 Cal. Rptr. 2d at 497 (noting that state treated Locks for two years over his objection, but that Locks sought habeas relief after state discontinued and then resumed treatment).

[182] *See id.*

[183] *See infra* notes 221-23 and accompanying text.

[184] *See Keyhea* injunction, *supra* note 109, § I(4)(a) to (c) (defining danger to others as presenting demonstrated danger of inflicting substantial harm upon others). The California Department of Corrections Operations Manual specifically incorporates the procedures of the *Keyhea* injunction as a procedural protection for inmates before the state may administer antipsychotic drugs for more than twenty-four days. *See* CALIFORNIA DEPARTMENT OF CORRECTIONS OPERATIONS MANUAL 753 (2000) (defining danger to others as requiring substantial physical harm or demonstrated danger of inflicting substantial physical harm on others).

have given him the benefit of another hearing.

Despite the different underlying purposes of an NGI verdict and a *Keyhea* hearing, *Locks* found that an NGI verdict moots the protections of a *Keyhea* hearing.[185] The *Locks* court based this holding on the specific language of the *Keyhea* injunction, which allows for forced medication in two instances.[186] First, the State may forcibly medicate prisoners if a court finds them gravely disabled and incapable of giving consent.[187] Second, the State may forcibly medicate prisoners if a court finds them a danger to themselves or others.[188] Consequently, *Locks* interprets the *Keyhea* injunction as requiring a judicial determination of competency for gravely disabled persons, but not for dangerous persons.[189] This interpretation effectively precludes NGI prisoners from the procedural protections of the *Keyhea* injunction.[190]

Contrary to the *Locks* court's interpretation of the *Keyhea* injunction, the protections surrounding the right to refuse medication involve more than a competency hearing.[191] These additional protections include the right to notice, judicial hearing, personal appearance, and assistance of counsel.[192] *Keyhea* noted that to divorce these protections from the right

---

[185] *See Locks*, 79 Cal. App. 4th at 897, 94 Cal. Rptr. 2d at 500 (distinguishing Locks from prisoners in *Keyhea* and mental patients in *Riese* and noting that Locks already had hearing which determined he was NGI).

[186] *See id.* at 896, 94 Cal. Rptr. 2d at 499 (referencing part III of *Keyhea* injunction). Part III(F) of the *Keyhea* injunction, under the heading "Judicial Determination," states that in order to medicate a prisoner for more than twenty-four days, the state must obtain a court order authorizing the recommended course of involuntary medication and a finding by clear and convincing evidence that the prisoner, as a result of a mental disorder, is: 1) gravely disabled and incompetent to refuse medication; or, 2) a danger to others or a danger to self. *See Keyhea* injunction, *supra* note 109, § III(F).

[187] *See Keyhea* injunction, *supra* note 109, § III(F).

[188] *Id.*

[189] *See Locks*, 79 Cal. App. 4th at 897, 94 Cal. Rptr. 2d at 499-500 (finding that *Keyhea* injunction does not entitle Locks to judicial hearing because NGI finding creates presumption he is already dangerous).

[190] Since the court found that all NGI prisoners are, by definition, dangerous, it follows that no insanity acquittee can receive a *Keyhea* hearing. *See id.*, 94 Cal. Rptr. 2d at 499-500; *see also In re* Qawi, 90 Cal. App. 4th 1192, 1204, 109 Cal. Rptr. 2d 523, 532 (2001) (acknowledging rationale of *Locks* as excluding NGI prisoners from protections of *Keyhea* because they are presumed dangerous).

[191] *See Keyhea* injunction, *supra* note 109, § III(F) (requiring court order before state may forcibly administer medication).

[192] *See* CAL. PROB. CODE §§ 1471(a) (West 2000) (providing for appointment of counsel for incompetent conservatees), 1825 (West 2000) (mandating conservatee's attendance at hearings); CAL. WELF. & INST. CODE §§ 5350(d) (West 2000) (providing for jury trial and notice to determine grave disability), 5358.2 (West 2000) (requiring notice and court order before forcibly medicating conservatee); Keyhea v. Rushen, 178 Cal. App. 3d 526, 542 n.14, 223 Cal. Rptr. 746, 755 n.14 (1986) (observing that LPS guarantee of right to competency hearing encompasses other procedural protections).

to a judicial determination of competency would render that right meaningless.[193] Thus, *Keyhea* held that the State should always adhere to certain procedural safeguards before administering psychotropic drugs against the will of a prisoner.[194]

When a prisoner is gravely disabled due to mental illness, the procedural safeguard is a hearing to determine the prisoner's competency to refuse treatment.[195] When a prisoner is mentally ill and dangerous, the procedural safeguards still apply, but the issue is no longer competency.[196] Rather, the issue becomes whether the prisoner is dangerous to the extent that the state may forcibly medicate him.[197] Therefore, while a finding of dangerousness obviates the need for a competency hearing, *Keyhea* still requires a court order establishing dangerousness before the state may authorize involuntary medication.[198]

Confusing an NGI finding with a finding of dangerousness for the purposes of forced medication defeats the purpose of the procedural protections that *Keyhea* mandates.[199] Although an NGI verdict may presume a prisoner dangerous, such a finding does not abrogate the protections of *Keyhea*.[200] *Keyhea* still requires a separate determination of dangerousness and a court order before the state may forcibly medicate prisoners.[201] It also provides for procedural protections that courts should not separate from the right to a competency hearing.[202] By equating an NGI verdict with a court finding of dangerousness, the *Locks* court undermines the protections of *Keyhea*.

---

[193] *Keyhea*, 178 Cal. App. 3d at 542 n.14, 223 Cal. Rptr. at 755 n.14.

[194] *Id.*, 223 Cal. Rptr. at 755 n.14.

[195] *See Keyhea* injunction, *supra* note 109, § III(F)(a) (requiring finding that prisoner is "gravely disabled and incompetent to refuse medication" before court may authorize involuntary medication).

[196] *See id.* § III(F)(b) (requiring finding that prisoner is danger to others or danger to self before court may authorize involuntary medication).

[197] *See id.*

[198] *See supra* note 109 and accompanying text.

[199] *See Keyhea*, 178 Cal. App. 3d at 542 n.14, 223 Cal. Rptr. at 755 n.14 (finding that procedural protections are necessary and integral part of judicial determination of competency).

[200] *See* Enis v. Dep't of Health & Soc. Servs., 962 F. Supp. 1192, 1199 (W.D. Wis. 1996) (holding that finding of NGI may not substitute for finding of dangerousness for purposes of forced medication); *Keyhea* injunction, *supra* note 109, § III(F) (requiring judicial determination of dangerousness before state may forcibly medicate detainee with psychotropic drugs).

[201] *See supra* note 109 and accompanying text.

[202] *See supra* notes 182-85 and accompanying text.

B. Locks *Encroaches on Legislative Authority*

By stripping insanity acquittees of important statutory protections guaranteed to the mentally ill, the *Locks* court overstepped its judicial authority in two ways. First, it limited the scope of important civil rights which the legislature conferred on the mentally ill.[203] The legislature carefully safeguarded the rights of the mentally ill through the provisions of the LPS Act.[204] The LPS Act includes the right to informed consent and the presumption of competence, and it applies to all persons involuntarily detained under its provisions.[205] Penal Code section 2600 incorporates these protections, making them applicable to state prisoners.[206] By creating its own exception to these rights, *Locks* effectively rewrites the legislation.[207]

Second, *Locks* overrides the legislative will by ignoring the express language of Penal Code section 2600.[208] The general provision of section 2600 guarantees that the state may deprive prisoners of only those rights that are reasonably related to legitimate penological interests.[209] The

---

[203] *See* CAL. WELF. & INST. CODE §§ 5326.2 (West 1998) (providing right to informed consent), 5327 (West 1998) (providing that rights set forth in LPS Act apply to every person involuntarily detained), 5331 (West 1998) (providing that no person may be presumed incompetent because of treatment or diagnosis as mentally ill).

[204] Enacted in 1967, the LPS Act repealed the principal provisions for the civil commitment of mentally ill persons found in prior California law. It replaced the prior provisions with a new statutory scheme repealing indeterminate commitment and removing the legal disabilities previously imposed upon mentally ill persons. It also enacted an extensive scheme of community-based services, emphasizing voluntary treatment and providing for involuntary observation and crisis treatment for gravely disabled persons or dangerous persons. *See* Thorn v. Superior Court, 1 Cal. 3d 666, 668, 464 P.2d 56, 58 (1970) (discussing impact of LPS Act); Riese v. St. Mary's Hosp. & Med. Ctr., 209 Cal. App. 3d 1303, 1312-13, 271 Cal. Rptr. 199, 204 (1987) (discussing protections of LPS Act, including legal reforms and emphasis on voluntary treatment); Lowe v. County of San Diego, 183 Cal. App. 3d 515, 524, 228 Cal. Rptr. 139, 144 (1986) (construing LPS Act according to legislative intent to protect mentally disordered persons).

[205] *See supra* note 194 and accompanying text.

[206] *See* CAL. PENAL CODE § 2600 (West 2000) (mandating compliance with *Keyhea* and allowing deprivation of only those rights reasonably related to legitimate penological interests); Thor v. Superior Court, 5 Cal. 4th 725, 732, 855 P.2d 375, 378 (1993) (holding that absent demonstrated threat to prison safety or security, section 2600 protects inmates' rights to self-determination and freedom of choice regarding medical treatment).

[207] *Compare In re* Locks, 79 Cal. App. 4th 890, 897, 94 Cal. Rptr. 2d 495, 500 (2000) (distinguishing Locks from *Keyhea* prisoners and *Riese* patients, and therefore denying right to judicial hearing), *with* CAL. PENAL CODE § 2600 (requiring that state follow procedures of *Keyhea* injunction, which guarantees judicial hearing, before forcibly medicating prisoners).

[208] *See* CAL. PENAL CODE § 2600 (protecting right to refuse psychotropic medication unless *Keyhea* procedures are followed); *Locks*, 79 Cal. App. 4th at 896, 94 Cal. Rptr. 2d at 499 (acknowledging that section 2600 grants right to refuse psychotropic medication).

[209] *See* CAL. PENAL CODE § 2600. Enacted in 1850, Penal Code section 2600, initially provided that a sentence of imprisonment suspended all the prisoner's civil rights during

statute goes further and expressly includes the right to refuse forced psychotropic medication unless the state follows the procedures of the *Keyhea* injunction.[210] The statute is quite clear.[211] The protections of Keyhea will apply to all prisoners.[212] It makes no exception, express or implied, for NGI prisoners or any other subclass of prisoners.[213]

Courts must generally defer to the legislative branch.[214] By codifying *Riese* and *Keyhea*, the California Legislature made a clear decision to adopt the holding and rationale of those decisions as state policy.[215] *Locks* impermissibly modified these legislative policy decisions when it carved out an exception for insanity acquittees.[216] As a result, the *Locks* court

---

the term of imprisonment. It also deemed the person sentenced to life imprisonment civilly dead. After subsequent amendments mitigated the concept of civil death, the legislature amended the statute again in 1970. This critical legislative reform abandoned the medieval concept of strict civil death. Instead, it replaced it with statutory provisions seeking to insure that the civil rights of prisoners be limited only in accordance with legitimate penal objectives. *See* DeLancie v. Superior Court, 31 Cal. 3d 865, 870-71, 647 P.2d 142, 145 (1982) (explaining evolution of section 2600 from civil death statute to civil rights statute). The 1994 Amendments to section 2600 expressly included the protections of the *Keyhea* injunction. *See* Cal. Dep't of Corr. v. Office of Admin. Hearings, 66 Cal. App. 4th 1100, 1108, 8 Cal. Rptr. 2d 473, 478 (1998) (finding that section 2600 expressly codified terms of *Keyhea* injunction).

[210] Normally, California courts employ a balancing test to determine what constitutes a legitimate penological interest. They balance any implicated rights against the necessity to satisfy reasonable security interests. *See* Gerber v. Hickman, 103 F. Supp. 2d 1214, 1219 (E.D. Cal. 2000) (applying three part balancing test to determine legitimate penological interest under section 2600); *In re* Arias, 42 Cal. 3d 667, 689-90, 725 P.2d 664, 677 (1986) (setting out three step inquiry for reviewing claims under Penal Code section 2600); *In re* Roark, 48 Cal. App. 4th 1946, 1951-52, 56 Cal. Rptr. 2d 582, 586 (1996) (describing three part balancing test for determining legitimate penological interests). However, it is unnecessary to apply this test here, because the legislature already balanced the interests by expressly granting the right to a *Keyhea* hearing. *See* CAL. PENAL CODE § 2600 (providing that nothing in section 2600 permits involuntary administration of psychotropic drugs unless state follows procedures of *Keyhea* injunction).

[211] *See* CAL. PENAL CODE § 2600 (mandating that *Keyhea* procedures be followed).

[212] *See* CAL. PENAL CODE § 2600.

[213] *See* CAL. PENAL CODE § 2600.

[214] *See* Conn. Indem. Co. v. Superior Court, 23 Cal. 4th 807, 814, 3 P.3d 868, 872 (2000) (noting well-settled principle of judicial deference to legislature); W. States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 572, 888 P.2d 1268, 1274 (1995) (pointing out that judicial deference to legislature arises out of separation of powers doctrine); Cal. Hotel & Motel Ass'n v. Indus. Welfare Comm'n, 25 Cal. 3d 200, 212-13, 599 P.2d 31, 38-40 (1979) (noting that courts exercise limited review of legislative acts by administrative bodies out of traditional deference); Lockard v. City of Los Angeles, 33 Cal. 2d 453, 472, 202 P.2d 38, 49 (1949) (observing courts' duty to uphold legislative power and noting that courts are not authorized to review legislative determinations).

[215] *See supra* notes 93-94, 124-26 and accompanying text.

[216] *See In re* Locks, 79 Cal. App. 4th 890, 897, 94 Cal. Rptr. 2d 495, 500 (2000) (pointing out that Locks is different from prisoners in *Keyhea* or patients in *Riese*). *See generally* Green v. Ralee Eng'g Co., 19 Cal. 4th 66, 71, 960 P.2d 1046, 1049 (1998) (stating that legislature,

effectively ignores the legislative intent to provide procedural protections to all prisoners.[217]

By ignoring the intent of the legislature, *Locks* also violates the established public policy of the State of California.[218] Setting public policy is primarily the task of the legislative branch of government.[219] In contrast, the primary role of the judiciary is to decide cases, not to set public policy.[220] Because the *Locks* decision directly contravenes the express policy objectives of the legislature, the court has overstepped its judicial authority.[221]

C. Locks *Violates Important Public Policy Considerations*

Riese and *Keyhea* recognized that allowing individuals to exercise autonomy is an important public policy consideration.[222] Both decisions stressed the importance of the right to refuse treatment, which is guaranteed to all persons under the Constitution and common law of California.[223] In the context of involuntary antipsychotic medication,

---

and not courts, is responsible for declaring public policy of state); Safeway Stores v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 574, 261 P.2d 721, 725 (1953) (noting that questions of public policy are primarily for legislature to determine); People v. Hector, 104 Cal. App. 2d 392, 395, 231 P.2d 916, 918 (1951) (stating that questions of policy must be determined by legislative, not judicial, branch).

[217] *See Locks*, 79 Cal. App. 4th at 896-97, 94 Cal. Rptr. 2d at 499-500 (exempting dangerous prisoners from protections of *Keyhea* hearing). *But see* Riese v. St. Mary's Hosp. & Med. Ctr., 209 Cal. App. 3d 1303, 1324, 271 Cal. Rptr. 199, 212-13 (1987) (finding that intent of legislature was to provide judicial review of decisions to forcibly medicate).

[218] *See* Glenn v. Clearman's Golden Cock Inn, 192 Cal. App. 2d 793, 796, 13 Cal. Rptr. 769, 771 (1961) (defining public policy as "good morals" or established interest of society).

[219] *See Green*, 19 Cal. 4th at 71, 960 P.2d at 1049 (stating that legislature, and not courts, is responsible for declaring public policy of state).

[220] *See id.* at 71, 960 P.2d at 1049.

[221] *See supra* notes 91-94, 124-28 and accompanying text.

[222] *See Riese*, 209 Cal. App. 3d at 1317-18, 271 Cal. Rptr. at 207-08 (citing great value society places on individual autonomy as basis for judicial review of decisions to forcibly medicate); Keyhea v. Rushen, 178 Cal. App. 3d 526, 542, 223 Cal. Rptr. 746, 756 (1986) (comparing forced drugging to techniques of gulag and arguing that state should permit it only after adherence to stringent substantive and procedural safeguards). The fundamental importance of the right to be left alone is well-documented elsewhere in California and U.S. law. *See generally* CAL. CONST. art. I, § 1 (guaranteeing right to privacy); Mills v. Rogers, 457 U.S. 291, 294 n.4, 299 n.16 (1982) (recognizing common law battery for unauthorized touchings by physician and assuming involuntary administration of psychotropic drugs implicates liberty interests).

[223] *See Riese*, 209 Cal. App. 3d at 1318, 271 Cal. Rptr. at 208 (observing that California guarantees right to refuse treatment in its constitution and case law); *Keyhea*, 178 Cal. App. 3d at 540, 223 Cal. Rptr. at 754 (finding that every person has right to withhold consent to proposed medical treatment under state constitutional guarantee of privacy and common law).

enforcing this right is especially important because the state action is so seriously intrusive.[224] Moreover, the use of antipsychotic drugs in the prison context is especially troubling, given the likelihood they will be used for discipline and control, rather than treatment.[225]

Protecting individual autonomy is an especially strong policy interest here because there are less intrusive means available to achieve the state's interests. In the *Locks* case, the state's interest is in maintaining the safety and security of the institution.[226] However, it is not necessary to deny prisoners a judicial hearing in order to maintain prison safety or security.[227] The burden or inconvenience of a judicial hearing in these cases is minimal.[228] Moreover, the drugs in question are extremely debilitating and potentially fatal.[229] The state should not use them solely

---

[224] *See* Washington v. Harper, 494 U.S. 210, 228 (1990) (Stevens, J., dissenting) (arguing that judicial hearing is necessary to protect individual rights, and citing *Riese* as example of correct approach). *See generally* Floyd, *State of the Law*, *supra* note 4, at 1254 (arguing that rationale for prisoner's right to refuse medication is twofold: inmate must be able to avoid serious dangers associated with drugs, and courts should intervene to prevent state-sanctioned abuse of these drugs); Hafemeister, *supra* note 24, at 63 (noting right to refuse psychotropic drugs, electroconvulsive therapy, and psychosurgery is due to their intrusive, onerous, or nonreversible effects).

[225] *See* Davis v. Hubbard, 506 F. Supp. 915, 926 (N.D. Ohio 1980) (finding that hospital staff used psychotropic drugs for punishment and convenience of staff, rather than treatment); Floyd, *State of the Law*, *supra* note 4, at 1254 (observing that efficiency of drugs in controlling prisoners, coupled with prisons' interest in discipline, creates great temptation to use drugs improperly).

[226] *See In re* Locks, 79 Cal. App. 4th 890, 897, 94 Cal. Rptr. 2d 495, 500 (2000) (expressing concern over Locks's potential danger to others). *See generally Keyhea*, 178 Cal. App. 3d at 533, 223 Cal. Rptr. at 749 (observing that section 2600 secures prisoners' rights other than those that jeopardize prison security or public safety); Cichon, *supra* note 2, at 338-44 (acknowledging state's interest in safety and security, but arguing that state must justify forced drugging in context of institutional setting); Floyd, *State of the Law*, *supra* note 4, at 1257 (noting state's interest in protecting prisoners and staff from violence, but arguing that courts must balance this interest against individual's constitutional rights).

[227] *See* CAL. PENAL CODE § 2600 (West 2000) (stating that prisoners may only be deprived of rights that are reasonably related to advance legitimate penological interests); *Keyhea*, 178 Cal. App. 3d at 542, 223 Cal. Rptr. at 755-56 (concluding that prisoners are entitled to judicial determination of their competency before they are subjected to involuntary psychotropic medication); see also Turner v. Safley, 482 U.S. 78, 89 (1987) (setting standard for state's interest in prison safety and security as reasonably related to legitimate penological interests); John B. Scherling, *Automatic and Indefinite Commitment of Insanity Acquittees: A Procedural Straitjacket*, 37 VAND. L. REV. 1233, 1249-60 (arguing that insanity acquittees deserve same procedural safeguards as those persons confined under civil statutes).

[228] *See Keyhea*, 178 Cal. App. 3d at 542, 223 Cal. Rptr. at 755 (citing trial court's findings that judicial hearings would not threaten prison security); Paul S. Appelbaum & Staven K. Hoge, *The Right to Refuse Treatment: What the Research Reveals*, 4 BEHAV. SCI. & L. 279, 281 (1986) (finding that only about ten percent of patients refuse treatment and seek procedural review).

[229] *See supra* notes 30-37 and accompanying text.

for the purpose of controlling prisoners when less intrusive and equally effective means are available.[230] Prisons are free to use other methods such as seclusion or physical restraints that do not have the severe side effects of these drugs.[231] Also, in light of the emergency provisions available, there is little danger to the public or prison resulting from the minimal delay of a judicial hearing.[232] Because the burden of providing a judicial hearing is slight and the risk of harm is great, the law should operate to protect individual autonomy.

Locks is also unfair because it arbitrarily labels all NGI prisoners dangerous.[233] Although Locks battered a prison guard, this crime should not brand a person so dangerous that they may be subject to long term medication without any procedural protections.[234] The crime of battery need not involve any violence or even cause injury.[235] Moreover,

---

[230] *See* Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984) (holding that courts should consider least restrictive alternatives before forcibly administering psychotropic drugs); Enis v. Dep't of Health & Soc. Servs. 962 F. Supp. 1192, 1200 (W.D. Wis. 1996) (discussing alternatives of seclusion or physical restraints); Floyd, *State of the Law*, *supra* note 4, at 1263-65 (arguing that prisons should exhaust least restrictive alternatives before forcibly medicating prisoners with psychotropic drugs).

[231] *See Enis*, 962 F. Supp. at 1200.

[232] *See* CAL. WELF. & INST. CODE § 5332(d) (West 1998) (allowing short-term medication in cases of emergency), *amended by* 2001 Cal. Legis. Serv. Ch. 506 (A.B. 1424) (West); *Keyhea* injunction, *supra* note 109, § III(J) (allowing short term forced medication when it is immediately necessary to prevent serious bodily harm).

[233] *See* Northern Mariana Islands v. Lizama, 27 F.3d 444, 448 (9th Cir. 1994) (citing fairness as important public policy concern); *In re* Locks, 79 Cal. App. 4th 890, 897, 94 Cal. Rptr. 2d 495, 500 (2000) (reasoning that NGI finding presumes dangerousness); *see also* Scherling, *supra* note 227, at 1255 (questioning usefulness of distinction between insanity acquittees and other committed persons).

[234] The court seemed to find Locks's battery conviction compelling in justifying his medication. *See Locks*, 79 Cal. App. 4th at 897, 94 Cal. Rptr. 2d. at 500 (noting that NGI finding presumes dangerousness and pointing out that Locks committed battery). *But see* People v. Lindsay, 209 Cal. App. 3d 849, 855-56, 257 Cal. Rptr. 529, 533 (1989) (observing that in cases of simple battery, any force against person is sufficient for conviction); People v. Mansfield, 200 Cal. App. 3d 82, 88, 245 Cal. Rptr. 800, 803 (1988) (concluding that simple battery does not necessarily involve violence or injury). Also, the *Keyhea* injunction sets a high standard for determining dangerousness for the purposes of forced medication. *See Keyhea* injunction, *supra* note 109, § I(4)(a)-(c) (defining danger to others as presenting demonstrated danger of inflicting substantial harm upon others); CALIFORNIA DEPARTMENT OF CORRECTIONS OPERATIONS MANUAL, *supra* note 184, at 753 (defining danger to others as requiring substantial physical harm or demonstrated danger of inflicting substantial physical harm on others).

[235] *See Mansfield*, 200 Cal. App. 3d at 87-88, 245 Cal. Rptr. at 802-03 (discussing elements of battery under section 242 and noting that violence has no real significance to crime of battery); WITKIN & EPSTEIN, 1 CALIFORNIA CRIMINAL LAW CH. III § 12 (3d ed. 2000) (observing that violence in section 242 has no real significance and that least touching may constitute battery). *But see* CAL. PENAL CODE § 242 (West 1999) (defining battery as any use of willful force or violence against person of another).

statistics show that, as a general rule, many insanity acquittees are guilty of minor offenses.[236] Therefore, a general rule presuming all NGI offenders dangerous is likely to be overinclusive.[237]

Locks assumes that criminals are dangerous because they have committed crimes, regardless of the circumstances of those crimes.[238] By making such a sweeping generalization of NGI offenders, *Locks* creates a test that is overbroad and unfair.[239] The courts should not allow the state to deprive prisoners of important statutory rights on the basis of such an unfair generalization.[240]

The *Locks* court would likely argue that forced medication is necessary to control dangerous prisoners, and that prison staff should be able to make decisions without the delay and inconvenience of a judicial hearing.[241] However, both the LPS Act and the *Keyhea* injunction contain

---

[236] *See* John Q. LaFond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?* 39 VILL. L. REV. 71, 93 n.106 (1994) (citing numerous studies which provide statistics showing that violent crimes constitute small percentage of all crimes committed by insanity acquittees). For example, only 7.46 percent and 1.49 percent of charges among NGRI population in Missouri were for murder and rape, respectively. John Petrila, *The Insanity Defense and Other Mental Health Dispositions in Missouri*, 5 INT'L J.L. & PSYCHIATRY 81, 95 tbl.3 (1982). Similarly, in New York from 1976 to 1978, 43.6 percent of acquittees were charged with murder while other charges included drug sales and arson. *See* Henry Steadman, *Insanity Acquittals in New York State: 1965-1978*, 137 AM. J. PSYCHIATRY 321, 323 (1980). Also, in a study of insanity acquittees in eight states, researchers found that approximately 35 percent of acquittees had committed robbery, property offenses, or other minor crimes. Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331, 336 tbl.2 (1991). *But see* People v. Beck, 47 Cal. App. 4th 1676, 1686, 55 Cal. Rptr. 2d 340, 345 (1996) (finding that insanity acquittees have already demonstrated their dangerousness by committing crimes and therefore should not get early release into community).

[237] *See* GEOFFREY NEIL CONACHER, MANAGEMENT OF THE MENTALLY DISORDERED OFFENDER IN PRISONS 36 (1996) (arguing that dangerousness is difficult to define and noting inadequacy of psychiatry and other disciplines in predicting future behavior); JOHN Q. LAFOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES 142 (1992) (pointing out that institutions can label virtually any behavior as dangerous).

[238] *See In re Locks*, 79 Cal. App. 4th at 897, 94 Cal. Rptr. 2d at 500 (reasoning that NGI finding presumes dangerousness and noting that Locks was convicted of battery).

[239] *See id.*, 94 Cal. Rptr. 2d at 500 (presuming Locks was insane during confinement).

[240] *See* CAL. WELF. & INST. CODE §§ 5325 (West 1998) (enumerating rights of involuntarily detained persons), 5327 (West 1998) (guaranteeing that involuntarily detained persons retain rights not specifically denied under LPS Act); Riese v. St. Mary's Hosp. & Med. Ctr., 209 Cal. App. 3d 1303, 1312, 271 Cal. Rptr. 199, 204 (1987) (finding that LPS Act protects rights of involuntarily detained persons); Keyhea v. Rushen, 178 Cal. App. 3d 526, 535, 223 Cal. Rptr. 746, 750 (1986) (finding that LPS Act scrupulously protects rights of involuntarily detained persons).

[241] There is some evidence of the effectiveness of using drugs as part of treatment. *See* Floyd, *State of the Law*, *supra* note 4, at 1253 (noting benefits of drugs, such as helping

provisions for forced medication in cases of emergency.[242] They define emergency as an action immediately necessary for the preservation of life or prevention of serious bodily harm, when it is impracticable to obtain consent.[243] Both *Keyhea* and the LPS Act limit the medication to only the amount required to treat the emergency condition.[244] They also require that the state provide medication in ways that are least restrictive of the personal liberty of the patient.[245] In light of these emergency provisions, long term involuntary medication is unnecessary to control the security risk that NGI prisoners may pose.[246] Because of the especially intrusive nature of the drugs, the individual's rights of personal autonomy and informed consent should outweigh the state's interest in security.[247]

The *Locks* court would also likely argue that medical professionals are better equipped than judges to decide when medication is necessary.[248] However, even for medical professionals, it is difficult to accurately assess mental disorders and judge competence.[249] Furthermore, the side effects of the drugs are serious, and the potential for abuse of state power is great.[250] Therefore, judicial review is necessary to safeguard individual

---

prisoners return to general prison community, opening prisoner up to other therapies, and reducing instances of violence and disruptive behavior).

[242] *See supra* note 220 and accompanying text.

[243] CAL. WELF. & INST. CODE § 5008(m) (West 2000) (defining emergency as situation in which action is immediately necessary for preservation of life or avoidance of serious bodily harm to patient or others); *Keyhea* injunction, *supra* note 109, § III(J) (defining emergency as situation in which action is immediately necessary for preservation of life or serious bodily harm).

[244] CAL. WELF. & INST. CODE § 5332(d) (West 1998) (limiting antipsychotic medication to amount necessary to treat emergency condition), *amended by* 2001 Cal. Legis. Serv. Ch. 506 (A.B. 1424) (West); *Keyhea* injunction, *supra* note 109, § III(J) (same).

[245] CAL. WELF. & INST. CODE § 5332(d) (requiring methods least restrictive of personal liberty); *Keyhea* injunction, *supra* note 109, § III(J) (mandating methods least restrictive of patient's personal liberty).

[246] *See* Washington v. Harper, 494 U.S. 210, 246-47 (1990) (Stevens, J., dissenting) (arguing that allowing prison administrations to forcibly medicate prisoners is exaggerated response to concerns for security, as distinguished from emergency situations).

[247] *See supra* notes 211-13 and accompanying text.

[248] *See Harper*, 494 U.S. at 231-33 (expressing concern over judiciary's ability to decide medical issues and noting burdens judicial hearing may pose on scarce prison resources); Riese v. St. Mary's Hosp. & Med. Ctr., 209 Cal. App. 3d 1303, 1320-21, 271 Cal. Rptr. 199, 210 (1987) (acknowledging argument that medical professionals are in best position to make judgments regarding medication).

[249] *See Riese*, 209 Cal. App. 3d at 1324, 271 Cal. Rptr. at 212 (noting that decisions regarding mental competence are scientifically uncertain); *see also* JOHN Q. LAFOND & MARY L. DURHAM, *supra* note 237, at 166-68 (arguing that judges should serve as gatekeepers to involuntary commitment system and not defer to judgment of medical professionals).

[250] Keyhea v. Rushen, 178 Cal. App. 3d 526, 531, 223 Cal. Rptr. 746, 748 (1986)

rights.[251]

Another concern is that judicial review will place an unnecessary burden on scarce state resources.[252] However, the number of cases in which individuals refuse medication is small.[253] It would be improper for the judiciary to ignore this legislative mandate because the state may find it inconvenient.[254]

CONCLUSION

The forced administration of psychotropic drugs is a serious and dangerous intrusion on the fundamental rights of persons involuntarily detained for mental treatment.[255] It raises basic questions about the most fundamental and broadly recognized individual rights.[256] The State of California has preserved these rights by providing statutory protections to mentally ill detainees.[257]

The LPS Act protects individuals from intrusive and unwanted treatment by ensuring that they give informed consent to such treatment, as determined by a court of law.[258] The California Penal Code extends this right to all state prisoners.[259] *Locks* unjustifiably denied these

---

(discussing side effects of psychotropic drugs); Cichon, *supra* note 2, at 297-310 (discussing seriousness of side effects); Floyd, *State of the Law*, *supra* note 4, at 1254 (pointing out potential for abuse of state power and noting fine line between medical treatment of mental illness and chemical control of behavior).

[251] *See Riese*, 209 Cal. App. 3d at 1321, 271 Cal. Rptr. at 210-11 (finding that competence is not clinical or medical issue and that courts are best equipped to make competency determinations); Rivers v. Katz, 495 N.E.2d 337, 343-44 (N.Y. 1986) (holding that determinations of competency to refuse medication are uniquely judicial); LAFOND & DURHAM, *supra* note 237, at 167 (arguing that judges should not defer to medical professionals in competency determinations).

[252] *See Harper*, 494 U.S. at 231-33 (noting burdens judicial hearing may pose on scarce prison resources).

[253] *See Riese*, 209 Cal. App. 3d at 1323, 271 Cal. Rptr. at 212 (observing that judicial review not necessary in overwhelming number of cases of psychotropic drug prescriptions); Appelbaum & Hoge, *supra* note 228, at 281 (finding that only ten percent of patients actually refuse medication, resulting in judicial review).

[254] *See Keyhea*, 178 Cal. App. 3d at 542, 223 Cal. Rptr. at 756 (observing that prison administrators and mental health professionals may find judicial hearing cumbersome, but arguing that this is cost of living in free society).

[255] *See supra* notes 33-46 and accompanying text.

[256] *See supra* notes 210-13 and accompanying text.

[257] *See supra* notes 66-69 and accompanying text; *see also* CAL. PENAL CODE § 2600 (West 2000) (requiring judicial hearing before administration of psychotropic drugs).

[258] *See* CAL. WELF. & INST. CODE § 5332(b) (West 1998) (requiring judicial determination of incompetence before state may administer psychotropic drugs to individuals against their will), *amended by* 2001 Cal. Legis. Serv. Ch. 506 (A.B. 1424) (West).

[259] *See* CAL. PENAL CODE § 2600 (retaining all civil rights for prisoners except those reasonably related to legitimate penological interests, and specifically retaining protections

statutory rights to a subclass of prisoners by holding that insanity acquittees are not entitled to the protection of the law.[260] This holding flies directly in the face of the basic principles of the LPS Act, which is intended to preserve the autonomy of the individual against unnecessary state intrusion.[261] The California Supreme Court should settle this question once and for all. It should uphold the will of the legislature by granting all individuals the protection of its laws.

---

of *Keyhea* injunction).

[260] *See In re* Locks, 79 Cal. App. 4th 890, 897-98, 94 Cal. Rptr. 2d 495, 500 (2000) (denying Lock's habeas corpus petition and distinguishing him from *Keyhea* prisoners on basis of prior determination of dangerousness).

[261] *See supra* notes 194-98 and accompanying text.

***